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Mechanic's Liens Law and How it Applies to You as an Owner of Real Property

By Don Odell

The best approach to the mechanic's lien laws is for a property owner to be proactive. By carefully planning the project and taking steps to ensure that work is being properly managed, a property owner will get the desired results from the project and will greatly limit his or her exposure to the potential of a mechanic's lien. Before you start your next home improvement project, consider doing the following:

1. Carefully plan and document your project before you contact a contractor. Develop precise plans for the work you want performed. Have a detailed list of the specifications for that work, its timeline, and your budget for the project. The more detail you have in these documents, the less room you leave for future disagreement with your contractor.
2. Get multiple bids for the project. Each bid should be based on your plans, specifications, timelines and budget. A bid that is too high or too low should be a red flag. The more

bids you get, the better you will be able to gauge how much the job is really worth and what contractor will give you the best value for your money.

3. Make sure that you know the contractors who are bidding your job. Each contractor should all be licensed, bonded and insured. You can check the contractor's license and bonding status on-line through the California State Contractor's License Board at www.cslb.ca.gov/. You will have to confirm the contractor's insurance through the contractor directly but each should be more than happy to give you proof of insurance. At minimum, the contractor should have general liability and worker's compensation coverage and should be able to prove it to you.
4. Once you have narrowed the field of contractors down to two or three, interview each of the contractors. Find out how many projects of a similar type each contractor has

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New Developments in Construction Defect Law

By Leslie Baxter

There is good news for real estate developers in California. California Supreme Court has resolved a split in the lower courts as to whether the limitations period for latent construction defect is tolled, while the defendant promises or attempts to repair the defects. In *Lantzy v. Centex Homes* published August 4, 2003, the Court decided that the 10-year limitations period of Code of Civil Procedure section 337.15 is not equitably tolled by the developer's promises or attempts to repair. The Court confirmed that Section 337.15 is a statute of repose, "to protect contractors and other professionals and trades people in the construction industry from perpetual exposure to liability for their work."

As the Court notes in the *Lantzy* opinion, Section 337.15 itself already provides several clear exemptions to the 10-year limit, for example, for

actions for personal injury, and for suits based on willful misconduct or fraudulent concealment. The Court reiterated the potential for a cross-complaint for indemnity by one participant in the project against another, if the cross-complainant was itself sued within the 10-year period. The Court states that the statutory exemptions and indemnity provision show a clear intent on the part of the Legislature that these are the only exceptions to the 10-year limit. The Court reasons that, if the Legislature had wished to toll the statute for repairs, it could have included that as an exemption in the statute.

The holding in *Lantzy* does provide a glimmer of hope to property owners. While it holds that there is no tolling-for-repairs rule, the Court stresses that claims are still possible under the distinct doctrine of equitable estoppel. Equitable estoppel comes into play only after the limitations period has run. An estoppel may be found if the

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Labor Law Update: Meal and Rest Periods

By Julie Rose

California Labor Code section 512 requires an employer to provide a 30 minute lunch period to all non-exempt employees for a work period of more than five hours per day. If the employee works more than 10 hours per day, then he or she must be given two 30-minute meal periods. These meal periods need not be considered hours worked as long as the employee is completely relieved of all duty, is free to leave his or her work station and the meal period is at least 30 minutes long. This meal break must be provided no later than at the end of the fifth hour worked.

An employer who not only prohibits an employee from taking a meal break but also permits an employee to work through his meal break or knows that an employee works through his meal break will be liable for the meal period penalty, discussed below.

Labor Code section 1174 requires employers to keep payroll records, showing the daily hours worked by employees. These records must be kept for two years. An employer must keep records of when an employee took his meal break and when he returned to work.

California Wage Orders require every employer to permit all non-exempt employees to take rest periods, unless the employee's total daily work time is less than three and a half hours. The rest period must be 10 minutes, and is counted as part of the hours worked. The rest periods do not need to be scheduled, and an employer is not required to keep records of when the employee took the rest period or resumed working.

Penalties

The Industrial Welfare Commission (IWC) amended its Wage Orders in 2000 to include a penalty provision for meal and rest period violations. This was codified in 2001 by Labor Code Section 226.7. Section 226.7 provides that if an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided. This pay is in addition to the pay required for the time the employee worked through the meal or rest period.

An employer may also face civil penalties under Labor Code Section 1199, which provides that the Labor Commissioner may recover a fine of \$100 or imprisonment for not less than 30 days, or both, against an employer for requiring an employee to work under conditions prohibited by an order of the Commission. Allowing an employee to work through his lunch hour so that he can leave early subjects the employer to these penalties.

An employer who willfully fails to maintain the records required by Labor Code section 1174 faces a civil penalty of \$500.00.

Employers need to make sure that they are keeping adequate records showing the hours that an employee actually works. Meal breaks need to be recorded. The employer should review its employee handbook, to make sure the meal and rest period policies are clearly stated and conform to the law.

New Developments in Construction Defect Law...cont.

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one potentially liable for a construction defect represents, before the limitations period has run, that the damage has been or will be repaired, and the property owner, in reasonable reliance forbears to sue. If the representation proves false after the limitations period has expired and the owner proceeds diligently once the falsity is uncovered, the defendant may be equitably estopped to assert the statute of limitations as a defense. While the Court found that the plaintiffs in *Lantzy* could not state facts to support a claim of equitable estoppel, the doctrine does survive as an avenue to defeat the 10-year statute of limitations for latent construction defect.

The *Lantzy* opinion, along with Senate Bill 800, the new Civil Code Section 895 et seq, adopted in 2002, give developers some new tools with which to manage and control construction defect claims regarding residential units. The *Lantzy* opinion provides developers with assurance that, during

the 10-year period, they will not be exposed to a tolling defense, if they promise or attempt repairs. It is too early to predict how the courts will apply the complex and ambiguous provisions of Section 895, the "right-to-repair" statute. Section 895 shortens the statute of repose for lawsuits regarding defects on some components of the units, such as plumbing, sewer, electrical and irrigation systems, and provides for a 100-day tolling period for filing a lawsuit if repairs are not completed until after the applicable time period has run. While the law is not settled at this point, *Lantzy* and Section 895 represent steps by the courts and the legislature to protect developers from perpetual exposure to liability for their work.

If you have questions about the *Lantzy* opinion, Civil Code Section 895 or construction defect claims in general, please give me a call.

Service Above Self: What a Great Idea

By Don Odell

With the cool winds of autumn blowing through the valleys, a calmness seems to have returned to the Bay Area. Summer vacations are over, the last spot of poison oak has disappeared from your arm, the kids are back in school, the swimming pool is quiet, and we are slowly settling back into our business routines.

As we refocus ourselves, now is the time to set aside a few minutes each week to do something great. Rotary International has a motto: "Service Above Self". The words are simple but the meaning is weighty. Just think what would happen if each of us spent one hour a week reading to inner-city school children, helping tutor math at a local school, picking up trash at a local park, or simply sitting and talking with an elderly shut-in. Service Above Self-adhering to the principle won't add to your pocket book, but it will pay great dividends in ways you may never even see. The motto applies to all of us, regardless of whether you are a member of Rotary, a student, a lawyer, or even a stay-at-home mom or dad making their 100th trip to dance lessons or little league.

We at McNichols Randick O'Dea & Tooliatos believe in that motto and apply it both in our professional careers and in our daily lives. We value our role as leaders in the Tri-Valley legal community. We strive to give back to the community that continues to give to us.

During the last year, our firm and our attorneys have given thousands of dollars and countless hours to the community through our involvement in social, charitable and service organizations throughout the Tri-Valley.

As a firm, we again sponsored the Rotary Club of Pleasanton's Spirit Run, the GASIT Golf Tournament, the Women's Council of Realtors Golf Tournament, and the Pleasanton Chamber of Commerce. The firm, its attorneys and staff donated 50 wheelchairs to the Wheelchair Foundation, which in turn were donated to underprivileged disabled people in Mexico. We bought over 150 boxes of Girl Scout cookies. We collected and donated hundreds of dollars worth of food to the Tri-Valley Food Bank. Julie Rose, Annette Neuhart, Christine Vincent, and Shelley Jarvis collectively walked 240 miles in support of Avon's 3-day Walk for the Cure, collecting thousands of dollars for breast cancer research. Scott Boccia worked on the advance crew for the Avon 3-Day walk, putting in endless hours setting up the walk route. We again chaired the Special Olympics Walk for the Gold fundraiser, and under Everitt Beers' leadership and with the help of Don Odell, Kevin Martin and numerous others throughout the community, the Walk raised more than the \$70,000.00 for the Special Olympics.

Everitt Beers, Don Odell, Mike Kyle, and Leslie Baxter dedicated hundreds of hours to their respective Rotary Clubs

of Pleasanton North, Pleasanton, Dublin and Danville-Sycamore.

In January, 2004, Leslie will be spending four days in the City of Monterrey, Mexico with the Danville-Sycamore club, helping to deliver a shipping container of wheelchairs to needy recipients and meeting with local Rotarians now to establish ongoing programs. She is the public relations chairperson for the club, a committee leader for the club's annual fundraiser, and a member of the club's International Projects Committee.

Everitt Beers completed his second year as a member of Hope Hospice's Board of Directors and is now serving as its President.

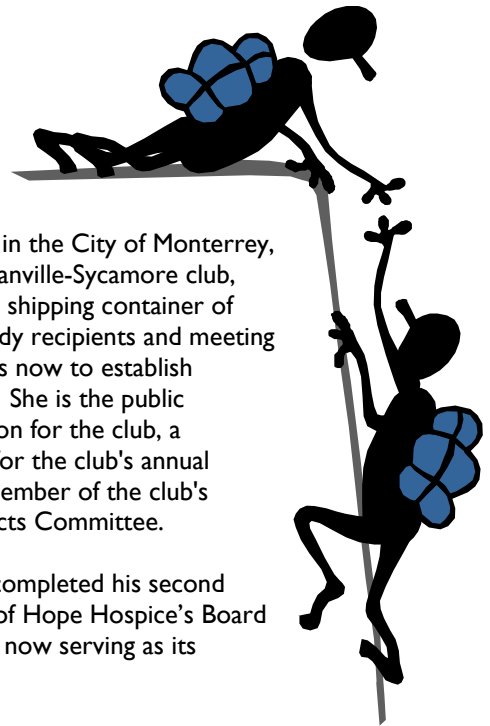
Mike Kyle continues his involvement with the Rotary's Tri-Valley student speech contest by again hosting the event. Mike has Chaired the Dublin Rotary's participation in the event for years, has hosted the event on numerous occasions, and even automated the materials used in the contest.

Phillip Vermont is active with several youth music groups. Recently, Mr. Vermont and MROT organized the donation and serving of 175 ice cream sundaes to the Phantom Regiment Drum and Bugle Corps of Rockford, Illinois when the group, which is made up of 135 young adult performers, traveled to Northern California for competitions and local performances. Mr. Vermont is a member of Friends of DCI (Drum Corps International) the national non-profit group which runs and organizes over 60 drum and bugle corps competitions throughout the country for performers under the age of 21. He has actively worked for and donated funds to other youth music groups in the area including the local high school and Junior high school music programs.

Don Odell and Brian O'Dea completed the Leadership Pleasanton and Leadership San Ramon programs respectively. Brian is also active as a Trustee for St. Mary's College East Bay Scholarship Fund.

Don Odell is a member of Board of Directors for Valley Community Health Center and serves as the Community Legal Advisor for the Junior League of Oakland-East bay. He also teaches Sunday School at Moraga Valley Community Church, coaches his daughter's soccer team, participated in the Pleasanton Police Department's Citizen's Police Academy,

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Going Places

By Kathi & Phillip Vermont

Earlier this year, our vacation plans were to travel to the south of France to visit family in Biarritz, then tour the French Riviera and continue on through the French Alps. Ultimately, the war in Iraq and the political “feud” between the United States and France caused us to reconsider the timing of our trip. Thus, with no firm vacation plans, we decided this May was the perfect time to meander throughout our own beautiful state of California, from the sea to the mountains.

We began our trip by spending two days in Santa Barbara. Traveling along Highway 1 South on the way to Santa Barbara, we drove through the charming beach town of Cayucos, where we stopped for lunch. During our stroll through town we encountered the local peddler’s fair, held each Saturday, and numerous antique and collectible shops. The town is in close proximity to Morro Bay and San Simeon State Parks, and the well-renowned Hearst Castle – definitely worth a visit.

Although we experienced overcast skies during our visit to Santa Barbara, the temperature was nonetheless warm and we found the city enchantingly beautiful and very friendly. Santa Barbara is also very bicycle-friendly, no doubt due to its close proximity to UCSB in nearby Goleta, and we enjoyed bicycling up and down its many bike paths along the coastline. On Sunday we were delighted to come across Santa Barbara’s weekly arts and crafts show, featuring various artisans displaying their crafts between the main boulevard of Santa Barbara and the sea for approximately two miles. We also enjoyed visiting State Street, where upscale restaurants, shops, and nightclubs can be found.

Our next destination was back up the coast to visit incredible Pismo Beach and the San Luis Obispo area. There we were met with 75 degree weather and crystal-clear blue skies for our two-day, relaxing stay. We highly recommend the Sandcastle Inn, located right on the beach. The Inn’s ocean-facing rooms feature a generous, private balcony and well appointed rooms. It is an easy one-block walk from the inn to the main Pismo Beach tourist area, where its many shops, restaurants, and nightclubs are located.

On the Wednesday following Memorial Day, we headed inland through the fertile fields of the San Joaquin Valley and past Fresno, to visit the Sequoia National Forest and Kings Canyon National Park for several nights of camping. The parks are adjacent to each other, south of Yosemite and about a 2-hour drive directly east of Fresno.

Entering from the south on Highway 198, we first drove through Sequoia National Forest. We were pleasantly surprised to find the park nearly empty of visitors. The park boasts numerous campgrounds, and after viewing several beautiful sites along the highway, we came upon Lodgepole campground, where we decided to settle for two nights. This

is a highly popular spot and reservations are required during the busy season. Since our visit was during the middle of the week at the beginning of the season, we were lucky enough to have nearly an entire camping loop to ourselves. The rains of April and the snow melt of Spring made for rushing rivers and breathtaking waterfalls. Tokopah Falls, a moderate 6-mile round trip hike from the Lodgepole campground, was particularly impressive.

Our next stop was in Kings Canyon National Park via Highway 180, also known as the General’s Highway. This route is an extraordinary, scenic highway, literally on the side of the mountain, with drops of 300-500 feet throughout (do not look over the side of your vehicle if you are prone to vertigo)! This is not a road for those in a hurry, as it takes nearly one and one-half hours to travel 20 miles. At the bottom of the canyon the highway travels next to Kings River, which was full, rushing, and extremely violent. The beauty, as well as the danger, of the river, was awesome.

Once in the canyon, we were struck by its exquisite scenery. We chose the Canyon View Campground for our two-night stay, approximately 6 miles from the end of Highway 180 – literally the end of the road! There were 6 to 8 campers in a campground containing approximately 60 sites. During our visit, we biked the canyon road to its end, and delighted in scenic vistas next to Roaring River Falls and Zumwalt Meadow. We also viewed Grizzly Falls and dozens of other unnamed water falls.

Having never camped in early Spring, particularly after nearly a month of heavy rains, we were thrilled to find an abundance of colorful, blooming wildflowers throughout the parks, along with the amazing wildlife attracted by such tasty treats. We both agreed that Sequoia National Forest and Kings Canyon National Park rival Yosemite National Park in every way except one; these parks are much less crowded.

After leaving the national parks, we made our way to Highway 49 and followed it from its southernmost point at Oakhurst, through the Gold Rush country to Pioneer, California, where we stayed for the next five nights. We passed through numerous Gold Rush towns, including Mariposa, Jamestown, Sonora, Angels Camp, and San Andreas. During our stay in Pioneer we took day trips to Jackson, Amador City, Volcano, and Sutter Creek. We highly recommend a visit to the wine country area near beautiful Sutter Creek. The weather was spectacular, and we enjoyed the peaceful and serene pace of California’s Gold Rush country.

In the end we had logged almost 1,200 miles. Each mile was worth the effort. By exchanging the hectic pace of a European vacation for a much slower and relaxing, meandering trip through our own state, we were treated to the beauty of central California in all her glorious splendor.

Mechanic's Liens...cont.

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- done in the past 1, 5 or 10 years. Ask for references, both good and bad, including some that will let you look at the contractor's work. Follow-up with the references. Ask the hard questions: "Was the contractor timely"? "Was the contractor's work good"? "Did the contractor hire competent workers"? "Did the contractor stay in budget"? "Was the contractor responsive to your questions or concerns"? Find out what subcontractors will be working on the project and get the subcontractors' license, bond and insurance information. Find out if the contractor or any of the subcontractors have ever been sued as a result of their work. If so, find out when the case was filed, the parties' names, the court in which the case was filed and how it resolved. Find out if the contractor or any of the subcontractors have ever done business under a different name or under a difference license. A contractor who has contracted under several different names or licenses should be questioned carefully. A good businessperson is proud of his or her business reputation. If the contractor or subcontractor had a good reputation, why would they change their name or license number?
5. Once you have selected your contractor, reduce your agreement to writing. A good written contract will be your strongest weapon or your greatest weakness. The contract should be fair to both parties, it should accurately reflect your agreement, include all the key terms of your agreement and provide for fixed remedies in the event either you or your contractor doesn't fully perform under the contract. Given the importance of the contract, you may want to retain an attorney to draft the contract. Paying a modest amount to an attorney to draft

a strong contract may well save you much more in the long run.

6. Finally, stay involved in the project as it moves forward. Be available to your contractor and work with the contractor to make the project run smoothly, but do stay out of the way; too much interaction on the job site or too many changes in the scope of work on your part can cause as many problems on a project as a bad contract or an unreliable contractor. Periodically inspect the work and promptly communicate any concerns that you have to the contractor. Inspections should be done before each payment is made on the contract, to ensure that the work that you are paying for has actually been completed. If you find a problem with the work, promptly report it to the contractor. It is much easier and less expensive to the contractor to fix a problem when it is first discovered, and it will save a lot of headaches if the problem is fixed before you pay for it. If the project is complex or you do not feel capable of inspecting the contractor's work, consider hiring a professional inspector to act on your behalf. As in drafting your contract, a little professional help along the way will more than pay for itself if problems can be avoided. Finally, keep open channels of communications with your contractor; the smallest problems can easily escalate if no one is talking to each other.

Even with the best planning, sometimes a mechanic's lien cannot be avoided. Look for a discussion of mechanic's liens in the next edition of *Briefly Speaking*.

Epicurean Delight: Frosted Pecan Cookies

The holidays are right around the corner! Here is one of those traditional cookie recipes for you to enjoy during your holiday eating extravaganzas.

Cookies

- 1 cup butter
- 1 cup sugar
- 2 egg yolks (reserve the whites)
- 1 tsp. vanilla
- 2 cups flour
- ¼ tsp. salt
- 2 egg whites (slightly beaten)
- 1 and ½ cups finely chopped pecans

Cream butter; add sugar gradually. Beat in egg yolks and vanilla. Blend in flour and salt. Chill until firm. Shape into small balls about 1 tsp. Of dough. Dip in egg whites, then roll in pecans. Place on greased cookie sheet. Bake at 375 degrees for 5 minutes. Remove from oven and make a

depression in center of each cookie. Return to oven and bake about 10 minutes longer. Cool. Fill center with tinted butter frosting.

Tinted Butter Frosting

- 3 T. soft butter
- 1 and ½ cups powdered sugar
- 3 T. cream
- 1 tsp. vanilla
- Red and green food coloring

Blend butter, sugar, cream and vanilla until smooth. Divide into two parts and tint one part each color. Fill the center of each cookie with frosting.

This cookie freezes well with the frosting.



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Service Above Self...cont.

is a chair of the Pleasanton Rotary Club's Student of the Month Program, and acts as a scorer for the Contra Costa County High School Moot Court Competition.

Kevin Martin fills his free time as a member of the Board of Directors of the Tri-valley Growers Association, as a member of the Board of Directors of Junior Achievement (Tri-Valley/Tri-Cities) and by teaching business law in a local community college.

Theresa Muley is active with her daughter's school and leads nearly 20 young ladies in various events throughout the year as a Girl Scout Troop Leader.

Nick Tooliatos perhaps gave more than most through his nearly one year of active duty service as a colonel in the United States Army.

As we close the book on summer and settle back in to our business routines, remember - "Service Above Self." That hour you give to the community, wherever you spend it, will give returns to you and to our community in far more ways than we will ever see.



Steve McNichols is the author of the chapter on "Remedies for Nuisance and Trespass" in a book entitled "California Real Property Remedies and Damages" published by California Continuing Education of the Bar (CEB). Steve completed the 2003 update for that chapter which was published in March of this year. He also contributed to the 2003 update of the chapter dealing with "Damages for Fraud and Nondisclosure".

For more information on this and other publications by members of our firm, see our web site at McNicholsLaw.com.