

By Paul S. Marks

# Constitutional Challenges to the Mechanic's Lien Law

**The California Legislature may update this law with due process safeguards**

The due process revolution of the late 1960s and early 1970s worked a fundamental realignment of the rights of debtors and creditors in California. Before the phrase “notice and an opportunity to be heard” found its way into the legal lexicon, creditors’ lawyers in California and elsewhere could obtain prejudgment remedies—such as the seizure of property and assets belonging to an alleged debtor—with very little difficulty, usually without opposition, and often without prior notice to the debtor. By contemporary standards, the property and assets of an alleged debtor were there for the taking.

In those days, creditors in California could obtain a prejudgment writ of attachment to seize any property of an alleged debtor simply by filing a lawsuit, submitting a declaration confirming the alleged debt, and filing an undertaking equaling half the debt.<sup>1</sup> The creditor’s lawyer did not need to worry that a meddlesome judge or court commissioner might question the validity—let alone the existence—of the debt.

Rather, the path to the sheriff’s office included only a quick detour to the clerk of the court, who was empowered to issue a writ of attachment based on the court filings.

Once issued by the clerk, the writ of attachment could reach any property of the alleged debtor—even a consumer debtor’s necessities of life<sup>2</sup>—and once seized, the property was typically beyond the use and enjoyment of its owner, at least until the collection lawsuit was finally resolved.<sup>3</sup> The same was true for a worker’s salary, which was subject to wage garnishment without notice or hearing,<sup>4</sup> as well as personal property in the possession of an alleged debtor, which was subject to replevin without prior notice and an opportunity to be heard.<sup>5</sup> In short, the period before the late 1960s marked the golden era of permissive, and sometimes abusive, collection practices in California.

This era ended with the 1969 decision of the U.S. Supreme Court in *Sniadach v. Family Finance Corporation*, which invalidated Wisconsin’s prejudgment wage garnishment statute because it did not provide for notice and hearing prior to the taking of the debtor’s property.<sup>6</sup> In short

order, the California Supreme Court invalidated virtually the entire panoply of prejudgment remedies available to California creditors.<sup>7</sup> To quote the California court: “The force of the constitutional principles underlying the

*Sniadach* decision has brought the validity of many of our state’s summary prejudgment remedies into serious question.”<sup>8</sup> Following *Sniadach*, California’s attachment,<sup>9</sup> wage garnishment,<sup>10</sup> and claim and delivery<sup>11</sup> statutes were all struck down. In subsequent years they were revived and amended to provide predeprivation notice and an opportunity for the alleged debtor to have his or her case heard by a judge.

One important prejudgment remedy, however, managed to survive this constitutional sea change: California’s mechanic’s lien law, which gives contractors, material suppliers, and others the right to place a lien on any “work of improvement” to which they have devoted labor or materials.<sup>12</sup> Notwithstanding that a mechanic’s lien may be placed on the alleged debtor’s property without notice and an opportunity to be heard, in 1976 the California Supreme Court ruled in *Connolly Development v. Superior Court* that the lien law “conforms to the requirements of procedural due process.”<sup>13</sup>

Recent developments have called into question the continuing vitality of this holding. As the California Legislature considers a major overhaul of the mechanic’s lien law,<sup>14</sup> now may be an appropriate time to take a fresh look at whether the lien law provides adequate due process protection for those whose property may be encumbered by it.

## California’s Mechanic’s Lien Law

Generally speaking, a mechanic’s lien is available under California law to any provider of

labor or materials to a construction project.<sup>15</sup> The typical beneficiaries of the law are contractors, subcontractors, and vendors. When these parties believe they have not been fully paid for their work on a construction project, they can record mechanic’s liens that will have the effect of encumbering the owner’s real property. The amount of the lien is supposed to be either the unpaid contract price or the reasonable value of the labor or materials provided, whichever is less.<sup>16</sup> The mechanic’s lien remedy is enshrined in the California Constitution<sup>17</sup> and was long ago implemented by the legislature.<sup>18</sup>

According to statute, a preliminary notice must be given by potential lien claimants who are not in privity of contract with the owner.<sup>19</sup> This requirement lets the owner know of the existence of a party that is providing labor or materials and that the party may file a lien in the future. In contrast, those in privity of contract with the owner—for example, a general contractor—need not give any notice that the property may be subject to a lien. Regardless of whether prenotice must be given, all liens must be filed within 90 days of completion of the project or the lien right is lost.<sup>20</sup>

Nothing prevents a lien claimant from recording a mechanic’s lien immediately after the claimant’s work on the project has begun. However, as a practical matter, there is usually no benefit in doing so, and there are important disincentives. First, the law mandates that each lien claimant has 90 days from recording to perfect the lien by filing

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a lawsuit.<sup>21</sup> Early filers therefore must be prepared to spend money on lawyers soon after the filing of the lien. Moreover, early recordation of a mechanic's lien does not bestow on the early claimant any priority over later mechanic's lien claimants. California follows the so-called first shovel rule, in which all mechanic's liens on a project are given equal priority and are deemed recorded on the date work began on the project.<sup>22</sup> Consequently, since there is usually no benefit to filing early, it is common for liens to be recorded in rapid succession toward the end of a project, when contractors and suppliers start getting nervous about being paid.

The amount of the lien is mandated by statute as the lesser of the unpaid contract price or reasonable value. The precise amount often proves to be a moving target. Consider the predicament of the homeowners in *Lambert v. Superior Court*,<sup>23</sup> who hired a contractor to do major remodeling work on their home. The total agreed-to contract price was \$327,705, with work to be completed within one year. Two years and \$361,000 later, the homeowners terminated the contractor but soon found their property encumbered by a mechanic's lien in the amount of \$117,338.05. Most of this amount—\$89,000—was what the contractor termed “delay/interest damages.”<sup>24</sup> Thus, the homeowners in *Lambert* found their home substantially encumbered by a contractor who had already been paid more than the contract price and whose claim had not been reviewed. Other such examples abound. California's otherwise extensive mechanic's lien law provides no specific mechanism for judicial preruleview (or speedy post facto review) of the probable validity of liens such as the one imposed on the homeowners in *Lambert*. The only judicial review specifically contemplated by the statute is a full trial on the merits, proceeding at the relaxed pace of ordinary civil litigation.

These potential constitutional failings were analyzed by the *Connolly* court in 1976. In upholding the statute, the court initially relied on *Speilman-Fond, Inc. v. Hanson's, Inc.*,<sup>25</sup> a one-line summary affirmance by the U.S. Supreme Court in 1974. In that decision, the court upheld Arizona's mechanic's lien law against a due process challenge. The *Connolly* court noted that California's mechanic's lien law contained more protections than the Arizona statute. Specifically, the California law contained the preliminary notice procedure,<sup>26</sup> the ability of the owner to “bond around” the lien,<sup>27</sup> and a relatively short 90-day period for perfecting the lien by filing suit (compared with six months under Arizona law).<sup>28</sup>

The California statute's lack of a procedure for predeprivation (or speedy postdepriva-

tion) judicial review was deemed not fatal. In so holding, the *Connolly* court noted that the owner had other alternatives: He or she could sue to enjoin a pending or threatened lien and could obtain a prelien hearing under the temporary restraining order mechanism set forth in the Code of Civil Procedure.<sup>29</sup> The owner could also file a declaratory relief action, which would be entitled to priority on a civil court's calendar.<sup>30</sup> Given these provisions of California law, the court found the lack of “prior judicial scrutiny” in the mechanic's lien statute to be “of little significance.”<sup>31</sup>

Finally, the court weighed the competing interests of property owners and those protected by the lien statute. The court expressed particular concern for laborers and providers of material, because they are often “in a...vulnerable position” on a construction project.<sup>32</sup> Without the protection of the lien statute, the court feared that “the improvement may be completed, the loan funds disbursed, and the land sold before the claimant can obtain an adjudication on the merits....”<sup>33</sup> In contrast, the court deemed the interests of the property owners to be not as great, since a mechanic's lien typically inflicts only a “minimal deprivation of property.”<sup>34</sup>

The dissent in *Connolly* took issue with each of these points. The dissent argued that *Sniadach* and other recent due process decisions mandated a predeprivation hearing (or, at least, an immediate postdeprivation hearing) presided over by a judicial officer.<sup>35</sup> Since California's mechanic's lien law did not specifically provide for a hearing, the statute should be struck down, just as California's attachment, wage garnishment, and claim and delivery statutes had been.<sup>36</sup> In particular, the dissent established that the earlier cases “did not attempt to ‘read into’ the statutes a procedure for a probable cause type of hearing.”<sup>37</sup>

Thus, California's mechanic's lien statute narrowly avoided the fate of many other pre-judgment remedies that were reviewed by the California Supreme Court for due process violations. But in a post-*Connolly* world, what is to become of property owners like the Lamberts? The Lamberts paid their contractor the full contract price and then some, only to find their house encumbered by a lien for “delay/interest damages” without any judicial participation. Or, to cite a more vexing problem of recent concern in the industry, what is to become of the homeowner who pays the general contractor in full, only to have an unhappy subcontractor slap a lien on the home because the general contractor did not pay the subcontractor? Are property owners in this situation left only with the statutorily approved method of bonding around the lien, thereby removing the lien but in the process placing at risk the liquid assets that collater-

alize the bond? Or, alternatively, must they pursue the unwieldy course that is endorsed in *Connolly* of filing a separate action for declaratory relief and an injunction?

*Lambert* provides counsel for homeowners with an interesting answer. The Lamberts, defending against the contractor's suit to foreclose the mechanic's lien, brought a motion to remove the lien. The trial court, invoking *Connolly*, held that no such motion existed, and that the homeowners were limited to the statutory remedy of bonding around the lien.<sup>38</sup> The court of appeal reversed, holding that a motion to remove a mechanic's lien qualified as one of the measures that were approved in *Connolly* by which the homeowner “can protect...against the impact of such a lien.”<sup>39</sup> The court noted that *Connolly* “is premised on the availability of speedy remedies,”<sup>40</sup> and that once the lien claimant files a foreclosure action, a motion brought in that action would be speedier than the separate declaratory relief and injunction actions envisioned by the *Connolly* court.<sup>41</sup>

At first blush, it might appear that the *Lambert* court, in following *Connolly*, did precisely what the *Connolly* dissent had warned against: reading into the statute a procedure—a motion to remove a mechanic's lien—that simply is not there, in order to preserve the statute's constitutionality. But on closer analysis, *Lambert* says little about the constitutionality of the mechanic's lien law. The judicial creation of a motion to remove the lien, to be brought as part of a lien foreclosure action, surely would not have satisfied the *Connolly* dissenters as an adequate protection of the owner's due process rights. Such a motion would not guarantee a speedy judicial determination on the probable validity of the underlying claim, as the motion could not be filed until after the lien foreclosure action was initiated, and that may not happen for up to three months after the recordation of the lien. Indeed, circumstances could easily delay the availability of the motion until more than three months have passed.<sup>42</sup>

In addition, attorneys representing homeowners are still guessing about the standards for a *Lambert*-type motion to remove a mechanic's lien. The statute is silent on the existence of any such procedure, and the *Lambert* court provided little guidance. Which party should bear the burden of proof? Must admissible evidence be presented with the motion, or can hearsay be introduced? Must the showing be by a preponderance of the evidence, by clear and convincing evidence, or by some other standard? Is the timing of the motion governed by Code of Civil Procedure Section 1005, or can the motion be brought ex parte? Or, because it is an important motion, must a longer notice period be allowed?

In the realm of other prejudgment remedies, these and other related questions are answered by reference to the detailed statutory schemes that were enacted with a view toward satisfying the due process rights of debtors. Not so with California's mechanic's lien law. One secondary source suggests that the procedure for a *Lambert*-type motion should be similar to the petition to remove a mechanic's lien that is discussed in Civil Code Section 3154. This provision permits a mechanic's lien to be expunged if a foreclosure action has not been filed within 90 days of lien recordation. Unfortunately, Section 3154 answers few important procedural questions. Rather, the section envisions a hearing that takes place within 30 days of the filing of the petition (and with as little as 10 days' notice to the lien claimant). The section sets the principal issue as one of timing—i.e., whether a lawsuit to foreclose on the lien was filed within 90 days of recordation. No guidance is given on how a court should assess the validity of the claim underlying the lien. Another secondary source avoids discussion of the standards for a *Lambert*-type motion to remove an improper mechanic's lien, undoubtedly recognizing that Section 3154 sheds no light on the subject.<sup>43</sup>

Finally, from a due process standpoint, it must be remembered that a *Lambert*-type motion is not available to the property owner during the time between the filing of the mechanic's lien and the filing of the lien claimant's foreclosure lawsuit. During that time, the owner will have suffered a taking of property for which there would appear to be no expeditious judicial relief available.

**Connolly Revisited**

In April 2003, the Rhode Island Superior Court sent minor tremors throughout the construction industry by declaring the mechanic's lien law of that state unconstitutional as a violation of the property owner's due process rights.<sup>44</sup> For practical purposes, Rhode Island's lien statute is identical to California's. It permits lien claimants to encumber the owner's property based solely on the claimant's sworn affidavit, without review by a judicial officer until a full trial on the merits. The only statutory method for avoiding the impact of the Rhode Island lien would be to post a bond to cover the lien or deposit cash in the amount of the lien into the court registry.

The decision striking down the Rhode Island law could have been written by the *Connolly* dissenters. The due process arguments rejected by the Rhode Island court found support in a recent decision by the U.S. Supreme Court. In 1991, the Court added to its *Sniadach* progeny with *Connecticut v.*

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*Doehr*.<sup>45</sup> In this case, the Court voided a Connecticut statute that permitted the prejudgment attachment of real property, noting that "even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection."<sup>46</sup> Significantly, the *Doehr* court limited the scope of *Speilman-Fond v. Hanson's, Inc.*, one of the primary cases on which the *Connolly* majority relied in upholding the California lien statute:

Our summary affirmance in *Speilman-Fond*...does not control. In *Speilman-Fond*, the District Court held that the filing of a mechanic's lien did not amount to the taking of a significant property interest...A summary disposition does not enjoy the full precedential value of a case argued on the merits and disposed of by a written opinion...The facts of *Speilman-Fond* presented an alternative basis for affirmance in any event. Unlike the case before us, the mechanic's lien statute in *Speilman-Fond* required the creditor to have a pre-existing interest in the property at issue....[A] heightened plaintiff interest in certain circumstances can provide a ground for upholding procedures that are otherwise suspect....<sup>47</sup>

Soon after *Doehr*, the First Circuit struck down a federal statutory lien that could be imposed on real property under federal environmental law, without notice or hearing.<sup>48</sup> Had *Doehr* and *Reardon* been available to the *Connolly* dissenters, California's mechanic's lien statute may not have survived the due process challenge in 1976.

In response to the invalidation of Rhode Island's mechanic's lien law, the Rhode Island General Assembly passed an amended statute providing for a due process hearing before an owner's property can be encumbered.<sup>49</sup> Other states already have such procedures on the books, including Maryland, where the property owner is given notice and a right to a prompt hearing.<sup>50</sup>

Once the dust generated by recent political events in California settles, the legislature will undoubtedly continue to propose and consider amendments to California's mechanic's lien law. In doing so, the legislature should look not only to recent court activity that calls the constitutionality of the law into question but also to statutes in other states that have enacted due process protections that balance the rights of lien claimants and property owners. ■

<sup>1</sup> Randone v. Appellate Dept., 5 Cal. 3d 536, 544 (1971).  
<sup>2</sup> *Id.* at 541.

<sup>3</sup> *Id.*

<sup>4</sup> *McCallop v. Carberry*, 1 Cal. 3d 903 (1970); *Cline v. Credit Bureau of Santa Clara Valley*, 1 Cal. 3d 908 (1970).

<sup>5</sup> *Blair v. Pitchess*, 5 Cal. 3d 258 (1971).

<sup>6</sup> *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

<sup>7</sup> *Randone*, 5 Cal. 3d 536; *McCallop*, 1 Cal. 3d 903; *Cline*, 1 Cal. 3d 908; *Blair*, 5 Cal. 3d 258.

<sup>8</sup> *Sniadach*, 395 U.S. at 540.

<sup>9</sup> *Randone*, 5 Cal. 3d 536.

<sup>10</sup> *McCallop*, 1 Cal. 3d 903; *Cline*, 1 Cal. 3d 908.

<sup>11</sup> *Blair*, 5 Cal. 3d 258.

<sup>12</sup> *Connolly Dev. v. Superior Court*, 17 Cal. 3d 803 (1976).

<sup>13</sup> *Id.* at 806.

<sup>14</sup> *See, e.g., Mechanic's Lien Law Reform*, 31 CAL. L. REVISION COMM'N REPORT 343 (2001).

<sup>15</sup> CIV. CODE §3110.

<sup>16</sup> *See, e.g., Lambert v. Superior Court*, 228 Cal. App. 3d 383 (1991).

<sup>17</sup> CAL. CONST. art. XIV, §3.

<sup>18</sup> CIV. CODE §§3109 *et seq.*

<sup>19</sup> CIV. CODE §§3097, 3114.

<sup>20</sup> CIV. CODE §3116.

<sup>21</sup> CIV. CODE §3144.

<sup>22</sup> CIV. CODE §3134.

<sup>23</sup> *Lambert v. Superior Court*, 228 Cal. App. 3d 383 (1991).

<sup>24</sup> *Id.* at 388.

<sup>25</sup> *Speilman-Fond, Inc. v. Hanson's, Inc.*, 417 U.S. 901 (1974).

<sup>26</sup> CIV. CODE §3097.

<sup>27</sup> CIV. CODE §§3143, 3171 (postlien release); CIV. CODE §§3139, 3161, 3162, 3235 (prelien payment bond).

<sup>28</sup> *Connolly Dev. v. Superior Court*, 17 Cal. 3d 803, 820 (1976).

<sup>29</sup> *Id.* at 822.

<sup>30</sup> *Id.* at 823.

<sup>31</sup> *Id.* at 822 n.16.

<sup>32</sup> *Id.* at 826-27.

<sup>33</sup> *Id.* at 827.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 828-29.

<sup>36</sup> *Id.* at 830-32.

<sup>37</sup> *Id.* at 833.

<sup>38</sup> *Lambert v. Superior Court*, 228 Cal. App. 3d 383, 385 (1991).

<sup>39</sup> *Id.* at 385-86.

<sup>40</sup> *Id.* at 387.

<sup>41</sup> *Id.*

<sup>42</sup> For example, a lien could be filed on January 1. The lien claimant could wait 90 days (until the beginning of April) to initiate the lawsuit to foreclose on the mechanic's lien. Notwithstanding current fast track rules, service of the lawsuit on the homeowner could be delayed until June or July with little adverse impact on the lien claimant. Once service is effected, the homeowner will need time to prepare and bring the motion to remove, which might not be heard until August or later. During this time, the lien will appear as a cloud on title, and will not be reviewed by any judicial officer.

<sup>43</sup> CALIFORNIA FORMS OF PLEADING AND PRACTICE ANNOTATED ch. 361 Mechanic's Liens, §§361.31 *et seq.* (2003).

<sup>44</sup> *Sells/Greene Building Company LLC v. Rossi, C.A. No. PB 021019* (R.I. Sup. Ct. 2003); *Gem Plumbing & Heating Co., Inc. v. Rossi, C.A. No. PB 02-2778* (R.I. Sup. Ct. 2003).

<sup>45</sup> *Connecticut v. Doehr*, 501 U.S. 1 (1991).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 12.

<sup>48</sup> *Reardon v. United States*, 947 F. 2d 1509 (1st Cir. 1991).

<sup>49</sup> R.I. GEN. LAWS §34-28-17.1 (2003).

<sup>50</sup> MD. CODE ANN., REAL PROP. §9-106.