

SENATE BILL REPORT

SSB 5497

AS PASSED SENATE, MARCH 18, 1991

Brief Description: Revising the right to a construction lien.

SPONSORS: Senate Committee on Commerce & Labor (originally sponsored by Senators McMullen, Matson, Rasmussen, Sellar, McCaslin, Murray and Stratton).

SENATE COMMITTEE ON COMMERCE & LABOR

Majority Report: That Substitute Senate Bill No. 5497 be substituted therefor, and the substitute bill do pass.

Signed by Senators Matson, Chairman; Anderson, Vice Chairman; Bluechel, McCaslin, McDonald, McMullen, Moore, Murray, and Skratek.

Staff: Dave Cheal (786-7576)

Hearing Dates: February 14, 1991; February 18, 1991; March 6, 1991

HOUSE COMMITTEE ON COMMERCE & LABOR

BACKGROUND:

Consumer protection problems relating to construction liens have been brought to the attention of the Legislature. The most common problem is in the home repair or remodeling area and typically occurs as follows:

A homeowner engages a general contractor to make a repair on their home or do a remodeling project. The contractor completes the job, having employed subcontractors and purchased materials which have been incorporated into the job. The homeowner probably has made periodic payments with full payment made upon completion and the satisfaction of the owner that the job has been done properly. It is then discovered that a material supplier or subcontractor with whom the homeowner has never dealt directly has placed a lien on the homeowner's property, because they have not been paid by the prime contractor. Problems which are variations on this theme have been brought to the attention of legislators and the consumer protection program of the Attorney General's Office for several years.

While the consumer protection problems described above may have supplied the impetus for legislative review of lien laws, other problems exist as well. Virtually all industry segments have reported problems with the current law. The construction lien laws have not been substantially amended or modernized during this century.

During the 1989 interim, the then chair of the Senate Committee on Economic Development and Labor appointed an industry task force to review the current law and develop proposed legislation that could be supported by all segments of the industry, as well as include enhanced consumer protection. When the bill prepared for the 1990 legislative session failed to pass, the Senate asked the task force to continue its efforts to refine the bill. This bill represents the continuing efforts of that task force.

SUMMARY:

NOTE: Due to the length and complexity of this bill, a full description of every section is not provided here. Following is a description of the major changes the bill would make in current law. Much of the bill is concerned with simply modernizing the language of the existing law without making substantive changes.

Lien rights based on the provision of landscaping or engineering services are incorporated into this bill, which allows the repeal of Chapters 60.20 and 60.48 RCW.

A comprehensive definitional section is provided, allowing the elimination of the lengthy repetitions which appear throughout the current law. Following are the major substantive changes:

1. Lien claims of subcontractors and suppliers who participate in residential remodeling projects, and who do not contract directly with the owner, are limited to amounts not yet paid to the contractor by the homeowner as of the time the homeowner receives notice from the subcontractor or supplier of their activity. "Notice" means that the subcontractor or supplier sends the notice set forth in the bill indicating that they are a participant in the project and have or are about to perform services or furnish supplies which would entitle them to make a lien claim.
2. Anyone who contracts directly with an owner is not required to give advance notice of a right to claim a lien. For new residential construction, participants who do not contract directly with the owner may give notice of their involvement at any time, but their right to claim a lien is limited to activity following a date which is 10 days prior to the time the notice is mailed or served. In commercial construction, those who contract directly with the owner are not required to give preclaim notice. Subcontractors who contract directly with prime contractors are not required to give preclaim notice. All other participants are required to give preclaim notice, which may be given at any time, but only protects lien rights for activity occurring after a date which is 60 days prior to giving notice.
3. Laborers are not required to give preclaim lien notice, as in current law.

4. Lien rights are given to persons furnishing labor, professional services, materials or equipment for the improvement of real property. The definition of "labor" excludes operated equipment and professional services. These services are covered separately. In the event of a lien foreclosure action, these services might have a different priority than under current law.
5. Under current law, a subcontractor or supplier who performs pursuant to a contract with a registered subcontractor who in turn has been employed by an unregistered contractor has no lien rights. This needless trap has been eliminated so that lien rights are not lost if the entity with which the lien claimant contracts is registered or licensed, if required to be.
6. Some services relating to a construction project give rise to lien rights, but do not produce anything visible at the site during the early stages of the project. Examples are architect and engineering services, soil samples, and biologist reports. These potential lien claimants must record a notice in the real property records of the county which describes their work. This gives subsequent purchasers or lenders an opportunity to discover these possible claims.
7. The priority of the lien in relation to other claims against the property is determined at the time of the commencement of the labor, professional services, delivery of material or equipment by the lien claimant. This changes a current rule established by a Court of Appeals decision which held that engineers' liens attach at the time they are recorded.
8. The need to record liens separately on the Torrens Register for registered land is eliminated. Liens are to be recorded the same as other instruments of title and are effective against registered and unregistered land.
9. Some of the rules are changed with regard to the parties required to be joined in a lien foreclosure action, and how claimants can become a party to a lien claim foreclosure that is already filed.
10. When a property owner files a bond to guarantee payment of a lien claim, the property is automatically released from the lien. Currently, the lien claimant has the option of rejecting the bond. The bond amounts are lowered to make this remedy more usable by owners and to more realistically reflect the protection needed for the lien claimant.
11. When a lender who is supplying interim or construction financing receives a notice from a supplier or subcontractor that timely payment has not been made to them by the prime contractor or owner, the lender is required to withhold the full amount due which is indicated in that notice from subsequent draws against

the loan. Currently, the lender is required only to withhold a percentage of the amount indicated in the notice. If a lender fails to properly withhold these amounts, the security that the lender has been given on the loan is subordinated to the lien claim, and language is added to make it clear that in some cases this subordination could include an amount for attorneys' fees.

12. Building permit applications are required to contain the information which current law requires to be posted at job sites. This includes the legal description, street address, owner's name, prime contractor's name and the lender involved. This information must be made available to anyone on request.

13. An expedited procedure is provided for eliminating frivolous lien claims and "stop-notices" to lenders.

Appropriation: none

Revenue: none

Fiscal Note: none requested

TESTIMONY FOR:

Consumers (homeowners) are protected from having to pay twice for repair and remodel projects.

The law is modernized to reflect current industry realities for the first time this century.

Supervision of cash flow by lenders is made workable.

The flow of necessary information to subcontractors and suppliers is enhanced.

Laws relating to engineers and landscapers are consolidated with other professionals and contractors so that all contributors to a project are treated equally.

TESTIMONY AGAINST:

A method is needed to eliminate specious lien claims, and to deal with other abuses associated with lien claims.

General contractors need to know who is working on a project. Lower-tier subcontractors who fail to give notice of their presence to the prime contractor should lose their lien rights.

Priority language in lien claim foreclosure proceedings should not be changed.

TESTIFIED: Gale Albertson, Mutual Materials Co. (pro); Phillip Schmuck, PDGA Task Force (pro); David Morgan, Task Force (pro); Duke Schaub, AGC of WA (con); Ken Marson, Jr. Marson &

Marson Lbr. Inc. (pro); Mick Bush, Bayview Bldg. Mat. (pro); Lance Colvin, Pacific Water Works Supply (pro); Sherry Grapp, Lumbermans (pro); Mel Kan, Task Force (pro); Mark Triplett, Building Industry Assn. (con); John Woodring, WA Land Title Assn. (con); Cliff Webster, Architects & Engineers Legislative Council; Don Brazier, Washington Savings League

HOUSE AMENDMENT(S):

A reference to "twenty days" is changed to "ten days" to conform with the provision in the bill that allows the notice to cover materials and services delivered up to ten days before the notice is mailed.

Language is added to notify the owner that labor liens may be claimed without sending a notice.

Provisions are added to clarify the procedure when several parties have filed foreclosure actions. If a second lien foreclosure action is filed, the court may consolidate the actions unless it would cause undue delay or hardship. If consolidation is not permissible, the second action will not be dismissed if the filing resulted from mistake, inadvertence, surprise, excusable neglect, or irregularity.

The building permit application must include either the legal description or the tax parcel number. The document to be posted at the construction site is the inspection record card, which must include either the legal description or the tax parcel number, and other specified information.

Language is added to clarify that the information that may be submitted after the initial building permit application is submitted is only the information concerning the lender or bond company, and that for the purposes of the vesting doctrine the lack of lender/bond company information does not cause the application to be incomplete.

A section of the lien law dealing with timber liens is removed from the list of sections repealed and is recodified in the chapter providing for timber liens.

Other technical changes are made to make the language consistent throughout the bill.