

BARKER LAW GROUP

A Professional Law Corporation

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Construction Law Update:

Overview of New Preliminary Notice & Reputed Owner Issues
California Construction Collections Guide to Third Party Rights

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Practice Area:

Construction Law

Areas of Emphasis:

Collections and Contract negotiation and litigation
Construction Defect dispute resolution and litigation

Bar Admissions:

U.S. District Court, Southern District of California, 1999
State of California, 1999

Education:

J.D., Thomas Jefferson School of Law, 1997
B.A., Economics, San Diego State University, 1987

Summary:

Robert Ilko, an attorney with the firm, practices construction law with an emphasis in construction collection matters. With experience gained at a civil engineering firm, coupled with having a General Engineering Contractor's "A" License, Ilko's background is a strength to clients' construction matters. He has worked for the San Diego County District Attorney's Office and has served as forensic specialist for geotechnical, environmental, and construction matters.

Active in civic associations, Ilko received "Citizen of the Year" in 2002 for his efforts to support Scripps Ranch community endeavors. In addition, he is active in the following organizations: American Subcontractors Association, International Concrete Repair Institute, LEAD San Diego, Scripps Ranch Civic Association District Representative, Scripps Ranch Planning Group and the Tile Contractors Association.

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Attorneys:

Douglas H. Barker

David J. Barnier

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The firm was founded in 1994 to help grow San Diego businesses, protect and defend clients' assets and offer sound legal counsel to businesses, insurance carriers and individuals. Barker Law Group's multidisciplinary approach encompasses a variety of practice areas that serve all of clients' business needs. In this economic marketplace, the cost of doing business requires legal counsel with experience, foresight and personal attention to avoid costly disputes and allow businesses to thrive. Barker Law Group's mission is centered upon helping clients succeed.

Achieving Client Solutions

Barker Law Group's philosophy is grounded in what has led to many enduring client relationships: **achieving client solutions**. First and foremost — clients are heard and questions are answered. The firm's attorneys are problem solvers. To the extent that client problems can be resolved quickly and efficiently, the firm seeks strategies to deliver solutions. When opposing parties may be uncooperative, or unwilling to resolve disputes reasonably, the firm's first-rate trial attorneys are ready for litigation.

Value-Added Services

Barker Law Group offers access to attorneys around the clock. The firm's dedicated team of attorneys and paralegals view client relationships as partnerships and are committed to achieving positive results.

Practice Areas

- **Business Transactions** for companies of all sizes
- **Commercial and Individual Litigation**
- **Construction Law** including collection and contract litigation for private, public and federal works projects; and construction defect dispute resolution and litigation
- **Employment and Labor** compliance and litigation
- **Insurance Defense**
- **Mediation and Arbitration**, services by Douglas H. Barker
- **Trusts, Estate Planning and Probate**



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Construction Law

From licensing issues to contract drafting and review to assistance with on-the-job disputes to litigation, the firm's construction attorneys are experienced and knowledgeable. Construction is an area unlike any other trade or business. The unique laws of licensing, mechanic's liens and related payment remedies, and contract interpretation are not always well known among even the most experienced veterans within the construction industry. On the other hand, the fast pace of construction as well as the need for coordination among trades require that when an issue arises on a job, it is given immediate attention.

The firm's attorneys provide aggressive, knowledgeable and cost-effective representation to the construction industry and to those who interact with the industry. Our current clients include contractors, materials suppliers, equipment companies, architects, and engineers. Our experience enables us to effectively consult with clients regarding the various goals that might be achieved via communications and demands to other parties and public entities. With substantial construction litigation experience, we are prepared to handle litigations and arbitrations from inception through trial. We pride ourselves on our efficiency, whether we are asked to become involved on one small issue or to pursue aggressive, "scorched earth" litigation efforts.

Construction Collections

David Barnier leads the firm's construction collection practice. Mr. Barnier regularly presents seminars to large groups regarding the basics of payment rights related to mechanic's liens, stop notices, bond claims, and the contracts, purchase orders, delivery tickets, and invoices that underlie all rights to payment. Mr. Barnier's trademark "Top Ten Misconceptions About Mechanic's Liens" seminar has been well received by various southern California construction groups. During the summer of 2003, the San Diego Daily Transcript sponsored a series of lectures on California construction law that was presented entirely by firm founder Douglas Barker and Mr. Barnier.

Mr. Barnier also consults with individual businesses on their collection practices, including contract language, the timing of invoices and demands for payment, and simple means of ensuring that mechanic's lien, stop notice, and bond rights are preserved. Ideally, the client is able to perfect its own in-house collection strategies such that there is no need to retain an attorney to pursue collection.

For instances in which an attorney is necessary to pursue collection, Mr. Barnier is well-versed in making demands for payment and communicating with the parties that owe money to the client, to advise the client on its rights, and to pursue litigation. At all stages, the "bottom line" result is emphasized, unless the client directs otherwise. When necessary, litigation is pursued aggressively but with the client remaining apprised of events as they occur and, perhaps more importantly, the events that the client can expect to occur in both the immediate and more distant future.



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Construction Law

Construction Defect

The firm's attorneys have a long history of defending contractors and other companies within the construction industry on construction defect claims. This experience has come in both the insurance context and in situations in which the client was not insured for the claim. Our success in providing cost-efficient services to clients extends to the construction defect practice, in which costs are most volatile and the client has the most at stake. Because we serve construction clients in other areas, we are able to understand the context surrounding defect claims and are therefore able to provide comprehensive representation that goes beyond defending the client from the claims of one party.

Other Legal Services

Legal issues within the construction industry are not limited to contracts, collections, performance, and defect allegations. The firm assists clients with licensing issues, bonding issues, and other issues that might arise. For issues unrelated to construction, our firm's general experience prepares us to handle just about any issue that might arise for an individual or business. If a client has an issue that is outside of our expertise, we will be forthright in acknowledging this and will assist in locating the right attorney for the client.

Services frequently provided to clients:

- Litigation on all construction issues (plaintiff and defendant)
- Pre-litigation collection efforts and enforcement of rights to payment via litigation
- Advice and guidance re mechanic's liens, stop notices, and payment bonds
- Contract review, Contract, purchase order, ticket, and invoice drafting
- Prompt analysis of client's rights related to on-the-job disputes



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Timeline Chart

California Construction Collections Guide to Third Party Rights

| Project Type | Your Customer | Types of Notices | Potential Third Party Rights to Pursue* |
|--------------------------------|--|--|--|
| Private Work | <p>Property Owner</p> <ul style="list-style-type: none"> - Prelim not necessary - Record Mechanic's Lien - Serve Stop Notice <p>Lessee / Tenant</p> <ul style="list-style-type: none"> - Be aware of property owner recording/posting Notice of Non-Responsibility - Serve Preliminary Notice - Record Mechanic's Lien - Serve Stop Notice <p>General Contractor</p> <ul style="list-style-type: none"> - Verify contractors license active - Serve Preliminary Notice - Record Mechanic's Lien - Look for payment bond claim if required by owner - Serve Stop Notice - Serve Notice to Surety and General Contractor - Send demand to contractors license bond surety <p>Subcontractor</p> <ul style="list-style-type: none"> - Verify general contractor and subcontractor licenses active - Serve Preliminary Notice - Record Mechanic's Lien - Look for payment bond if required by general contractor - Serve Stop Notice - Send demand to contractors license bond surety | <p style="text-align: center;">20-Day Preliminary Notice</p> <ul style="list-style-type: none"> - Covers labor, materials, and/or supplies provided 20 days before service of preliminary notice - Serve personally or by certified mail with return receipt request - Serve on reputed owner, reputed general contractor, and reputed lender <p style="text-align: center;">Mechanic's Lien</p> <ul style="list-style-type: none"> - Must have served 20-Day Preliminary Notice on reputed owner if reputed owner is <u>not</u> your customer - Record with County Recorder's Office where the project is located - If you are not general contractor, then record within 30 days if Notice of Completion or Notice of Cessation recorded or within 90 days of actual project completion if no Notice of Completion recorded and within 10 days of owner filing bankruptcy - If you are the general contractor, then record within 60 days if Notice of Completion or Notice of Cessation recorded or within 90 days of actual project completion if no Notice of Completion recorded and within 10 days of owner filing bankruptcy <p style="text-align: center;">Stop Notice / Bonded Stop Notice</p> <ul style="list-style-type: none"> - Serve by certified mail with return receipt request to Construction Lender - Serve within 30 days if Notice of Completion or Notice of Cessation recorded or within 90 days of actual project completion if no Notice of Completion recorded - Serve <u>bonded</u> Stop Notice if project is <u>not</u> owner financed <p style="text-align: center;">Notice to Surety and General Contractor</p> <ul style="list-style-type: none"> - If no Preliminary Notice required, serve written notice to payment bond surety and general contractor within 15 days after Notice of Completion is recorded or within 75 days after actual project completion if no Notice of Completion recorded ("2nd Chance Rule") - Serve personally or by certified mail with return receipt request | <p style="text-align: center;">Mechanic's Lien Rights</p> <ul style="list-style-type: none"> - File suit in Superior Court within 90 days of recording if no M/L release bond recorded - File suit in Superior Court within 6 months if M/L release bond recorded - <i>If bankruptcy filed</i>, file and serve Notice of Continued Perfection within dates above - Verify expiration date is <u>not</u> a weekend or court holiday - Immediately record Notice of Pending Action / Lis Pendens - Your contractors license and corporation, if applicable, must be in good standing to file suit <p style="text-align: center;">Stop Notice Rights</p> <ul style="list-style-type: none"> - Not before 10 days of serving Stop Notice and not later than 90 days after the expiration date for serving a Stop Notice (120 days after valid Notice of Completion or 180 days after actual completion) - File Notice of Commencement within 5 days after filing suit and serve on same person / entity in the same way you served Stop Notice - If Stop Notice Release Bond is issued, examine release bond for expiration date for filing suit <p style="text-align: center;">Payment Bond Rights</p> <ul style="list-style-type: none"> - If bond recorded before project completed, file lawsuit within 6 months after project is completed - If bond not recorded, examine bond for specific language (potentially up to 4 years) <p style="text-align: center;">Contractors License Bond Rights</p> <ul style="list-style-type: none"> - 2 years from when your customer's contractors license bond expires or 2 years after license inactive, whichever comes first <p>* You may have contract, implied-by-law, or other rights in addition to third party rights</p> |
| Local/State Public Work | <p>Property Owner</p> <ul style="list-style-type: none"> - Prelim not necessary - Serve Stop Notice <p>General Contractor</p> <ul style="list-style-type: none"> - Verify general contractor and subcontractor licenses active - Serve Preliminary Notice - Look for payment bond if required by owner - Serve Stop Notice - Serve Notice to Surety and General Contractor - Send demand to contractors license bond surety <p>Subcontractor</p> <ul style="list-style-type: none"> - Verify contractors license active - Serve Preliminary Notice - Look for payment bond if required by owner or general contractor - Serve Stop Notice - Send demand to contractors license bond surety | <p style="text-align: center;">20-Day Preliminary Notice</p> <ul style="list-style-type: none"> - Serve within 20 days of first providing labor, materials, and/or supplies - Serve personally or by certified mail with return receipt request - Serve on reputed owner, reputed general contractor, and reputed lender <p style="text-align: center;">Bonded Stop Notice</p> <ul style="list-style-type: none"> - Serve by certified mail with return receipt request on public agency within 30 days after valid Notice of Completion or Notice of Cessation recorded - Serve by certified mail with return receipt requested on public agency within 90 days after actual project completion if no Notice of Completion or Notice of Cessation <p style="text-align: center;">Notice to Surety and General Contractor</p> <ul style="list-style-type: none"> - If no Preliminary Notice required, serve written notice to payment bond surety and general contractor within 15 days after Notice of Completion is recorded or within 75 days after actual project completion if no Notice of Completion recorded ("2nd Chance Rule") - Serve personally or by certified mail with return receipt request | <p style="text-align: center;">Stop Notice / Bonded Stop Notice Rights</p> <ul style="list-style-type: none"> - File suit after 10 days but before 90 days after Stop Notice is served - File Notice of Commencement within 5 days after filing suit and serve on same person/agency in the same way you served Stop Notice <p style="text-align: center;">Stop Notice Release Bond Rights</p> <ul style="list-style-type: none"> - Examine bond for specific language (potentially up to 4 years and may include attorneys' fees) <p style="text-align: center;">Payment Bond Rights</p> <ul style="list-style-type: none"> - File lawsuit after you provided last materials / labor but within 6 months after Stop Notice filing period ends - If bond not recorded, examine bond for specific language (potentially up to 4 years) <p style="text-align: center;">Contractors License Bond Rights</p> <ul style="list-style-type: none"> - 2 years from when your customer's contractors license bond expires or 2 years after license inactive, whichever comes first |
| Federal Work | <p>Prime Contractor</p> <ul style="list-style-type: none"> - Verify with contracting officer that payment bond was posted - Serve 90-Day Notice <p>1st Tier Subcontractor</p> <ul style="list-style-type: none"> - Verify with contracting officer that payment bond was posted - Serve 90-Day Notice | <p style="text-align: center;">90 Day Notice</p> <ul style="list-style-type: none"> - Serve by certified mail with return receipt request to Prime Contractor within 90 days of you last provided labor, services, and/or materials | <p style="text-align: center;">Miller Act Payment Bond Rights</p> <ul style="list-style-type: none"> - File lawsuit not before 90 days after you last provided labor, equipment, services, or materials and not after 1 year of that date |

Overview of New Preliminary Notice & Reputed Owner Issues

By David J. Barnier, Attorney with Barker Law Group, APLC

Two recent revisions to the California Civil Code alter the laws that are related to preliminary 20-day notices. The first revision modifies Civil Code section 3097 by adding additional language that must be included within a preliminary 20-day notice. The second revision creates Civil Code section 3259.5, which obligates a property owner to mail written notice of any notice of completion or notice of cessation to the general contractor and to “any claimant ... who has provided a preliminary 20-day notice.”

Under both the old and new versions of section 3097, a subcontractor or supplier need only serve the *reputed* owner of a property with his preliminary 20-day notice in order to maintain his ability to pursue mechanic’s lien and stop notice rights. One of the purposes of this relaxed standard is to prevent owners from giving in accurate ownership information that would cause a claimant to serve the wrong party with his preliminary 20-day notice. If a claimant were required to serve the actual owner with his preliminary 20-day notice, there would be an incentive for owners to hide their identity, because this requirement would cause an inaccurately served preliminary 20-day notice to defeat a claimant’s rights on the job. Under section 3097, however, so long as the claimant performs a reasonable amount of research into the identity of the owner and serves the preliminary 20-day notice on the party believed to be the owner, the claimant’s 20-day preliminary notice is legally effective and preserves the claimant’s ability to pursue mechanic’s lien and stop notice rights.

However, under the newly created section 3259.5, an owner need only mail a notice of completion or notice of cessation to those claimants from whom it has *actually received* a preliminary 20-day notice. For this reason, an owner may have an incentive to hide the identity of the owner. A claimant’s preliminary 20-day notice will be valid to protect the claimant’s third-party rights on a project so long as it is served on a reputed but in accurate owner, but from the language of the new statute that is quoted, above, it appears that the claimant will only be entitled to receive a copy of any notice of completion or notice of cessation if the owner *actually received* a copy of the claimant’s preliminary 20-day notice.

The same incentive to provide inaccurate ownership information may extend down to general contractors and subcontractors, who would prefer that their subcontractors and suppliers have no ability to pursue mechanic’s lien and stop notice rights.

It will be interesting to see how the California courts deal with this issue in the next few months when a claimant serves a reputed, but inaccurate, owner with a preliminary 20-day notice and the actual owner records a notice of completion or notice of cessation but fails to serve the claimant who had served an inaccurate but reputed owner. How will the courts interpret the plain language of the new statute, which states that the owner must mail notices to parties who have “provided” a preliminary 20-day notice. Should the claimant be subject to the 30-day deadline? Does the answer to this question change if it is shown that an owner (or general contractor or subcontractor) has intentionally misled a claimant? The answers to these public policy questions depend on one’s place within the construction industry, and this public policy issue may very well be addressed via a revision to the laws by the legislature within the next year or two.

David J. Barnier is an attorney with Barker Law Group, APLC. He may be reached at (619) 682-4842 or via email, djb@barkerlawgroup.com.

All information provided herein are for informational purposes only and does not constitute legal advice. Any contractor seeking to evaluate and/or enforce its legal rights should obtain the advice of an experienced attorney to evaluate the specific facts affecting the contractor. While general rules of law may be summarized as within this article, exceptions to these general rules or additional rules of law may apply to any given set of facts.
