

'Moore' Is Less: How The Moorefield Decision Impairs Lien Rights

By Dale Ortmann and Kathlynn Smith

EVERYONE IN THE CONSTRUCTION industry agrees that mechanic's liens are among the most sacred rights granted to contractors. And, by and large, this position has been universally upheld time and time again in the Courts. Recently, however, a Court of Appeal decision calls into question a fundamental principle of California's Lien Laws; namely, that contractors cannot be required to subordinate or waive their mechanic's liens rights.

In *Moorefield Construction, Inc. v. Intervest-Mortgage Investment Co.*, the Court of Appeals

reviewed a waiver and subrogation clause in an assignment agreement required by a construction lender, which was signed after work on the project had already begun. When the owner-developer failed to pay the contractor and defaulted on the construction loan, a dispute arose over the priority of the contractor's mechanic's lien. While the trial court ruled that this subrogation clause was void, the Court of Appeal interpreted former Civil Code section 3262 to allow such agreements when the agreements are between an "owner" and "original contractor."

Former Civil Code section 3262 provided that neither the "owner nor original contractor by any term of a contract, or otherwise,

shall waive, affect, or impair the claims and liens of other persons" The Court in *Moorefield* interpreted this language to mean that an "original contractor" was not within the group of "other persons" that section 3262 aimed to protect. Instead, the Court found that section 3262 identified "original contractors" only as a party from whom "other persons" needed protection.

The *Moorefield* Court's interpretation of former section 3262 could have potentially significant negative impacts on contractors of all tiers for several reasons. First,

the *Moorefield* decision appears to create different levels of protections among lien claimants. Second, this decision creates a divergence in case law that previously – and uniformly – held that mechanic's lien rights are waivable only after materials are delivered or work is performed, and, even then, only in accordance with the specifically-worded mechanic's lien waiver forms set forth in *Civil Code* § 3262 (now *Civil Code* § 8132 - 8138).

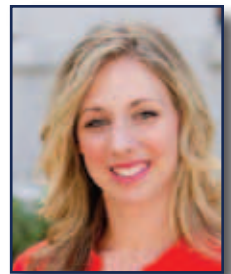
Third, the *Moorefield* decision could have an unintended – and disastrous – impact on the interpretation of *Civil Code* section 8122, which replaced section 3262's ban on prospective lien waivers. Section 8122 was an attempt to expand the protections under former section 3262 to include any prospec-

tive waivers of lien rights insisted on by a "subcontractor." Under the reasoning of *Moorefield*, however, the express identification of "subcontractor" in the statute would eliminate lien waiver protections to subcontractors as they no longer qualify as "other claimants" under the statutory language. This result would virtually destroy constitutionally-protected mechanic's lien rights for critical segments of the construction industry, effectively leaving only material suppliers, equipment vendors and laborers with statutory protection against contractual mechanic's lien waivers.

The full impact and the extent of the consequences of the decision in *Moorefield* are yet to be known or felt by those who these laws were intended to protect. And although the Supreme Court denied review of the *Moorefield* decision, there is a growing chorus calling for immediate and decisive legislative action to clearly state that contractors of all tiers are to receive the same protection against contractual waiver or impairment of their mechanic's lien rights. ■



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