

Crawford & Bangs, LLP

San Diego Office
5333 Mission Center Road
Suite 380
San Diego, California 92101

Visit us on the internet at
www.BuildersLaw.com
SHolbrook@builderslaw.com

1290 E. Center Court Drive
Covina, California 91724-3600
Telephone: 626-915-1641
Fax: 626-332-5604

Riverside Office
1950 Market Street
Riverside, California 92501

Writers Direct Dial:
1.626.858.4207

November 25, 2014

California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

RE: Supreme Court Case No. S222379
MOOREFIELD CONSTRUCTION v. INTERVEST-MORTGAGE
INVESTMENT COMPANY, Court of Appeal Case No. D065464, Superior
Court Case No. RIC539252, California Public Policy Against Waiver of
Mechanic's Lien Rights

Dear California Supreme Court:

By this letter the American Subcontractors Association ("ASA") and the American Subcontractors Association of California ("ASAC") request that you grant the petition for review of the above-referenced case or de-publish this case. This is based on the adverse impact to the Construction Industry and the right to secure payment via a Mechanic's Lien because the Court of Appeal's misinterpreted former California Civil Code § 3262 and current California Civil Code Section 8122.

**I. About the American Subcontractors Association and
American
Subcontractors Association of California**

ASA is a non-profit corporation supported by the membership dues paid by its approximately 2500 member businesses trading as construction subcontractors and suppliers throughout the country. The American Subcontractors Association of California is an ASA member and includes 300 plus members with four chapters in the State of California.

Because of ASA's unique, national perspective as a representative of the construction industry subcontractors, ASA's applications for leave to submit

amicus curiae briefs have been approved in many previous California cases, including California in Wm. R. Clarke v. Safeco Ins. (1997) 15 Cal.4th 882; Vandenberg v. Superior Court (1999) 21 Cal. 4th 818; Crawford v. Weather Shield Mfg (2008) 44Cal.4th 441; and Los Angeles Unified School District v. Great American Insurance (2010) 49 Cal.4th 739. ASA also submitted an amicus letter regarding Golden State Boring and Pipe Jacking v. Eastern Municipal Water District (Safeco Insurance Company), Case: S220888, which the California Supreme Court decertified the Court of Appeals Decision for publication.¹

II. This Case is Important to the Construction Industry with Severe Implications on Protecting Mechanic's Lien Rights

This case implicates the California Constitutional Right to Mechanic's Liens. The California Constitution Cal.Const. Art. 14, § 3 states

Mechanics, persons furnishing materials, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens.

Further, Civil Code Section 3262 in effect at the time of this contract provided:

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 whether with or without notice except by their written consent, and any term of the contract to that effect shall be null and void.

Despite this language the Court of Appeals ruled that Civil Code Section 3268 then in effect allowed contractual subrogation of lien rights despite specific language in Civil Code Section 3262 that prohibited impairing lien rights. ASA is deeply concerned that allowing subordination of mechanic's lien rights has severe implications to payment protection in the construction industry and contrary to the intent of the California Mechanic's Lien laws threatens security for payment to all who improve real property.

¹ ASA has also participated *amicus curiae* in many jurisdictions regarding construction issues including most recently in the United States Supreme Court in Atlantic Marine Construction Co., Inc. v. United States District Court for the Western District of Texas, (2013) 134 S.Ct. 568.

III. The Court of Appeals Decision Impairs Lien Rights under the Current Civil Code Section 8122 and Allows the Constitution Right of Mechanic's Lien to be Affected by Contract which is against the stated Public Policy of California.

As pointed out in, Wm. R. Clarke Corp. v. Safeco Ins. Co. (1997) 15 Cal.4th 882, 888–889, 64 Cal.Rptr.2d 578, 938 P.2d 372,

The mechanic's lien is the only creditors' remedy stemming from constitutional command and our courts 'have uniformly classified the mechanics' lien laws as remedial legislation, to be liberally construed for the protection of laborers and materialmen.' [Citation.] [Citation.] '[S]tate policy strongly supports the preservation of laws which give the laborer and materialman security for their claims.'

In the Court of Appeals decision at issue here the Court acknowledged that Civil Code Section 3262 stated that,

Neither an owner nor original contractor by any term of contract, or otherwise, shall, waive, affect, or impair the claims and liens of other persons . . . any term of the contract to that effect shall be null and void

However, the Court of Appeals erroneously read "owner nor original contractor" as a single term as opposed to two separate classes of contracting parties forbidden from impairing lien rights. The Court of Appeals thus mistakenly ruled that the "other persons" whose rights could not be impaired referred to in the former Civil Code Section 3262 did not include general contractors. As a result the Court of Appeals overruled the trial court's ruling that invalidated what it found to be a subordination agreement by Moorefield in the prime contract. The Court of Appeals stated that Moorefield, as a general contractor, was not protected by the prohibition against owners impairing lien rights. Instead, the Court ruled that "owner nor general contractor" in Civil Code Section 3262 should be read together to prohibit "owner" and "general contractor" from together impairing "other persons" lien rights.

The current Civil Code Section 8122 has added the term "subcontractors" to the "owner nor general contractor" language that was in the former Civil Code Section 3262. The implication to the construction industry of the Court of Appeals decision here is that the Court of Appeals reasoning could be applied to the new

Section 8122 to exclude "subcontractors" from "other persons" protected by the statute from having their lien rights impaired by contract.

The general public policy and California Constitutional right to mechanic's lien stated in Wm. R. Clarke Corp. v. Safeco Ins. Co. (1997) 15 Cal.4th 882, 888-889, 64 Cal.Rptr.2d 578, 938 P.2d 372 would be irreparably harmed if the Court of Appeal's decision is allowed to stand because the risk of subcontractors and/or general contractors being allowed to subordinate mechanic's liens when contracting irreparably impairs the fundamental California Constitutional right to a mechanic's lien. Such a result would introduce uncertainty into contracting (as to what is or is not enforceable or permitted), would engender disputes and create conflicts and inconsistencies with the California Code, and run counter to the public interest in assuring payment to those who provide construction labor and materials to projects to improve real property in California.

By allowing a subordination agreement in a prime contract under the facts at bar to be enforceable against a mechanic's lien claimant the Court of Appeals has removed any meaningful protection in the California Code against impairing mechanic's lien rights other than through the prescribed statutory release forms. Such an interpretation hopelessly undermines the public policy intended by California's Legislature and the California Constitution to secure payment protection and the public policy in favor of mechanic's lien claimants in California's construction industry. Clearly, ASA urges this Court to correct this error by granting certification to review the decision or, at a minimum, de-publishing the decision.

Sincerely yours,

LAW OFFICES OF
CRAWFORD & BANGS, LLP



BY: E. SCOTT HOLBROOK, JR.
For the Firm