

# **CONSTRUCTION LIENS IN TEXAS**

**Applicable to All Projects with Original Contracts  
Entered Into On or After  
January 1, 2022**

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**PERFECTING LIEN CLAIMS ON NON-RESIDENTIAL / PRIVATE PROJECTS****INTRODUCTION**

This paper focuses primarily on the filing of mechanic's liens on commercial construction projects (non-residential) located on private property and incorporates the legislative updates to Chapter 53 of the Texas Property Code that go into effect on all projects where the original contract (the contract between the owner and general contractor) was entered into on or after **January 1, 2022**. The Texas mechanic's lien laws are more complex than those of most states. Claimants must give notice within specific time limits in order to properly perfect a lien. Furthermore, claimants must file an affidavit of lien that meets the statutory requirements with the county clerk of the county where the work was performed within the statutory time limitations. Lastly, if the claim is not paid, the claimant must timely file suit. One must comply with all of the technical requirements of the statute to perfect a mechanic's lien and to have legal rights against the owner of the property, and, most importantly, negotiate leverage.

Even though Texas courts have consistently held that Chapter 53 of the Texas Property Code is to be "liberally construed for purposes of protecting laborers and materialmen,"<sup>1</sup> lien claimants are strongly urged to strictly comply with the statutory requirements. The so-called liberal construction policy has historically been applied to the wording and content of notices and affidavits—but not to the statutory deadlines.<sup>2</sup>

**NOTE: This paper is merely a guide. Please seek legal counsel should you have any questions regarding the contents of this paper. The original version of this paper was written several years ago. This updated version is appropriate for use if the original contract for the project was entered into on or after January 1, 2022.**

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<sup>1</sup> See Republic Bank Dallas, N.A. v. Interkal, Inc., 691 S.W.2d 605, 607 (Tex. 1985).

<sup>2</sup> See Suretec Ins. Co. v. Myrex Indus., 232 S.W.3d 811 (Tex. App.—Beaumont 2007, pet. denied); Bunch Elect.Co. v. Tex-Craft Builders, Inc., 480 S.W. 2d 42 (Tex. App.—Tyler 1972); Hunt Developers, Inc. v. Western Steel Co., 409 S.W. 2d 443 (Tex. Civ. App.—Corpus Christi 1966, no writ); Day v. Van Horn Trading Co., 183 S.W. 85 (Tex. Civ. App.—Austin 1916, no writ).

**HOW TO SEND THE PROPER NOTICES AND FILE THE PROPER AFFIDAVIT**

**Categories of Claimants**

The procedures for perfecting a lien claim depend on the claimant's position on the construction "food chain." The pre-lien notice requirements in the Property Code are dependent upon whether the claimant is (1) an original contractor, or (2) a subcontractor/supplier (anyone not performing under a contract with the owner). Subcontractors/suppliers have mandatory pre-lien notice requirements, whereas pre-lien notice is not required of an original contractor prior to filing a mechanic's lien.

**Original Contractor (a/k/a Prime Contractor or General Contractor)**

An original contractor is defined as "a person contracting with an owner either directly or through the owner's agent."<sup>3</sup> On large projects, it is not uncommon to have more than one original contractor. For example, if the mechanical and electrical contractors on a project contract directly with the owner, both contractors will be considered original contractors under the lien statute.

Be advised that if the original contractor (1) can effectively control the owner; (2) is effectively controlled by the owner through common ownership of voting stock or ownership interests, interlocking directorships, common management, or otherwise; or (3) was engaged by the owner for the construction or repair of improvements without a good faith intention of the parties that the original contractor would actually perform, that original contractor is defined under the law as a "purported original contractor."<sup>4</sup> A party that contracts with a purported

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<sup>3</sup> TEX. PROP. CODE. § 53.001(7).

<sup>4</sup> TEX. PROP. CODE. § 53.001(7-a).

original contractor is considered to be an original contractor for purposes of perfecting a mechanics' lien.<sup>5</sup>

### **Subcontractors**

A subcontractor is defined as “a person who labors or has furnished labor or materials to fulfill an obligation to an original contractor or to a subcontractor of any tier to perform all or part of the work required by an original contract.”<sup>6</sup> Subcontractors must comply with detailed notice requirements pursuant to the Texas Property Code. Subcontractors and suppliers not in privity with the owner are also referred to by the statute as “derivative claimants.”

#### **Rules Applicable to All Notices Under Chapter 53 of the Texas Property Code**

Chapter 53 requires that all notices or written communications required therein be delivered (1) in person to the party entitled to the notice or to that party's agent; (2) by certified mail; or (3) by any other form of traceable, private delivery or mailing service that can confirm proof of receipt.<sup>7</sup> If a claimant chooses to send notice by certified mail, deposit or mailing of the notice in the United States mail in the form required constitutes compliance with the notice requirement.<sup>8</sup> However, if the notice is actually received by the party entitled to receive it, the method of delivery is immaterial.<sup>9</sup>

When calculating a deadline to provide notice, if the last day of the notice period falls on a Saturday, Sunday, or legal holiday, the period is extended to include the next day that is not a Saturday, Sunday, or legal holiday.<sup>10</sup>

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<sup>5</sup> TEX. PROP. CODE. § 53.026(a).

<sup>6</sup> TEX. PROP. CODE § 53.001(13).

<sup>7</sup> TEX. PROP. CODE § 53.003(b).

<sup>8</sup> TEX. PROP. CODE § 53.003(c). Although the 2021 Legislative changes now permits delivery through other forms of private traceable delivery such as UPS or FedEx, certified mail continues to be preferred method because deposit satisfies the claimant's statutory notice requirement.

<sup>9</sup> TEX. PROP. CODE § 53.003(d).

<sup>10</sup> TEX. PROP. CODE § 53.003(e).

## **Lien Perfection Steps**

### **Original Contractors**

The Notice: An original contractor is not required to send a notice before filing a mechanic's lien affidavit. The only notice required of an original contractor is the notice that must be sent after filing the lien affidavit. (*See* § 3, below).

The Lien Affidavit: For an original contractor to properly perfect a statutory lien, the contractor must file a lien affidavit in the real property records in the county in which the property is located **not later than the 15<sup>th</sup> day of the fourth month after:**

The month in which the original contractor's work was completed, terminated, or abandoned.<sup>11</sup>

The Notice To Owner After the Lien Affidavit is Filed. The original contractor must send a copy of the lien affidavit to the owner or reputed owner at the last known business or residence address not later than five days after the date the affidavit is filed with the county clerk.<sup>12</sup> When calculating this deadline (and any other deadline to provide notice), if the last day of the notice period falls on a Saturday, Sunday, or legal holiday, the period is extended to include the next day that is not a Saturday, Sunday, or legal holiday.<sup>13</sup>

Practice Tip: As a practical matter, it is best to send notice to the owner on the same day the lien affidavit is filed in order to avoid failing to comply with this requirement.

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<sup>11</sup> TEX. PROP. CODE § 53.052(a)(1).

<sup>12</sup> TEX. PROP. CODE § 53.055(a).

<sup>13</sup> TEX. PROP. CODE § 53.003(e).

**Subcontractors**

The Notice: For any subcontractor or supplier<sup>14</sup> to properly perfect a statutory lien, the subcontractor must send a letter by certified mail to the owner and the original contractor informing them of the unpaid claim not later than the **15<sup>th</sup> day of the third calendar month after each month during which:**

the labor or materials were provided; or  
the undelivered specially fabricated materials would normally have been delivered.<sup>15</sup>

The Property Code requires that this notice be in substantially the form set forth below.

**This form is a new requirement as of January 1, 2022**

**NOTICE OF CLAIM FOR UNPAID LABOR OR MATERIALS**

WARNING: This notice is provided to preserve lien rights. Owner’s property may be subject to a lien if sufficient funds are not withheld from future payments to the original contractor to cover this debt.

Date: \_\_\_\_\_

Project description and/or address: \_\_\_\_\_

Claimant’s name: \_\_\_\_\_

Type of labor or materials provided: \_\_\_\_\_

Original contractor’s name: \_\_\_\_\_

Party with whom claimant contracted if different from original contractor: \_\_\_\_\_

\_\_\_\_\_

Claim amount: \_\_\_\_\_

\_\_\_\_\_ (Claimant’s contact person)

\_\_\_\_\_ (Claimant’s address)<sup>16</sup>

<sup>14</sup> Prior to the 2021 legislative changes to Chapter 53 of the Texas Property Code, the statutes made a distinction between first-tier subcontractors versus second-tier (and lower) subcontractors. For projects with original contracts entered into on or after January 1, 2022, there are no subcontractor-tier distinctions for lien perfection purposes.

<sup>15</sup> TEX. PROP. CODE § 53.056(a-1).

The notice may include an invoice or billing statement.<sup>17</sup> However, a notice that specifically references or incorporates an invoice or billing statement is not required in order to have a valid lien claim.<sup>18</sup>

When an owner receives this notice, any unpaid contract funds (up to the amount of the claim as stated in the notice) are “trapped” in the hands of the owner. The owner must withhold these funds, in excess of the amount the owner is statutorily obligated to reserve under § 53.101, until (1) the time for filing an affidavit of mechanic’s lien has passed; or (2) if a lien affidavit has been filed, the lien claim has been satisfied or released.<sup>19</sup> Potentially, the claimant has a lien on the real property *and* a claim against the owner for the funds that were supposed to be “trapped” in the hands of the owner by the notice letter. The owner further has the ability to withhold these funds *in addition to* those that are already statutorily reserved.<sup>20</sup>

Practice Tip: The legal effect of a timely and proper statutory notice of claim by a subcontractor or supplier to the owner is to “trap” funds due the original contractor in the hands of the owner.<sup>21</sup> It is essential that a claimant authorize the owner to withhold such funds because otherwise, the claimant’s recovery under its lien is limited to its share, if any, of the original contractor’s ten percent (10%) reserved funds being withheld by the owner.<sup>22</sup> It is to a claimant’s advantage to send notices to the owner as soon as a payment problem is evident. If the owner has

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<sup>16</sup> TEX. PROP. CODE § 53.056(a-2).

<sup>17</sup> TEX. PROP. CODE § 53.056(a-3).

<sup>18</sup> TEX. PROP. CODE § 53.056(a-4).

<sup>19</sup> TEX. PROP. CODE § 53.082.

<sup>20</sup> TEX. PROP. CODE §§ 53.081; 53.084 ; 53.101.

<sup>21</sup> TEX. PROP. CODE § 53.081.

<sup>22</sup> See TEX. PROP. CODE §§ 53.101 ; 53.105(b); see also First Nat’l Bank in Graham v. Sledge, 653 S.W.2d 283 (Tex. 1983).

already paid out all of the contract funds by the time it receives the statutory notice letter, there will be no opportunity to “trap” contract funds in the hands of the owner.

The Lien Affidavit: The next step for a subcontractor is to file an affidavit in the real property records in the county where the project is located **not later than the 15<sup>th</sup> day of the fourth month after the later of:**

the month the claimant last provided labor or materials; or

the month the claimant would normally have been required to deliver the last of specially fabricated materials that have not actually been delivered.<sup>23</sup>

Notice to Owner and Original Contractor After the Lien Affidavit is Filed: The Claimant must send a copy of the affidavit by certified mail to: (1) the owner or reputed owner at the owner’s last known business or residence address, and (2) to the original contractor at the original contractor’s last known business or residence address not later than five days after the date the affidavit is filed.<sup>24</sup>

Practice Tip: As a practical matter, it is best to send notice to the owner on the same day the lien affidavit is recorded in order to avoid failing to comply with this requirement.

**PERFECTION OF A CONTRACTUAL RETAINAGE CLAIM (A/K/A CLAIM FOR  
“UNPAID” RETAINAGE)**

**The Notice Requirements**

When a *subcontractor or supplier* provides material or labor under an agreement which provides for contractual retainage, and wishes to perfect a lien for such contractual retainage held by the general contractor or other downstream party, the claimant may send notice to the owner or reputed owner and the general contractor of the contractual retainage claim to the last known

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<sup>23</sup> TEX. PROP. CODE § 53.052(b).

<sup>24</sup> TEX. PROP. CODE § 53.055.

business or residence address not later than the earlier of: (1) the 30<sup>th</sup> day after the date the *claimant's* agreement providing for retainage is completed, terminated, or abandoned; or 2) the 30<sup>th</sup> day after the date the *original contract* is terminated or abandoned.<sup>25</sup>

The Property Code requires that this notice be substantially in the form set forth below.

**This form is a new requirement to perfect as of January 1, 2022.**

**NOTICE OF CLAIM FOR UNPAID RETAINAGE**

WARNING: This notice is provided to preserve lien rights. Owner's property may be subject to a lien if sufficient funds are not withheld from future payments to the original contractor to cover this debt.

Date: \_\_\_\_\_

Project description and/or address: \_\_\_\_\_

Claimant's name: \_\_\_\_\_

Type of labor or materials provided: \_\_\_\_\_

Original contractor's name: \_\_\_\_\_

Party with whom claimant contracted if different from original contractor: \_\_\_\_\_  
\_\_\_\_\_

Total retainage unpaid: \_\_\_\_\_

Claim amount: \_\_\_\_\_

\_\_\_\_\_ (Claimant's contact person)

\_\_\_\_\_ (Claimant's address).<sup>26</sup>

The notice may include an invoice or billing statement.<sup>27</sup> However, a notice that specifically references or incorporates an invoice or billing statement is not required in order to have a valid lien claim.<sup>28</sup>

<sup>25</sup> TEX. PROP. CODE § 53.057(a-1).

<sup>26</sup> TEX. PROP. CODE § 53.057(a-2).

**Filing the Lien Affidavit**

To perfect a lien for unpaid contractual retainage, the lien claimant must send notice as detailed above and:

**file an affidavit claiming a lien** not later than the 30<sup>th</sup> day after the earlier of the date:

- the work is completed;
- the original contract is terminated; or
- the original contractor abandons the project<sup>29</sup>

**OR**

**file an affidavit claiming a lien** not later than the date required for filing an affidavit under Section 53.052 which requires a claimant other than an original contractor claiming a lien for retainage to file the lien affidavit no later than the 15<sup>th</sup> day of the third month after the month in which the original contract under which the claimant performed was completed, terminated, or abandoned.<sup>30</sup>

The claimant must send a copy of the filed affidavit to the owner or reputed owner at the owner’s last known business or residence address not later than the fifth day after the date the affidavit is filed with the county clerk.<sup>31</sup> If the claimant is not an original contractor, the person must also send a copy of the affidavit to the original contractor at the original contractor's last known business or residence address within the same five day period.<sup>32</sup>

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<sup>27</sup> TEX. PROP. CODE § 53.056(a-3).  
<sup>28</sup> TEX. PROP. CODE § 53.056(a-4).  
<sup>29</sup> TEX. PROP. CODE § 53.103.  
<sup>30</sup> TEX. PROP. CODE §§ 53.057(f); 53.052(d).  
<sup>31</sup> TEX. PROP. CODE §§ 53.057(f)(2); 53.055(a).  
<sup>32</sup> TEX. PROP. CODE § 53.055(b).

# TEXAS LIEN CLAIMS ON *PRIVATE* PROJECTS (Non-Residential)

## Notice & Filing Deadlines For General Contractors and Subcontractors

Month When Labor and/or Material Furnished	Subcontractors of All Tiers Deadline to Send Notice to Owner and General Contractor	Deadline to File Lien Affidavit After Completion of Your Work (See Notes 1, 2 & 3 below)
	(15th day of 3rd Month)	(15th day of 4 <sup>th</sup> Month)
January	April 15	May 15
February	May 15	June 15
March	June 15	July 15
April	July 15	August 15
May	August 15	September 15
June	September 15	October 15
July	October 15	November 15
August	November 15	December 15
September	December 15	January 15
October	January 15	February 15
November	February 15	March 15
December	March 15	April 15

1. General contractor has to file a lien affidavit by the 15th day of the 4th month after the month in which the general contractor completes or abandons the job.
2. Subcontractor has to file a lien affidavit by the 15th day of the 4th month after the last month in which the Subcontractor provides labor or materials. However, if subcontractor's work is performed near the end of a project, shorter deadlines may apply.
3. Everyone who files a lien affidavit must send notice to the owner and general contractor of the filed lien affidavit no later than the 5th day after the date of filing.
4. Architects, engineers, surveyors, landscapers, and demolition contractors who have a written contract with the owner, general contractor, or subcontractor can perfect a lien. If performing work under a contract with the owner, they are considered to be general contractors for lien perfection purposes. If performing work under a contract with the general contractor or a subcontractor, they are considered a subcontractor for lien performed purposes.
5. All notices should be sent by certified mail. For expediency, you may also want to send your notice by FedEx or UPS with tracking capabilities.

### **Shortened Lien Filing Deadlines for Unpaid Materials and/or Labor Against the Statutory Reserved Fund**

Except as permitted below for the filing of liens for Contractual Retainage only, a claimant must file its lien affidavit not later than the 30th day after the earliest of the completion, termination, or abandonment of the original contract. Note: this may occur before the 15th day of the 4th month deadline provided in the chart above. All claimants should adjust their pre-lien notice deadlines to be sent before or contemporaneously with this shortened lien filing deadline.

### **Different Deadlines for Contractual Retainage Claims**

- A. Notice must be sent to the owner and to the general contractor not later than the earlier of:
  - a. the 30th day after the Claimant's agreement providing for retainage is completed, terminated, or abandoned; or
  - b. the 30th day after the original contract is terminated or abandoned.
- B. If you are a subcontractor, the lien affidavit must be filed by not later than the earliest of:
  - a. the 30th day after the earliest of completion, termination, or abandonment of the original contract; or
  - b. the 15th day of the third month after the month in which the original contract was completed, terminated, or abandoned;
- C. If you are a general contractor, the lien affidavit must be filed by the 15th day of the fourth month after the last day of the month in which the original contract was terminated, completed or abandoned.

### **Specially Fabricated Items**

Compliance with the dates set forth in the chart above is sufficient to perfect a claim for delivered or undelivered materials, so long as the calculation of the notice deadlines and the lien recording deadlines are calculated from the month the claimant would normally have been required to deliver the specially fabricated materials (even if they were not actually delivered).

**PLEASE NOTE: The Texas lien claim laws are complex.**

**This information is a guide and is not intended as legal advice. Please call us if you need help.**

**About Porter Hedges Construction Law Practice** - Porter Hedges assists owners, contractors, subcontractors, suppliers, lenders and design professionals who manage the risks of construction projects. From commercial to industrial and infrastructure construction, our experienced counsel can take you from contract formation to project completion, including the complexities of financing projects. Our breadth of experience helps clients avoid claims and resolve them when they happen.

**CLAIMS AGAINST THE STATUTORY RESERVED FUNDS (FOR UNBONDED PROJECTS)**

Section 53.101 of the Property Code requires the owner of a project to withhold 10% of the contract price of the work to the owner or 10% of the value of the work (measured by the proportion that the work done bears to the work to be done, using the contract price or, if there is no contract price, the reasonable value of the completed work) as “**reserved funds**” (previously referred to as “retainage”) during the project and for thirty (30) days after completion of the work under the parties’ contract.<sup>33</sup>

These reserved funds are intended to secure payment for subcontractors and suppliers that supply labor and material to the project. If the owner fails to reserve the 10%, a claimant who complies with the applicable statutes has a lien against the property, at least to the extent of the amount that should have been reserved.<sup>34</sup> While, generally, an owner’s liability to subcontractors and suppliers will not exceed the required reserved fund, the owner can have additional liability depending upon whether funds were “trapped” by the statutory notices.

In order to properly perfect a claim on the statutory reserved funds held by the owner (or the amount which should have been reserved), a claimant, with the exception of the procedure set forth in Section 53.057 discussed in Section III *supra*, must:

send all notices in the time and manner required by Chapter 53;<sup>35</sup> and

file an affidavit claiming a lien not later than the 30<sup>th</sup> day after the original contract work is completed, the original contract is terminated or the original contractor abandons performance under the original contract.<sup>36</sup>

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<sup>33</sup> TEX. PROP. CODE § 53.101(a).

<sup>34</sup> TEX. PROP. CODE § 53.105.

<sup>35</sup> Some of the statutory notice requirements may actually be cut short in the event that you perform your work toward the end of the project. Be sure to thoroughly review the forthcoming **Practice Tip** for further explanation.

If the claimant fails to give proper notice and perfect the lien, neither the owner nor the owner's property will be liable for the unpaid amounts.

The ten percent (10%) reserved funds requirement does not apply if there is a Chapter 53 statutory payment bond.<sup>37</sup>

**Practice Tip: If you perform work at the end of a project, you should send a statutory notice and perfect your lien immediately.**

As discussed above, an owner is only required to withhold statutory reserved funds for thirty days past final completion of the project under § 53.101. Accordingly, sending a statutory notice under the time frame permitted by § 53.056 (authorizing a 3 month window for timely sending notice of unpaid amounts for labor or materials) may not be soon enough to trap any funds in the hands of the owner (*i.e.*, statutory reserved funds or trapped funds). Since the owner, in the absence of a statutory notice, may release the reserved funds without liability after the expiration of thirty days after completion of the work, the effective deadline for sending any statutory notice is the earlier of: 1) thirty days after the project is completed/terminated/abandoned; or 2) the fifteenth of the third month (for a subcontractor) following each month the claimant's labor was performed or material delivered.<sup>38</sup> Therefore, if you are a subcontractor or supplier performing work toward the end of the project, you likely do not want to wait the full permitted time to send out a statutory notice under § 53.056.

The same timeliness issue arises when perfecting a lien under § 53.052 if you perform your work toward the end of the project. Section 53.052(b) permits a claimant to record its lien no later than the 15<sup>th</sup> day of the fourth month after the month the claimant last provided labor or

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<sup>36</sup> TEX. PROP. CODE § 53.103.

<sup>37</sup> TEX. PROP. CODE § 53.201(b); *Indus. Indem. v. Zack Burnett*, 677 S.W.2d 493 (Tex. 1984).

<sup>38</sup> If your claim includes unpaid contractual retainage, ensure that your statutory lien notice under § 53.057 gets sent by the 30<sup>th</sup> day after the date your contract is completed, terminated or abandoned, which, under certain circumstances, may happen to fall even earlier than these deadlines.

materials. However, if you perform your work toward the end of a project, perfection of your lien within a four-month window may not be timely to perfect your lien against the statutory reserved funds. Thus, the effective deadline for recording your lien is the **earlier** of: 1) thirty days after the project is completed/terminated/abandoned; or 2) the 15<sup>th</sup> day of the fourth month after the month the claimant last provided labor or materials.<sup>39</sup>

**THE OWNER’S OBLIGATIONS TO INFORM SUBCONTRACTORS OF COMPLETION,  
TERMINATION, OR ABANDONMENT**

In *Page v. Wood Structural Components, Inc.*, 102 S.W.3d 720 (Tex. 2003), the Texas Supreme Court held that a subcontractor’s deadline for filing a lien affidavit to perfect a claim for retainage (*i.e.*, statutory reserved funds per the 2022 legislative changes) runs from the date the original contract is completed, terminated or abandoned, even if the subcontractor did not know when (or even if) the original contract was completed, terminated or abandoned. The *Page* case was decided prior to the 2022 legislative changes, however, presumably, the law remains the same under Tex. Prop. Code § 53.103.

However, the owner is not without responsibility to inform claimants for whom they have received a statutory lien notice. An owner is required to provide written notice to a subcontractor who has sent a statutory lien notice (or otherwise submits a written request for notice of any affidavit of completion<sup>40</sup>) of any filed affidavit of completion within 3 days of filing the affidavit or by the 10<sup>th</sup> day after the owner receives the lien notice, whichever is later.<sup>41</sup> An owner is furthermore required to provide written notice to a subcontractor who has sent a lien notice or

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<sup>39</sup> The only exception to this is the extended period for which to record a lien permitted under § 53.052(d), which is *only* applicable to a claim for unpaid contractual retainage.

<sup>40</sup> TEX. PROP. CODE § 53.106(c); if the subcontractor made a written request for notice of any affidavit of completion under § 53.106(c), the owner must furnish a copy of the affidavit of completion no later than the date the affidavit is filed or by the 10<sup>th</sup> day after the date the request is received, whichever is later.

<sup>41</sup> TEX. PROP. CODE § 53.106(b).

who has requested written notice from an owner whenever an original contract is either terminated or abandoned.<sup>42</sup> Under Section 53.107, if the owner does not provide notice within ten days of termination or abandonment and the lien claimant otherwise properly perfects its lien claim by timely sending its lien notice and perfecting its lien under § 53.052, the owner will not be allowed to object on the grounds that an early termination or abandonment of the original contract shortened the subcontractor's time to perfect its lien claim.<sup>43</sup> This statute does not apply to residential contracts.<sup>44</sup>

The statute:

Requires owners to provide notice to claimants that the original contractor has been terminated or has abandoned the project if prior to abandonment/termination the owner received notice under §§ 53.056, 53.057, or otherwise received a written request from the subcontractor for notice of termination or abandonment.<sup>45</sup>

Requires the owner's notice to provide the following:

the name and address of the owner;

the name and address of the original contractor;

a description, legally sufficient for identification, of the real property on which the improvements are located;

a general description of the improvements agreed to be furnished under the original contract;

a statement that the original contract has been terminated or that performance under the contract has been abandoned;

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<sup>42</sup> TEX. PROP. CODE § 53.107(a).

<sup>43</sup> TEX. PROP. CODE § 53.107(d); however, note that § 53.057 permits filing of a lien affidavit in accordance with Subchapter E or § 53.052 without reference to any owner obligations to provide the subcontractor with notice of termination or abandonment.

<sup>44</sup> TEX. PROP. CODE § 53.107(e).

the date of the termination or abandonment; and

a conspicuous statement that a claimant may not have a lien on the retained funds unless the claimant files an affidavit claiming a lien in the time and manner required by this chapter.<sup>46</sup>

Provides that if the owner fails to provide the required notice of termination or abandonment, the subcontractor need only comply with § 53.052 deadlines to perfect its lien on the reserved fund.<sup>47</sup>

While § 53.107 helps those claimants who have sent their lien notices and those who send a request for notice to the owner, presumably the *Page* holding is still the law. Therefore, those claimants who wait to send a statutory lien notice and who do not send any written request for notice of completion, abandonment or termination to the owner, but rather perform their work on a project and then leave while the work of others continues must still keep up with the status of the project. Best practice is to send your statutory lien notice and file your lien for any outstanding amounts as soon a problem with the timeliness of the payment becomes apparent, and certainly before or simultaneously with the original contractor's completion of the work, abandonment or termination.

### **WHEN DOES “COMPLETION” OCCUR?**

“Completion” is defined as “the actual completion of the work, including any extras or change orders reasonably required or contemplated under the original contract, other than

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<sup>45</sup> TEX. PROP. CODE § 53.107(a).

<sup>46</sup> TEX. PROP. CODE § 53.107(b). It is currently unclear whether the intent of the phrase “this chapter” was intended to mean “Chapter 53” of the Texas Property Code, or limit the timing of perfecting the lien to the time period proscribed by Subchapter E, § 53.103.

<sup>47</sup> TEX. PROP. CODE § 53.107(d). However, again, please note that § 53.057 permits timely lien filing in accordance with either Subchapter E or § 53.052. **Practice tip:** if you receive notice from the owner in accordance with § 53.107(b), best practice is to file your lien affidavit claiming unpaid contractual retainage within the time limits proscribed by § 53.103.

warranty work or replacement or repair of the work performed under the contract.”<sup>48</sup> Therefore, additional work and punch list work required to complete the original contract scope extends the date of completion and therefore, the deadline for filing mechanic’s liens against the reserved funds or trapped/withheld funds. However, performing warranty or repair work will generally not extend the completion date.

In *Texas Wood Mill Cabinets, Inc. v. Butter*, 117 S.W.3d 98 (Tex. App.—Tyler 2003, no. pet.), the court dealt with the task of defining whether a project was completed. The Butters’ house was constructed by D&D, as a “spec house.” Texas Wood Mill (“TWM”), the cabinet contractor, was not paid and sought to foreclose its lien against the Butters. Texas Wood Mill argued that the evidence at trial established as a matter of law that the contract was completed in July 1999. The Butters argued that the evidence established that all work done after May 25, 1999 related to specific requests made by D&D to make adjustments to the work. The Court interpreted the term “completed,” to mean “ended” or “concluded.” Since the objective of the contract between D&D and TWM was the construction and installation of the cabinets for the house, the Court found the contract could not be “completed,”<sup>49</sup> until the cabinets were constructed, installed, and functional. In other words, until the “punch list” was completed.

Although “completion” may vary on a case-by-case basis under the foregoing analysis, an owner’s filing of an affidavit of completion in accordance with § 53.106(a) is prima facie evidence of the date the work under the original contract is completed for purposes of Chapter

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<sup>48</sup> TEX. PROP. CODE § 53.001(15).

<sup>49</sup> *Texas Wood Mill Cabinets, Inc. v. Butter*, 117 S.W.3d 98, 104 (Tex. App.—Tyler 2003, no. pet.).

53.<sup>50</sup> However, if the affidavit is filed after the 10<sup>th</sup> day after the date of completion, the date of completion for purposes of Subchapter E is the date the affidavit is filed.<sup>51</sup>

### SPECIAL FABRICATORS

A subcontractor or material supplier who supplies specially fabricated materials, regardless of whether the materials are delivered and/or incorporated into the project, is nevertheless afforded protection under the Texas lien laws.<sup>52</sup>

The Notice: A fabricator of specially fabricated materials that have not been delivered to the project, must send notice by certified mail to the last known business or residence address of the owner or reputed owner and the original contractor not later than the 15<sup>th</sup> day of the third month after the month the undelivered specially fabricated materials would normally have been delivered.<sup>53</sup> If the specially fabricated materials are delivered to the project, notice must be sent in accordance with § 53.056(a-1)(1)(A) (*i.e.*, no later than the 15<sup>th</sup> day of third month after the month the materials were delivered).

The Lien Affidavit: After the proper notice has been sent, the claimant for specially fabricated materials must file an affidavit in the real property records of the county where the project is located not later than the 15<sup>th</sup> day of the fourth calendar month after:

the month the claimant last provided labor or materials; or

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<sup>50</sup> TEX. PROP. CODE § 53.106(d).

<sup>51</sup> *Id.*

<sup>52</sup> TEX. PROP. CODE § 53.023(2).

<sup>53</sup> TEX. PROP. CODE § 53.056(a-1)(1)(B). Previously, special fabricators were required to send an additional notice to the owner two months after entering into the contract for specially fabricated material in order to perfect a lien if the specially fabricated materials were ultimately never delivered to the project. Now, the Texas Legislature has amended the lien laws to eliminate the necessity of this early notice requirement for special fabricators.

the month the claimant would normally have been required to deliver the last of specially fabricated materials that have not been actually delivered.<sup>54</sup>

The claimant must send a copy of the filed affidavit to the owner or reputed owner at the owner's last known business or residence address not later than the fifth day after the date the affidavit is filed with the county clerk. If the claimant is not an original contractor, the person must also send a copy of the affidavit to the original contractor at the original contractor's last known business or residence address within the same five day period.<sup>55</sup>

#### **THE GENERAL CONTRACTOR'S CONSTITUTIONAL LIEN**

In addition to the specific statutory procedure outlined above, the Texas Constitution provides a self-executing lien for improvements to property made by an original contractor who is in direct privity of contract with the owner. The original contractor need not comply with the requirements of Chapter 53 of the Property Code to enforce such a constitutional lien. This right, however, is very limited. Art. XVI § 37 of the Texas Constitution provides:

Mechanics, artisans, and materialmen, of every class, shall have a lien upon the buildings and articles made or repaired by them for the value of their labor done thereon, or materials furnished therefore; and the legislature shall provide by law for the speedy and efficient enforcement of said liens.

On the other hand, subcontractors and suppliers not contracting directly with the owner do not have a constitutional lien, and are relegated to statutory liens. The constitutional lien is only available to one in privity with the owner of the property in question.<sup>56</sup>

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<sup>54</sup> TEX. PROP. CODE § 53.052(b).

<sup>55</sup> TEX. PROP. CODE § 53.055.

<sup>56</sup> First Nat'l Bank of Paris v. Lyon-Gray Lumber Co., 194 S.W. 1146 (Tex. Civ. App.—Texarkana 1917), *aff'd*, 110 Tex. 162, 217 S.W. 133 (1919); Ralph M. Parsons Co. v. South Coast Supply Co. (In re A&M Operating Co.), 182 B.R. 997 (E.D. Tex. 1995).

Although a constitutional lien exists without the necessity of filing a lien affidavit, certain circumstances which would bar collection of the debt can prevent enforcement of the lien. For example, a constitutional lien cannot be enforced against a good faith purchaser for value of the property who had no knowledge of the lien claim.<sup>57</sup> Therefore, in order to preserve such a claim against a subsequent good faith purchaser, claimants are encouraged to file a lien affidavit in the county records for the property in question. The filing of the lien affidavit will put prospective purchasers of the property on notice of the lien.<sup>58</sup>

While a valid constitutional lien requires direct contractual privity with the owner, certain provisions of the Texas Property Code concerning “sham contracts” may allow a subcontractor or supplier to prevail on such a claim. The claimant must show that the original contractor was actually a “purported original contractor,” defined as one “who can effectively control the owner or is effectively controlled by the owner through common ownership of voting stock or ownership interests, interlocking directorships, common management, or otherwise, or who was engaged by the owner for the construction or repair of improvements without a good faith intention of the parties that the purported original contractor was to perform under the contract.”<sup>59</sup> Texas Property Code § 53.026 is most frequently litigated or arbitrated if the subcontractor failed to provide proper notices of its lien or failed to perfect its lien timely, or both, because the rules that allow a general contractor to create and enforce its liens against an owner’s property are much easier to follow than those concerning subcontractors.

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<sup>57</sup> See *Cavazos v. Munoz*, 305 B.R. 661, 681 (S.D. Tex. 2004); see also *Contract Sales Co. v. Skaggs*, 612 S.W.2d 652, 653 (Tex. Civ. App.—Dallas 1981, no writ.).

<sup>58</sup> See *FDIC v. Bodin Concrete Co.*, 869 S.W.2d 372 (Tex.App.—Dallas 1993, writ denied); *Justice Mortgage Investors v. C.D. Thompson Constr. Co.*, 533 S.W. 2d 939 (Tex.Civ.App.—Amarillo 1976, writ ref’d n.r.e.).

<sup>59</sup> TEX. PROP. CODE §§ 53.001(7-a), 53.026. See *Trinity Drywall Sys. v. TOKA Gen Constrs., Ltd.*, 416 S.W. 3d 201 (Tex.App.—El Paso 2013, pet. denied); but see *Southwest Props., L.P. v. Lite-Dec, Inc.*, 989 S.W. 2d 69 (Tex.App.—San Antonio 1998, writ denied).

Certain types of construction work which may be covered by the statutory lien are not covered by a constitutional lien. The constitutional lien is only valid for articles or buildings. Suppliers of materials such as refrigerators which are not “incorporated” into the project may not acquire a constitutional lien, even if they are ordered directly by the owner.<sup>60</sup> Likewise, claims for landscaping or water lines which are not considered ‘buildings’ can only be perfected through a statutory claim.<sup>61</sup> However, unlike the mechanic’s lien provided under the Texas Property Code, the constitutional lien will attach to the articles, i.e. chattels, made or repaired by the mechanic, artisan or materialman.

Due to the limitations of the constitutional lien, claimants should not rely on it to protect their rights. A statutory lien should always be perfected in order to preserve claims. The constitutional lien is a remedy of last resort for the original contractor who fails to timely perfect the statutory lien.

#### **Constitutional Lien Time Period for Foreclosure.**

There are two cases, one citing the other, that hold that the limitations period to foreclose a Constitutional Lien is four years.<sup>62</sup> Neither *Hoarel* nor *Atkinson* dealt with contracts governed by Tex. Prop. Code § 53.158, which, at least as to statutory mechanic’s liens under Chapter 53, expressly sets forth one-year (or an extended-by-agreement two year) limitations periods for foreclosure of statutory mechanic’s liens. Nevertheless, these cases are cited for the proposition that foreclosure of a *Constitutional Lien* is governed by a four-year statute of limitations.

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<sup>60</sup> See *First Nat’l Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262, 266 (Tex. 1974)

<sup>61</sup> *Taylor v. Rigby*, 574 S.W.2d 833, 837 (Tex. Civ. App.—Tyler 1978, writ ref’d n.r.e.) (citing *Campbell v. City of Dallas*, 120 S.W.2d 1095, 1097 (Tex. Civ. App.—Waco 1938, writ ref’d)).

<sup>62</sup> *Hoarel Sign Co. v. Dominion Equity Corp.*, 910 S.W.2d 140 (Tex. App. — Amarillo 1995, writ denied); *Atkinson v. Swoboda*, 1997 WL 94358 (Tex. App. — Houston [1st Dist.] 1997, pet. denied).

If one is to assume that the filing of a Constitutional Lien is also governed by Chapter 53 of the Texas Property Code, then presumably Tex. Prop. Code § 53.158 governs the limitations period for both statutory and Constitutional liens, and such period is one year from the last date a claimant could file a lien under Section 53.052.

As a Constitutional Lien claimant, the safest course is to file suit to foreclose the Constitutional Lien within the time periods set forth in Tex. Prop. Code § 53.158. If suit is filed thereafter, limitations may become an issue.

### **Constitutional Lien Affidavits: Best Practices**

For the potential Constitutional Lien claimant, the best course is to follow the Chapter 53 requirements. Presumably in most cases you are coupling the Constitutional Lien with a Chapter 53 statutory mechanic's lien anyway. Here is the recommended procedure:

File a lien affidavit in the county in which the project is located.

Draft the lien affidavit to comply with the requirements of Tex. Prop. Code § 53.054.

For residential homestead projects, include the statutory notice required by Tex. Prop. Code §53.254 at the top of your lien affidavit - "NOTICE: THIS IS NOT A LIEN. THIS IS ONLY AN AFFIDAVIT CLAIMING A LIEN."

For residential construction projects, file the lien affidavit by the 15<sup>th</sup> day of the third month after the last day of the month in which the claimant last provided labor or materials; or the last day of the month in which the claimant would normally have been required to deliver the last of specially fabricated materials that have not been actually delivered (whichever is later). Tex. Prop. Code §53.052(c). For non-residential projects—the 15<sup>th</sup> day of the fourth month. Tex. Prop. Code §53.052(b).

Send written notice of the lien affidavit filing to the owner(s) on the day you file, and in any event, within five days of the lien affidavit filing by certified mail. Tex. Prop. Code § 53.055(a).

File suit to foreclose, or if applicable, your demand for arbitration, “within one year after the last day a claimant may file a lien affidavit under Section 53.052” or enter into a written agreement with the owner to extend the limitations deadline for an additional year and file such agreement with the clerk in the county where the lien is filed. Tex. Prop. Code §53.158.

### **Constitutional Lien Enforcement Against a Bona Fide Purchaser**

To enforce a constitutional lien against a bona fide purchaser of the property, a lien claimant must provide the purchaser with actual notice or constructive notice of the constitutional lien recorded on the property. Otherwise, a bona fide purchaser of the property will take the property free and clear of the constitutional lien. A bona fide purchaser has actual knowledge if purchaser knew of the general contractor’s recent work or lien claim, or where the purchaser might, by reasonable diligence, have informed itself of the existence of certain facts.<sup>63</sup> Constructive notice of a constitutional lien on a bona fide purchaser requires that the lien be filed in accordance with the statutory requirements, including timeliness.<sup>64</sup> By failing to comply with the statutory requirements, courts have held that the lien affidavit does not impart constructive notice on a good faith purchaser under Texas law, even though the lien is self-executing under the Texas Constitution. Therefore, unless the subsequent bona fide purchaser has actual knowledge of the constitutional lien, the purchaser will take free and clear of the constitutional lien.

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<sup>63</sup> See Tex. Wood Mill Cabinets, Inc. v. Butter, 117 S.W.3d 98, 102 (Tex. App.—Tyler 2003, no pet.); Detering Co. v. Green, 989 S.W.2d 479, 481 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).

<sup>64</sup> See *Butter*, 117 S.W.3d at 105-07; Apex Fin. Corp. v. Brown, 7 S.W.3d 820, 831 (Tex. App.—Texarkana 1999, no pet.); McEvoy v. Ron Watkins, Inc., 105 B.R. 362, 365 (N.D. Tex. 1987); Black, Sivals & Bryson v. Operators’ Oil & Gas Co., 37 S.W.2d 313, 315 (Tex. Civ. App.—Eastland 1931, writ dism’d w.o.j.).

**RESIDENTIAL CONSTRUCTION PROJECTS**

Subchapter K of the Texas Property Code addresses the additional requirements that exist to perfect a lien on a residential construction project. This section does not describe all of the requirements and you are encouraged to review Subchapter K in its entirety and consult with counsel before setting out to perfect a lien on a residential project.

“Residential construction project” is defined in the Texas Property Code as a “project for the construction or repair of a new or existing residence, including improvements appurtenant to the residence, as provided by a residential construction contract.”<sup>65</sup> “Residence” means a “single-family house, duplex, triplex, or quadruplex or a unit in a multiunit structure used for residential purposes that is: (1) owned by one or more adult persons; and (2) used or intended to be used as a dwelling by one of the owners.”<sup>66</sup> For instance, in *Texas Wood Mill Cabinets, Inc. v. Butter*, the court held that a “spec” house was not a residential construction project because the builder and the owner were the same, and there was no residential construction contract or intent by the owner to use the residence as a dwelling. 117 S.W.3d 98, 105 (Tex.App.—Tyler 2003, no pet.). For these reasons, houses built by commercial developers typically do not fit the definition of “residential construction” under the Texas Property Code, because the owner of the property at the time of commencement of construction is not a person who intends to occupy the property as a residence when it is completed.

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<sup>65</sup> TEX. PROP. CODE § 53.001(10).

<sup>66</sup> TEX. PROP. CODE § 53.001(8).

**Deadlines to Send Notices and File Lien Affidavits.**

Original Contractors do not have to provide notice to the owner before filing a lien affidavit. They have until the 15<sup>th</sup> day of the **third** month after the original contractor's work was terminated, completed, settled or abandoned for filing a lien affidavit.<sup>67</sup>

Subcontractors and suppliers have until the 15<sup>th</sup> day of the **second** month after each month in which they provided labor or materials or the undelivered specially fabricated materials would normally have been delivered to send a notice.<sup>68</sup> They have until the 15<sup>th</sup> day of the third calendar month after the later of: (1) the month the claimant last provided labor or materials; or (2) the month the claimant would normally have been required to deliver the last of specially fabricated materials that have not been actually delivered.<sup>69</sup>

**Disclosure.** When dealing with a residential project, the original contractor must deliver the "disclosure statement" required by Texas Property Code § 53.255.

**List of Subcontractors and Suppliers.** The original contractor must provide the owner with a list of the name, address and telephone number of each supplier the contractor intends to use in performance of the work.<sup>70</sup> The owner can waive this requirement as long as such waiver is in writing.

**Final Bills-Paid Affidavit.** The original contractor shall provide the owner with an affidavit stating that the original contractor has paid for all labor and materials used in construction of the residence as a condition of final payment.<sup>71</sup>

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<sup>67</sup> TEX. PROP. CODE § 53.052(a)(2).

<sup>68</sup> TEX. PROP. CODE § 53.056(a-1)(2).

<sup>69</sup> TEX. PROP. CODE § 53.052(c).

<sup>70</sup> TEX. PROP. CODE § 53.256.

<sup>71</sup> TEX. PROP. CODE § 53.259.

**Homestead.** Additionally, if the residence is a homestead, additional requirements are necessary. The original contractor must execute a written contract setting forth the terms of the agreement before the materials are provided or the labor is performed. The contract must be signed by both spouses if the owner is married and must be filed with the county clerk of the county in which the homestead is located. Furthermore, all lien notices and the lien affidavit must contain the specific notice language mandated by statute in order to be effective.<sup>72</sup> A lien on a homestead is valid only if the lien strictly complies with the Texas Constitution and the Texas Property Code.

### **ARCHITECTS, ENGINEERS, SURVEYORS AND MORE**

#### **Architect / Engineer Liens**

Section 53.021 states that a licensed architect, engineer or surveyor providing services to prepare a design, drawing, plan, plat, survey, or specification under a contract with the owner or the owner's agent, trustee, receiver, contractor, or subcontractor has a lien on the property. As long as the engineer/architect/surveyor has a contract with the owner, owner's agent, trustee, receiver, contractor, or subcontractor, and has actually prepared the design, drawing, plan, plat, survey, or specification, the engineer/architect/surveyor has the right to a lien regardless of whether construction on the property actually occurred. The notice requirements for an original contractor apply to an engineer, architect, and surveyor so long as they are under a contract with an owner. Those contracted with the owner or the owner's agent, trustee, or receiver are considered to be original contractors for lien perfection purposes, they do not have to send a notice, but they do have to file a lien affidavit timely.

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<sup>72</sup> TEX. PROP. CODE § 53.254; CVN Group, Inc. v. Delgado, 47 S.W. 3d 157 (Tex.App.—Austin 2001), *rev'd on other grounds*, 95 S.W. 3d 234 (Tex. 2002); Stewart v. Clark, 677 S.W.2d 246 (Tex. App.—Corpus Christi 1984, no writ).

### **Landscaper Liens**

Section 53.021 of the Property Code provides the following that a person who, under a contract with the owner or the owner's agent, trustee, receiver, contractor, or subcontractor, provides labor, plant material, or other supplies for the installation of landscaping for an improvement, including the construction of a retention pond, retaining wall, berm, irrigation system, fountain, or other similar installation has a lien on the property. The same notice and timing requirements under Chapter 53 apply to such liens.

### **Demolition Work**

Section 53.021(e) states that a person who, under a contract with the owner or the owner's agent, trustee, receiver, contractor, or subcontractor, performs labor as part of, or furnishes labor or materials for, the demolition of an improvement on real property has a lien thereon.

### **HOW DO I GET THE INFORMATION I NEED TO FILE A STATUTORY LIEN AFFIDAVIT WITH THE PROPER CONTENT? THE "REQUEST FOR INFORMATION"**

Claimants should ask for the information they may eventually need when the project begins.

**Practice Tip: Subcontractors should always request a copy of contract between the owner and original contractor prior to signing a subcontract agreement. This is the easiest way to ensure that you have the requisite information needed to perfect a lien.**

Pursuant to § 53.159, a claimant should make a written request of the owner, original contractor and/or subcontractor, as applicable, for needed information.

Claimants can get the following information from an **owner** within 10 days after receipt of the request:

a legal description of the property;

whether there is a surety bond and if so, the name and address of the surety and a copy of the bond;

whether there are any prior recorded liens or security interests on the real property, and if so, the name and address of the person having the lien or security interests; and

the date on which the original contract for the project was executed.

Claimants can get the following information from a **general contractor** within 10 days after the receipt of the request:

the name and last known address of the person to whom the original contractor furnished labor or materials for the construction project (*i.e.*, the owner info);

whether the original contractor has furnished or has been furnished a payment bond for any of the work on the construction project and if so, the name and last known address of the surety and a copy of the bond; and

the date on which the original contract for the project was executed.

Claimants can get the following information from a **subcontractor** within 10 days after the receipt of the request:

the name and last known address of each person from whom the subcontractor purchased labor or materials for the construction project, other than those materials that were furnished to the project from the subcontractor's inventory;

the name and last known address of each person to whom the subcontractor furnished labor or materials for the construction project; and

whether the subcontractor has furnished or has been furnished a payment bond for any of the work on the construction project and if so, the name and last known address of the surety and a copy of the bond.

In addition, the owner, surety or general contractor can ask a **claimant** for:

his contract or purchase order;

any billing, statement or payment request reflecting the unpaid amount and the work performed; and

the estimated amount due for each calendar month the claimant has provided labor or material.<sup>73</sup>

If the person from whom the information is sought does not have a direct contractual relationship with the person requesting the information, the person supplying the information can require payment of actual costs up to \$25.00.<sup>74</sup> A person who fails to furnish information as required by § 53.159 (other than the information the claimant is required to furnish), is liable to the requesting person the reasonable and necessary costs incurred in procuring the requested information.<sup>75</sup>

#### CONTENTS OF THE LIEN AFFIDAVIT

Section 53.054 states that a lien affidavit must be signed by the person claiming the lien or by another person on the claimant's behalf and must contain substantially the following:

A sworn statement of the amount of the claim;

The name and last known address of the owner or reputed owner;

A general statement of the kind of work done and materials furnished by the claimant and, for a claimant other than an original contractor, a statement of each month in which the work was done and materials furnished for which payment is requested;

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<sup>73</sup> TEX. PROP. CODE § 53.159(d).

<sup>74</sup> TEX. PROP. CODE § 53.159(e).

<sup>75</sup> TEX. PROP. CODE § 53.159(f).

The name and last known address of the person by whom the claimant was employed or to whom the claimant furnished the materials or labor;

The name and last known address of the original contractor;

A description, legally sufficient for identification, of the property sought to be charged with the lien;

The claimant's name, mailing address, and if different, physical address; and

For a claimant other than an original contractor, a statement identifying the date each notice of the claim was sent to the owner and the method by which the notice was sent.

It is crucial that the affidavit meet the requirement of a sworn statement. The affidavit must state that it was “subscribed and sworn to”, not just acknowledged,<sup>76</sup> and the affidavit must be sworn to before a notary.

The Property Code states that a claimant may attach to the affidavit a copy of any applicable written agreement or contract, as well as a copy of each notice sent to the owner.<sup>77</sup> However, these attachments are not required and many practitioners do not attach these documents to mechanic's lien affidavits due to the filing costs and for other reasons.

#### **Description of the Material or Labor and Applicable Months**

Section 53.054(c) states that the affidavit is not required to set forth individual items of work done or material furnished or specially fabricated.<sup>78</sup> An affidavit may use any abbreviations or symbols customary in the trade. However, Texas courts have held that the

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<sup>76</sup> TEX. PROP. CODE § 53.054; *see also* Sugarland Bus. Ctr., Ltd. v. Norman, 624 S.W.2d 639, 641 (Tex. App.—Houston [14th Dist] 1981, no writ) (“It is well established under the Texas law that a subcontractor must file an affidavit containing a “sworn statement” of his claim as an essential part of perfecting a Mechanic's Lien against the landowner.”); *accord* Perkins Construction Co. v. Ten-Fifteen Corp., 545 S.W.2d 494 (Tex. Civ. App.—San Antonio 1976, no writ); Crockett v. Sampson, 439 S.W.2d 355 (Tex. Civ. App.—Austin 1969, no writ).

<sup>77</sup> TEX. PROP. CODE § 53.054(b).

<sup>78</sup> TEX. PROP. CODE § 53.054(c).

statute contemplates a description which is meaningful and intelligible, and meets the substantial compliance test.<sup>79</sup> In the labor context, the court in *In re: Orah Wall Fin. Corp.*, 84 B.R. 448, 444 (Bankr. W.D. Tex. 1986) found “[i]t is difficult to see what elaboration of ‘General Contractor Responsibilities’ is necessary in order to meet the statutory requirement of a ‘general statement.’ A general contractor is a general contractor is a general contractor.” Conversely, in one specific case, the description of labor and materials furnished by the claimant as “5-12’2” x 14’1” O.H. St.d M.G. \$3,328.00” was held to be insufficient and “gibberish” and the lien was held invalid.<sup>80</sup> In other words, the more specific and “understandable” the description, the less risk a claimant takes in a court finding that the lien is insufficient. One way for the claimant to meet these requirements is to attach dated, descriptive invoices to the lien affidavit setting forth the individual items of work done or material furnished. Invoices are strongly encouraged because they assist in clarifying the claimant’s lien. Although abbreviations or symbols customary in the trade may be used, the best practice is to indicate plainly and clearly (with complete words) the services or materials provided.<sup>81</sup>

Failure to include a statement of each month in which the work was done and the materials were furnished, as required by § 53.054(a)(3), has been held to be grounds for finding that the lien is not perfected.<sup>82</sup> The failure of a derivative claimant or subcontractor to provide the months for their work will not meet the substantial compliance standard.<sup>83</sup>

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<sup>79</sup> *James Mechanical Contractors, Inc. v. Tate*, 647 S.W.2d 347, 349 (Tex. App.—Corpus Christi 1982, no writ); *Haden Co., Inc. v. Mixers, Inc.*, 667 S.W.2d 316, 318 (Tex. App.—Dallas 1984, no writ).

<sup>80</sup> *Haden Co.*, 667 S.W.2d at 317-18.

<sup>81</sup> TEX. PROP. CODE § 53.054(c); *In re Orah Wall Financial Corp.*, 84 B.R. 442 (Bankr. W.D. Tex. 1986).

<sup>82</sup> *Milner v. Balcke-Durr, Inc.*, 03-05-00547-CV, 2006 WL 2190516, at \*1 (Tex. App.—Austin Aug. 4, 2006, no pet.).

<sup>83</sup> *Id.* (citing *First Nat’l Bank v. Sledge*, 653 S.W.2d 283, 285 (Tex. 1983); see *LTF Real Estate Co., Inc. v. D & D Util. Supply, LLC*, 01-11-00244-CV, 2013 WL 1183300, at \*10 (Tex. App.—Houston [1st Dist.] Mar. 21, 2013, no

### **Description of the Property**

While the courts have reiterated that there is no clear and fast rule as to what constitutes a legally sufficient description of property for purposes of the Mechanic's Lien Statute, the Texas Supreme Court has held that there must "appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others."<sup>84</sup> In fact, Texas courts have continually cited the holding that:

The descriptive words in an instrument should be given a liberal construction, in order that the writing may be upheld, and parol evidence is admitted to explain the descriptive words and to identify the land; but the instrument itself must contain a nucleus of description. The parol testimony must directly be connected with the descriptive data, and when more than this is required, the description is insufficient.<sup>85</sup>

Applying the general rule, however, can be problematic. For example, describing property only by quantity and as part of a larger tract is generally void for uncertainty.<sup>86</sup> Yet, adding additional information to the description through the introduction of evidence which makes the property identifiable by someone familiar with the area may be sufficient. In describing the particular property charged with the lien, a claimant should use a legal description and not merely a street address; however, in *AMS Constr. Co. v. Warm Springs Rehab. Found. Inc.*, 94 S.W.3d 152 (Tex. App.—Corpus Christi 2002, no writ), a street address listing the name of the owner but the wrong county, was held to be sufficient under the "substantial compliance" standard. The affidavit was, however, filed in the right county. The best practice is to use either

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pet.) (citing *Milner*, 2006 WL 2190516, at \*3); see also *Addison Urban Dev. Partners, LLC v. Alan Ritchey Materials Co., LC*, 437 S.W.3d 597, 606 (Tex.App.—Dallas 2014, no pet.) (citing TEX. PROP. CODE § 53.054).

<sup>84</sup> *Scholes & Goodall v. Hughes & Boswell*, 14 S.W. 148, 149 (Tex. Ct. App. 1890).

<sup>85</sup> *Smith v. Sorrelle*, 87 S.W.2d 703, 705 (Tex. 1935).

<sup>86</sup> *Perkins Constr. Co. v. Ten-Fifteen Corp.*, 545 S.W. 2d 494, 501 (Tex. Civ. App.—San Antonio, 1976, no writ).

a lot, block, and subdivision description, or a metes-and-bounds description from a surveyor's field notes if the lot-and-block description is not available. Failing to provide the identifiable legal description and omitting the name or reputed name of the owner resulted in a void lien in *Perkins Constr. Co. v. Ten-Fifteen Corp.*, 545 S.W.2d 494 (Tex.App.—San Antonio 1976, no writ).

In *Blanco, Inc. v. Porras*, 897 F.2d 788 (5th Cir. 1990), the court found that a mechanic's lien affidavit need not contain a metes-and-bounds survey of the property in order to be valid. Instead, a land description was deemed legally sufficient within the meaning of Texas Property Code § 53.054(a)(6) if it contains a "nucleus of information" that would enable a party familiar with the locality to identify with reasonable certainty the premises intended to be described. The court held that a lien affidavit was sufficient that described 1500 acres as those on which the corporation asserting the lien performed "clearing, leveling and dirt work." The court further observed "that witnesses familiar with the property testified that it was possible to identify those acres given the fact that the unimproved land was densely forested and covered with deep ravines and gullies prior to the "dirt work."

Descriptions of rural routes and box numbers in the absence of appropriate evidence can be insufficient. Claimants should always endeavor to use metes and bounds or lot, block and subdivision descriptions whenever possible. The description should always include the city, county, and state as well.

Claimants should obtain a legal description and determine the identity of the true owner. For a quick look before you send your notice, visit the website for the applicable County Appraisal District (CAD), then conduct a street address "search" to see who owns the property, and obtain the legal description. Generally the "Owner" information is correct at the County

Appraisal District website but their legal descriptions can be questionable. Since the appraisal districts are not the final word, you must search the Real Property Deed Records maintained by the County Clerk before you send the notice, or file an affidavit. You should check the title chain to get the correct owner and legal description. If you fail to send the lien notices to the true owner, you will not have an enforceable lien.<sup>87</sup>

### **Amount of The Lien**

When money is owed to a contractor, subcontractor, or material supplier, Chapter 53 authorizes the claimant to file a lien. When the claimant has fully performed its contractual obligations without compensation, the claimant is entitled to file a lien up to the full amount of the money owed under the contract, plus any charges for extra work performed.<sup>88</sup> Sales tax on items which have been incurred in the process of completing the project may also be included in the lien amount.<sup>89</sup> Attorneys' fees and prejudgment interest may not be included as part of the lien.<sup>90</sup> However, attorneys' fees that are "equitable and just" may be awarded to the prevailing party in an action to foreclose a lien.<sup>91</sup> Furthermore, any items which are returned or repossessed by the claimant may not be included in the lien.<sup>92</sup>

### **Limitation on Subcontractor's Lien**

The amount of a subcontractor's lien may not exceed:

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<sup>87</sup> Texas courts have held that giving the § 53.056 notice to the owner "is a condition precedent to the validity of a lien claimed by a subcontractor." *See, e.g., Yeager Elec. & Plumbing, Inc. v. Ingleside Cove Lumber & Builders, Inc.*, 526 S.W.2d 738, 741-42 (Tex. App.—Corpus Christi 1975, no writ) (involving predecessor statute).

<sup>88</sup> *Graves v. Hallmark*, 232 S.W.2d 130, 133 (Tex.Civ.App.—Amarillo 1950, writ ref'd n.r.e.).

<sup>89</sup> *First Nat'l Bank v. Whirlpool Corp.*, 517 S.W.2d 262, 27d (Tex. 1974).

<sup>90</sup> *Dossman v. Nat'l Loan Investors, L.P.*, 845 S.W.2d 386-87 (Tex. App.—Houston [1st. Dist] 1992, writ denied); *Ambassador Dev. Corp. v. Valdez*, 791 S.W.2d 612, 622-24 (Tex.App.—Fort Worth 1990, no writ).

<sup>91</sup> TEX. PROP. CODE §53.156.

<sup>92</sup> *Murphy v. Fleetford*, 70 S.W. 989, 990 (Tex. Civ. App. 1902, no writ).

An amount equal to the proportion of the total subcontract price that the sum of the labor performed, materials furnished, materials specially fabricated, reasonable overhead costs incurred, and proportionate profit margin bears to the total subcontract price; minus

The sum of previous payments received by the claimant on the subcontract.<sup>93</sup>

### **COMMONLY ENCOUNTERED LIEN ISSUES**

#### **Penalty for Filing a Fraudulent Lien**

Chapter 12 of the Texas Civil Practice and Remedies Code, known as the Fraudulent Lien Statute, gives an owner a cause of action and imposes liability on one who records a fraudulent lien. However, the statute limits the circumstances when one can be liable for filing a fraudulent lien to those cases when the person filing the lien does so with “the intent to defraud.”<sup>94</sup> The Houston [1st Dist.] Court of Appeals held that unless the party asserting that the lien is fraudulent provides evidence of every component of the statutory formula provided in Texas Property Code § 53.024 to show that the lien was invalid, then the evidence will be legally insufficient to support a finding of a fraudulent lien.<sup>95</sup> The liability imposed for filing a fraudulent lien with the intent to defraud is the greater of \$10,000.00 or the actual damages caused by the violation plus court costs, reasonable attorneys’ fees and exemplary damages as awarded by the court.<sup>96</sup>

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<sup>93</sup> TEX. PROP. CODE § 53.024.

<sup>94</sup> TEX. CIV. PRAC. & REM. CODE § 12.002(c).

<sup>95</sup> Lyon v. Bldg. Galveston, Inc., 01-15-00664-CV, 2017 WL 4545831, at \*6 (Tex. App.—Houston [1st Dist.] Oct. 12, 2017, no pet.).

<sup>96</sup> TEX. CIV. PRAC. & REM. CODE § 12.001 *et al.*

**Liens for Temporary Labor**

*Reliance Nat'l Indemnity Co. v. Advanc'd Temporaries, Inc.*<sup>97</sup> – The Texas Supreme Court held that temporary employment agencies can lien a project for the labor they furnish to the project.

**Deadlines Are Strictly Enforced**

Although the statutory amendments to Chapter 53 that went into effect on January 1, 2022 may have alleviated the strict application to deadlines that fell on Saturdays, Sundays, or legal holidays, presumably courts will nevertheless strictly enforce the statutory deadlines (as opposed to a substantial compliance standard). *See, e.g., Suretec Ins. Co. v. Myrex Industries*<sup>98</sup> where prior to the legislative changes the Beaumont Court of Appeals held that the requirement set forth in the Texas Property Code Section 53.154, requiring a lien to be filed not later than the 15<sup>th</sup> day of the fourth calendar month after the indebtedness accrues, meant that the lien must be filed on or before the 15<sup>th</sup>, regardless of whether the 15<sup>th</sup> was a Saturday, Sunday or legal holiday.

The legislative changes to § 53.003(e) appear to permit an extension to all Chapter 53 deadlines that fall on a Saturday, Sunday, or legal holiday. However, specifically, subsection (e), which falls under the statutory header “NOTICES,” states:

In computing the period of days in which to provide a notice or to take any action required under this chapter, if the last day of the period is a Saturday, Sunday or legal holiday, the period is extended to include the next day that is not a Saturday, Sunday, or legal holiday.

While it appears that the language was drafted broadly to include deadlines pertaining to both notice deadlines *and lien filing deadlines*, we nevertheless await clarification from courts to

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<sup>97</sup> *Reliance Nat'l Indemnity Co. v. Advanc'd Temporaries, Inc.*, 227 S.W.3d 46 (Tex. 2007).

<sup>98</sup> *Suretec Ins. Co. v. Myrex Industries*, 232 S.W.3d 811 (Tex.App.—Beaumont 2007, pet. denied).

confirm that this provision permits an extension to lien filing deadlines that fall on the 15<sup>th</sup> of the month which also happens to be a Saturday, Sunday, or legal holiday.

**Practice Tip: If your lien recording deadline falls on a Saturday, Sunday or legal holiday, file your lien in the real property records in the county in which the project is located on the preceding business day. Further, if filing electronically, be sure to submit the filing before 2:00 pm because many county clerks cutoff acceptance of new filings in the early afternoon.**

### **Checks Are Not Payment**

In *Honeycutt*, a nonpayment issue arose on a project involving the owner, general contractor, and a subcontractor. The subcontractor sent the appropriate fund-trapping notice to the owner regarding the amounts owed to it by the general contractor. The general contractor issued a post-dated check to the subcontractor in exchange for a mutual release. At the same meeting, the owner issued a check (presumably not post-dated) to the general contractor. The check from the general contractor to the subcontractor was subsequently returned NSF, so the subcontractor then filed a lien and sued the owner to recover the amount owed.

The subcontractor argued the mutual release failed for lack of consideration, and therefore the subcontractor should be able to pursue the owner for, among other things, paying over a trapping notice. The court cited the applicable statutory language when it stated "...the ability to 'trap' funds is extinguished if the 'claim is otherwise paid or settled.'"<sup>99</sup> The court held that the acceptance of a post-dated check in exchange for a mutual release operates as payment and settlement, and therefore the subcontractor had no claim regarding trapped funds.<sup>100</sup>

Claimants should take care to not execute an unconditional release in exchange for a check, as a check is a negotiable instrument. Since 2012, some of this issue has been solved by the statutorily prescribed forms, where conditional releases are exchanged for checks and

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<sup>99</sup> *Id.* (citing TEX. PROP. CODE §§ 53.056(d), now superseded by 53.056(a-2)).

unconditional releases are subsequently executed after the checks clear and collected funds are confirmed. However, in practice, many upstream parties attempt to have claimants sign the *unconditional* form of release in exchange for a check. Claimants should insist on using the conditional release forms until the actual funds are in their possession.

### **Substantial Compliance with the Substance of Notices**

*Mustang Tractor & Equipment Co. v. Hartford Accident & Indemnity Co.* – The Austin Court of Appeals held that a subcontractor’s failure to include a statement identifying the date each notice of claim was sent to the owner and the method by which the notice was sent in a lien affidavit, as required by Texas Property Code Section 53.054, was not fatal to the subcontractor’s claim in light of the fact that the subcontractor “substantially complied” with the statutory requirements.<sup>101</sup>

### **JUDICIAL FORECLOSURE**

In order to enforce a perfected mechanic’s and materialman’s lien against a private construction project in Texas, a lawsuit must be filed seeking the foreclosure of the lien. A mechanic’s lien can only be foreclosed on the judgment of a court of competent jurisdiction.<sup>102</sup> Upon showing that a lienholder has a valid debt and perfected mechanic’s lien, the court is required to enter a judgment of foreclosure and order the sale of the property subject to that lien.<sup>103</sup>

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<sup>100</sup> See *Stolz v. Honeycutt*, 42 S.W.3d 305, 313 (Tex.App.—Houston [14th Dist.] 2001, no pet.).

<sup>101</sup> 263 S.W.3d 437 (Tex.App.—Austin 2008, pet. denied).

<sup>102</sup> TEX. PROP. CODE § 53.154.

<sup>103</sup> *Crawford Servs., Inc. v. Skillman Intern. Firm, LLC*, 444 S.W.3d 265 (Tex. App.—Dallas 2014, pet. dism’d).

**Jurisdiction**

Texas has three types of Courts that hear and determine lawsuits filed by individuals other than small claims. These three types of Courts are district courts, statutory county courts at law, and constitutional county courts. The jurisdiction of the various courts in the State of Texas is determined by the amount in controversy and the subject matter involved.

Article 5, Section 8 of the Constitution of the State of Texas grants to the district courts of this state exclusive, original, and appellate jurisdiction of all actions except those where the original, exclusive or appellate jurisdiction has been conferred by the legislature on another court. The legislature of the State of Texas, pursuant to Texas Government Code Section 25, Subchapter C, grants to certain statutory county civil courts at law (specifically, Harris, Dallas, El Paso, and Tarrant Counties) concurrent jurisdiction with the district courts on suits for the enforcement of liens on real property.<sup>104</sup> On the other hand, the legislature, pursuant to Texas Government Code § 26.043, prohibits constitutional county civil court from having jurisdiction in suits involving, among other things, suits for the enforcement of a lien on land. In summary, a suit to foreclose a lien on real property may be filed in district court in all counties. In addition, suits to foreclose liens on real property in Harris,<sup>105</sup> Tarrant, El Paso, and Dallas counties may be filed in that county's statutory county courts at law. Lastly, suits to foreclose a lien on real property may not be filed in constitutional county courts.

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<sup>104</sup> The county courts at law which have this concurrent jurisdiction include: Harris County (25.1032 (c)(3)- specifically enumerated lien claim jurisdiction), Tarrant County (25.2222 (b)(7)- specifically enumerated lien claim jurisdiction), Dallas County (25.0592 (a) concurrent jurisdiction with the district court regardless of amount in controversy), and El Paso County (25.0732 (a) jurisdiction provided by the constitution and by general law for district courts).

<sup>105</sup> The amount in controversy must exceed \$500 and be less than \$100,000 for the suit to be filed in Harris County.

### Venue

Every county in the State of Texas has a statutory county court and a district court. Some of the smaller counties share district courts. Once a determination is made as to which court has jurisdiction of the suit to foreclose a mechanic's and materialman's lien, a determination must then be made regarding in which county the suit must be brought. There is no mandatory venue provision governing where a suit to foreclose on a lien must be brought. Section 53.154 of the Texas Property Code only requires that the suit be heard by a "court of competent jurisdiction." However, Section 53.157 of the Texas Property Code provides that a mechanic's lien may be extinguished by "failing to institute suit to foreclose the lien in the county in which the improvement is located..." Therefore, Chapter 53 appears to require a claimant to file suit to foreclose a lien in the county where the project is located. **While there is no case that decides the issue definitively, the best practice is to file suit in the county where the project is located.**

### Limitations to File Suit

Generally, the time period to file suit to foreclose a Chapter 53 mechanic's lien is one year after the last day a claimant may file a lien affidavit under Section 53.052.<sup>106</sup> This rule applies to liens for residential and non-residential construction. The parties may extend the limitations period by one additional year if the claimant enters into a written agreement with the then-current owner of the property to do so, and the agreement must be recorded with the clerk of the same county where the lien was recorded.<sup>107</sup> In 2021, the Legislature amended Section 53.158 to clarify that, after the expiration of limitations period, a suit brought solely to discharge a lien because limitations have expired does not revive the lien claimant's right to seek

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<sup>106</sup> TEX. PROP. CODE § 53.158(a); *but see also* TEX. PROP. CODE § 53.158(a-2).

<sup>107</sup> TEX. PROP. CODE § 53.158(a-2).

foreclosure.<sup>108</sup> Any suit to foreclose a lien not brought within the applicable time period(s) discussed above will be barred and may be discharge.<sup>109</sup> The limitation periods will not affect the applicable limitation periods for other causes of action that a claimant may possess.

**Parties**

Pursuant to Rule 39 of the Texas Rules of Civil Procedure, a person or entity must be made a party to a lawsuit if:

in his absence complete relief cannot be granted; or

he claims an interest related to the subject matter of the suit and is so situated that the disposition of the suit in his absence would impair or impede his ability to protect that interest or leave any of the parties to the suit in substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the claimed interest.

The Constitution of the United States prohibits the taking of property without due process of law. Since the entry of a judgment foreclosing a mechanic's and materialman's lien and ordering the sale of the property can result in the owner of the property being divested of his property, the owner of the property at the time the suit is filed is a necessary party to any lawsuit to foreclose a mechanic's and materialman's lien. If the property that is the subject of the mechanic's and materialman's lien has been sold subject to the accrual of the indebtedness giving rise to the lien, the former owner of the property is not a necessary party to the suit to foreclose the lien.<sup>110</sup> The holder of a lien, encumbrance, or mortgage that has priority over the mechanic's and materialman's lien is not a necessary party to a suit to foreclose the lien (Texas Property Code Sec. 53.123).

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<sup>108</sup> TEX. PROP. CODE § 53.158(a-1).

<sup>109</sup> TEX. PROP. CODE § 53.157(2).

<sup>110</sup> See *Matthews v. First State Bank*, 312 S.W.2d 571 (Tex. Civ. App.—Texarkana 1961, writ ref'd n.r.e.).

**PROPERTY SUBJECT TO THE LIEN**

A statutory lien extends to improvements, and to each lot of land necessarily connected.<sup>111</sup> The Texas Property Code defines the term “improvement” as includ[ing]:

- (a) a house, building, structure, parking structure, physical appurtenance, pool, utility, railroad, well, storage facility, abutting sidewalks and streets, utilities in or on those sidewalks and streets, land reclaimed from overflow, and other fixtures or modifications to real property;
- (b) clearing, grubbing, draining, or fencing of land;
- (c) machinery or apparatuses used for raising water or for supplying or storing water for stock, domestic use, or irrigation;
- (d) work described in Section 53.021(4); and
- (e) a design, drawing, plan, plat, survey, or specification provided by a licensed architect, engineer, or surveyor.”<sup>112</sup>

A perfected mechanic’s and materialman’s lien extends to all improvements without regard to who placed them there.<sup>113</sup> The lien does not extend to abutting sidewalks, streets, and utilities that are public property.<sup>114</sup>

Pursuant to the Texas Property Code, fixtures are also specifically made subject to a materialman and mechanic’s lien.<sup>115</sup> Texas courts have adopted the following test for determining whether materials have become fixtures for mechanic’s lien purposes: if the materials or items are annexed to, and essential for the use of the property, and removal would

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<sup>111</sup> See TEX. PROP. CODE § 53.022(a); *see also* Moore v. Brenham Ready Mix, Inc., 463 S.W.3d 109, 118 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

<sup>112</sup> See TEX. PROP. CODE § 53.001(2).

<sup>113</sup> Richard H. Sikes, Inc. v. L & N Consultants, Inc., 586 S.W.2d 950 (Tex. Civ. App.—Waco 1979, writ ref’d n.r.e.).

<sup>114</sup> TEX. PROP. CODE § 53.022(b).

<sup>115</sup> TEX. PROP. CODE §§ 53.022(a); 53.001(2)(A).

damage the underlying property and its value, then the materials are fixtures and subject to the statutory mechanic's lien.<sup>116</sup> In deciding the answer, the intent of the parties is examined.<sup>117</sup>

A lien against land in a city, town or village extends to each lot on which the improvement is situated or on which the labor was performed.<sup>118</sup> A lien against land not in a city, town or village extends to not more than 50 acres on which the improvement is situated or on which the labor was performed.<sup>119</sup> The Property Code does not define the term "lot," but the Texas Supreme Court has stated that the term "lot" "usually refers to a parcel of land as marked on a plat or survey."<sup>120</sup>

But what happens when a lien attaches to undivided property and is subsequently sold to individual lot owners? When (1) improvements are made to an undivided parcel of land, (2) the mechanic or materialman has properly perfected its lien against the whole, and (3) the land is parceled off to individual lot owners, then the lien can only be enforced against each lot owner based on the portion of the property purchased by that individual lot owner.<sup>121</sup> In other words, each individual lot owner is only liable for its pro rata share of the total value of the lien.

### **PRIORITIES**

The perfection of a mechanic's and materialman's lien does not guarantee a claimant payment. Instead, it improves the claimant's chances of payment and gives him a right to a share

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<sup>116</sup> See *First Nat'l Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262, 266 (Tex. 1974) (holding that refrigerators and ranges, which were not built into or in any other manner affixed or incorporated in the construction of the apartment building, fall in the same category as floor lamps, irons, television sets and other chattels which are connected by cords and plugs into an electrical outlet).

<sup>117</sup> See *Campbell v. Teeple*, 273 S.W. 304, 307 (Tex. Civ. App.—San Antonio 1925, no writ).

<sup>118</sup> See TEX. PROP. CODE § 53.022(c).

<sup>119</sup> TEX. PROP. CODE § 53.022(d).

<sup>120</sup> *Valdez v. Diamond Shamrock Ref & Mktg. Co.*, 842 S.W.2d 273, 275 (Tex. 1992).

<sup>121</sup> *Moore v. Brenham Ready Mix, Inc.*, 463 S.W.3d 109, 118 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

of any funds available or that should be available to pay mechanic's and materialman's lien claimants. The priority of the various types of claims determines what funds, if any, should be, or are available to pay claims and also the amount of any judgment the claimant is entitled to receive in a suit brought to foreclose his mechanic's and materialman's lien.

### **Inception of Lien**

Pursuant to Texas Property Code § 53.124, the time of inception of a mechanic's and materialman's lien for a claimant other than an architect, engineer, surveyor, or landscaper is the earlier of: 1) the commencement of visible construction of the improvements on the land on which the improvements are to be located, or 2) the first delivery of materials to be used in the construction of the improvements to the land on which the improvements are to be located, or 3) the recording of an affidavit of commencement pursuant to Texas Property Code § 53.124(c). In order for the commencement of construction to be sufficient to constitute the inception of the lien, it must be conducted on the land to be improved itself, be visible on that land, and constitute either an activity defined as an "improvement" under Texas Property Code § 53.001 or excavation for or laying of the foundation or structure of the building.<sup>122</sup> The clearing of the construction site is not sufficient to constitute commencement of construction for inception purposes.<sup>123</sup> In order to constitute inception of the lien, the materials delivered to the improvement site must be materials that will be used during the construction or incorporated into the permanent structure.<sup>124</sup> The recording of an affidavit of completion that is in compliance with Texas Property Code § 53.124(c) is prima facie evidence of the date of commencement.<sup>125</sup>

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<sup>122</sup> See *Diversified Mortg. Inv'rs v. Lloyd D. Blalock General Contractor, Inc.*, 576 S.W.2d 794 (Tex. 1978).

<sup>123</sup> See *Perkins Const. Co. v. Ten-Fifteen Corp.*, 545 S.W. 2d 494 (Tex. Civ. App.—San Antonio 1976, no writ).

<sup>124</sup> See *Diversified Mortg. Investors*, 576 S.W.2d at 794.

<sup>125</sup> TEX. PROP. CODE § 53.124(d).

The time of inception of a mechanic's and materialman's lien claimed by an architect, engineer, surveyor, landscaper, or demolition contractor—as those persons are defined in Texas Property Code § 53.021(3), (4), and (5)—is the date of the recording of the affidavit of lien under Texas Property Code § 53.052.<sup>126</sup>

### **Relation Back Doctrine**

This doctrine comes into play in situations where a receiver, mortgagee or other lien claimant attempts to hold his lien or claim superior to that of the mechanic's and materialman's lien claimant. It determines the priority of liens that may be filed. Pursuant to this doctrine, all mechanic's and materialman's liens relate back to their time of inception regardless of when the affidavit claiming the lien was actually recorded or when the work resulting in the lien claim was performed, except for, as described above, architect's, engineer's, surveyor's, landscaper's, and demolition contractor's liens, where the time of inception for their liens is decided by the date the lien affidavit is actually recorded. The relation back doctrine, along with Texas Property Code §§ 53.122 and 53.124, place all mechanic's and materialman's liens, with the exception of architect's, engineer's, surveyor's, landscaper's, and demolition contractor's liens, on an equal footing, regardless of when the affidavit claiming the lien was actually recorded or when the work resulting in the lien claim was performed. The priority of a lien claimed by an architect, engineer, surveyor, landscaper or demolition contractor is determined by the date of recording of the lien affidavit.<sup>127</sup> Texas Property Code § 53.123 provides that all mechanic's and materialman's lien claims have priority over any lien, mortgage or encumbrance recorded or arising after the date of inception of the mechanic's and materialman's lien.

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<sup>126</sup> See TEX. PROP. CODE § 53.124(e).

<sup>127</sup> TEX. PROP. CODE §§ 53.021(3)-(5), 53.124(e).

**Priorities**

Except for liens claimed by architects, engineers, surveyors, landscapers, and demolition contractors, all perfected mechanic's and materialman's liens are on equal footing regardless of the date of the filing of the affidavit claiming the lien. Texas Property Code § 53.122 does not create a "race to the courthouse" situation. As such, a properly recorded affidavit claiming a mechanic's and materialman's lien that is recorded in April is treated equally to one properly recorded in June. If the proceeds of a foreclosure sale of property are insufficient to discharge all properly perfected mechanic's and materialman's liens in full, the various lien claimants share pro rata in the proceeds.<sup>128</sup>

**Preferences**

Individual artisans and mechanics are entitled to a preference to reserved funds.<sup>129</sup> A mechanic is generally defined as those that perform manual labor, while an artisan is generally defined as an individual skilled in a trade requiring manual dexterity (Black's Law Dictionary). After payment of the individual artisans and mechanics, other perfected lien claimants share proportionally in the balance of the reserved funds.

**REMOVABLES**

Perfected mechanic's and materialman's liens are granted a preference over all other liens on improvements that can be removed without material injury to the land, pre-existing improvements, or improvements to be removed from the structure. This preference even extends to deeds of trust filed prior to the inception of the mechanic's lien.<sup>130</sup> The courts, however, have held that a claimant cannot remove a removable unless it can be proven that the claimant

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<sup>128</sup> TEX. PROP. CODE § 53.122(b).

<sup>129</sup> TEX. PROP. CODE § 53.104.

furnished the removable that it seeks to remove (*i.e.*, unless it can identify its materials).<sup>131</sup> Thus, a lumber supplier cannot remove the air handling unit because the lumber supplier did not provide air handling unit. The original contractor, however, is entitled to remove all removables provided by it and its subcontractors and suppliers since the entirety of the construction was provided pursuant to his contract with the owner.<sup>132</sup> A lien as to such removables can only be foreclosed by the order of a court with competent jurisdiction. The claimant is not entitled to self-help repossession in regard to these items.

Whether or not a particular item constitutes a “removable” is a question of fact for a jury to decide and will be decided on a case by case basis. The following questions must be asked to determine removability. Will the removal cause: (1) material damage to the land; (2) material damage to an improvement that was already in existence at the time the improvement in question was installed or affixed; (3) material detriment or material injury to the building or lot; or (4) material injury to the improvement itself? The following is a list of some of the items that the courts have, in the past, held to be removables:

Garbage disposals and dishwashers. *See First Nat. Bank in Dallas v. Whirlpool*, 517 S.W.2d 262 (Tex. 1974);

Air conditioning and heating system equipment such as furnaces, air conditioning coil, compressor, thermostat, and condensing unit. *See Houck Air Conditioning, Inc. v. Mortgage & Trust, Inc.*, 517 S.W.2d 593, (Tex. Civ. App.—Waco 1974, reh’g denied);

Windows and doors that can be removed by temporarily taking out surrounding brick without causing ultimate damage to a residence. *See First Continental Real Estate Investment Trust v. Continental Steel Co.*, 569 S.W.2d 42 (Tex. Civ. App.—Fort Worth 1978, no writ);

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<sup>130</sup> First Nat’l Bank v. Whirlpool Corp., 517 S.W.2d 262 (Tex. 1974).

<sup>131</sup> See *Kaspar v. Cockrell-Riggins Lighting Co.*, 511 S.W.2d 109 (Tex. Civ. App.—Eastland 1974, no writ); *Suburban Homes Lumber Co. v. Lomas & Nettleton Fin. Corp.*, 609 F.2d 1387 (5th Cir. 1980).

<sup>132</sup> See *L & N Consultants, Inc. v. Sikes, Inc.*, 648 S.W.2d 368 (Tex. Civ. App.—Dallas 1983, writ ref’d n. r. e.).

Lighting fixtures, cabinets, chimes, buttons, mail boxes and lamps. See *Kaspar v. Cockrell-Riggins Lighting Company*, 511 S.W.2d 109 (Tex. Civ. App.—Eastland 1974, no writ);

Picture screen, ticket booth, neon sign, and speaker pools at drive-in movie. See *Freed v. Rozman*, 304 S.W.2d 235 (Tex. Civ. App.—Texarkana 1951, writ ref'd n.r.e.);

Pumps fastened to beds of concrete. See *Mogul Prod. & Refining Co. v. Southern Engine & Pump Co.*, 244 S.W. 212 (Tex. Civ. App.—Beaumont 1922, no writ);

Carpets, appliances, air conditioning and heating components, smoke detectors, burglar alarms, light fixtures, and door locks. See *Richard H. Sikes Inc. v. L & N Consultants Inc.*, 586 S.W.2d 950 (Tex.Civ.App.—Waco 1979, writ ref'd n.r.e.);

Mirrors. See *Occidental Nebraska FSB v. East End Glass Co.*, 773 S.W.2d 687 (Tex.App.—San Antonio 1989, no writ);

Pumps, compressors, fans for air conditioning and heat systems, toilets, basins, doors, windows, light fixtures, wall switches, electrical control panels, building hardware, and cabinets. See *In re Orah Wall Finan. Corp.*, 84 B.R. 442 (Bankr. W.D. Tex. 1986);

Highway billboard signs. See *Hoarel Sign Co. v. Dominiom Equity Corp.*, 910 S.W.2d 140 (Tex.App.—Amarillo 1995, writ denied);

Light fixtures, gears, electrical panels, lamps, wire, electrical wire. See *In re Demay Inter., LLC*, 431 B.R. 164 (Bankr. S.D. Tex. 2010);

Chiller to provide air conditioning. See *RDI Mechanical, Inc. v. WPVA, L.P.*, 2008 WL 920315 (Tex.App.—Houston [1<sup>st</sup> Dist.] 2008); and

Air conditioning compressors, acoustic tiles and ceiling grid, air handling units, distribution air grills, doors, elevator equipment and cab, electric circuit breaker panels. See *Cornerstone Bank. N.a. v. J. N. Kent Constr. Co.*, 1992 WL 86591 (Tex.App.—Dallas 1992).

The following is a list of some of the items that the courts have, in the past, held to be non-removable:

Concrete roof tiles. See *Exchange Sav. & Loan Assn. v. Mononcret Party Ltd.*, 629 S.W.2d 34 (Tex. 1982);

Window frames. See *McCallen v. Mogul Prod. & Refining Co.*, 257 S.W. 918 (Tex. Civ. App.—Galveston 1923, no writ);

Certain types of cabinets. See *Houck Air Conditioning, Inc. v. Mortgage & Trust Inc.*, 517 S.W.2d 593 (Tex. Civ. App.—Waco 1974, rehearing denied);

Plastering and painting. See *R.B. Spencer & Co. v. Brown*, 198 S.W. 1179 (Tex. Civ. App.—El Paso 1917, writ ref'd);

Lumber used in construction of a house. *See Cameron County Lumber Co. v. Al & Lloyd Parker Inc.*, 122 Tex. 487, 62 S.W.2d 63 (1933);

Bricks utilized in the construction of a fireplace and chimney. *See Chamberlain v. Dollar Sav. Bank*, 451 S.W.2d 518 (Tex. Civ. App.—Amarillo 1970, no writ);

Roofing tiles. *See Exchange Sav. & Loan Ass'n v. Monocrete Property Ltd.*, 629 S.W.2d 34 (Tex. 1982);

A shell home. *See Irving Lumber Co. v. Alltex Mortgage Co.*, 446 S.W.2d 64 (Tex. Civ. App.—Dallas 1969), *aff'd*, 468 S.W.2d 341 (Tex. 1971);

Duct work for air conditioning and heating systems, copper plumbing, piping, sheet rock, electrical wiring and conduit, electromagnetic insulation, glass brick interior wall, and suspended ceiling. *See In re Oran Finan. Corp.*, 84 B.R. 442 (Bankr. W.D. Tex. 1986);

Lumber, nails, roofing, hardware, reinforcing mesh, and rebar steel. *See In re Jamail*, 609 F. 2d 1387 (5th Cir. 1980); and

Exterior glass, including gasket material and aluminum framing. *See Cornerstone Bank. N.a. v. J. N. Kent Constr. Co.*, 1992 WL 86591 (Tex.App.—Dallas 1992).

In determining whether an item is removable, the court will look to the manner of its attachment to the land or existing improvements, the extent to which the removal of the item would require repairs, modifications, or protection of the land or existing improvements, the status of the construction at the time the removal is sought, and the function of the improvements sought to be removed.<sup>133</sup>

#### **LEASED PROPERTY – LIENS AGAINST A LEASEHOLD**

The extent of a leasehold interest and thus, the leasehold improvements, is determined by the terms of the lease agreement itself. A ground lease is an agreement pursuant to which a land owner leases his land to a tenant who, in turn, constructs a building upon the property. In that situation, the leasehold improvements would consist of the construction performed by the tenant such as the building constructed, underground utilities constructed by the tenant, parking lots,

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<sup>133</sup> *See Exchange Sav. & Loan Assn.*, 629 S.W.2d 34 (Tex. 1982).

landscaping, etc. The leasehold interest of a tenant in an existing structure such as a shopping center is far less inclusive. The improvements would still consist of the construction performed by the tenant, but would not include the structure since it most likely was already in place. Leasehold improvements in an existing structure could, depending upon the terms of the lease, include HVAC equipment, interior walls, lighting, doors, floor and wall coverings, cabinets, and built-ins. A claimant can perfect a mechanic's and materialman's lien against leasehold improvements. The rights of a contractor or materialman can be no greater than those of the person with whom he has contracted. As such, contracts with a lessee of real property cannot give any rights against the lessor or his title to the realty.<sup>134</sup> A contractor, subcontractor or supplier that supplies labor and/or materials for the construction of leasehold improvements can perfect a mechanic's and materialman's lien against the leasehold interest, but the lien affidavit must specify that the lien is limited to that interest.<sup>135</sup> The mechanic's and materialman's lien attaches to any interest in the real estate and fixtures held by or that later come into the hands of the person that contracted for the improvements.<sup>136</sup> The mechanic's and materialman's lien attaches to fixtures which the tenant is entitled to remove as well as those affixed to the property.<sup>137</sup> Many leases contain a reversionary interest provision. This is a provision that provides that the tenant, upon termination of the lease, shall surrender the premises and all improvements thereon to the landlord. Lease agreements also frequently provide that all improvements constructed become the property of the landlord when constructed or become the landlord's property upon the termination of the lease. The inclusion of a reversionary interest

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<sup>134</sup> See *Schneider v. Delwood Ctr.*, 394 S.W.2d 671 (Tex. Civ. App.—Austin 1965, reh'g denied); *Grube v. Nick's No. 2*, 278 S.W.2d 252 (Tex. Civ. App.—El Paso 1955, writ ref'd n.r.e.).

<sup>135</sup> *Denco CS Corp. v. Body Bar, LLC*, 445 S.W.3d 863 (Tex. App.—Texarkana 2014, no pet.); see *Ogburn Gravel Co. v. Watson Co.*, 190 S.W. 205 (Tex. Civ. App.—Dallas 1916), *aff'd*, 110 Tex. 161, 217 S.W. 373 (Tex. 1919).

<sup>136</sup> See *Diversified Mortgage Inv'rs v. Blalock*, 576 S.W.2d 794 (Tex. 1978).

provision in a lease agreement can defeat a mechanic's and materialman's lien. A tenant's contractors and materialmen have no lien against the leasehold improvements, even if the improvements are removable, if the lease contains a reversionary claim and if the lease is terminated prior to the foreclosure of the mechanic's and materialman's lien.<sup>138</sup>

### **SUMMARY MOTION TO REMOVE A LIEN**

#### **§ 53.160. Summary Motion to Remove Invalid or Unenforceable Lien**

In a suit brought to foreclose a lien or to declare a claim or lien invalid or unenforceable, a party objecting to the validity or enforceability of the claim or lien may file a motion to remove the claim or lien. The motion must be verified and state the legal and factual basis for objecting to the validity or enforceability of the claim or lien. The motion may be accompanied by supporting affidavits.

The grounds for objecting to the validity or enforceability of the claim or lien for the purposes of the motion are limited to the following:

notice of claim was not timely furnished to the owner or original contractor as required by §§ 53.056 or 53.057;

an affidavit claiming a lien failed to comply with § 53.054 or was not filed as required by § 53.052;

notice of the filed affidavit was not furnished to the owner or original contractor as required by § 53.055;

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<sup>137</sup> See *Summerfield v. King*, 98 Tex. 332, 83 S.W. 680 (Tex. 1904), *modified on reh'g*, 84 S.W. 643 (Tex. 1905).

<sup>138</sup> See *Schneider v. Delwood Ctr.*, 394 S.W.2d 671 (Tex. Civ. App.—Austin 1965, no writ).

the deadlines for perfecting a lien claim for reserved funds have expired and the owner complied with the requirements of § 53.101 and paid the reserved funds and all other funds owed to the original contractor before:

the claimant perfected the lien claim; and

the owner received a notice of the claim as required by this chapter;

all funds subject to the notice of a claim to the owner and a notice regarding the reserved funds have been deposited in the registry of the court and the owner has no additional liability to the claimant;

when the lien affidavit was filed on homestead property:

no contract was executed or filed as required by § 53.254;

the affidavit claiming a lien failed to contain the notice as required by § 53.254; or

the notice of the claim failed to include the statement required by § 53.254; and

the claimant executed a valid and enforceable waiver or release of the claim or lien claimed in the affidavit.

The claimant is not required to file a response. The claimant and any other party that has appeared in the proceeding must be notified by at least 30 days before the date of the hearing on the motion. A motion may not be heard before the 30<sup>th</sup> day after the date the claimant answers or appears in the proceeding. The claimant must be allowed expedited discovery regarding information relevant to the grounds set forth for objecting to the lien.<sup>139</sup>

At the hearing on the motion, the burden is on:

the claimant to prove that the notice of claim and affidavit of lien were furnished to the owner and original contractor as required by this chapter; and

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<sup>139</sup> TEX. PROP. CODE § 53.160(c).

the movant to establish that the lien should be removed for any other ground authorized by this section.<sup>140</sup>

The court shall promptly determine a motion to remove a claim or lien under this section. If the court determines that the movant is not entitled to remove the lien, the court shall enter an order denying the motion. If the court determines that the movant is entitled to remove the lien, the court shall enter an order removing the lien claimed in the lien affidavit. A party to the proceeding may not file an interlocutory appeal from the court's order.<sup>141</sup>

Any admissible evidence offered at the hearing may be admitted in the trial of the case. The court's order denying the motion or order removing the lien is not admissible as evidence in determining the validity and enforceability of the claim or lien.

A motion to remove an invalid lien under Section 53.160 of the Texas Property Code operates, in effect, as a motion for partial summary judgment and an order granting such a motion may constitute a final and appealable judgment.<sup>142</sup>

### **§ 53.161 Bond Requirements After Order To Remove**

In the order removing a lien, the court shall set the amount of security that the claimant may provide in order to stay the removal of the claim or lien. The sum must be an amount that the court determines is a reasonable estimate of the costs and attorney's fees the movant is likely to incur in the proceeding to determine the validity or enforceability of the lien. The sum may not exceed the amount of the lien claim.<sup>143</sup>

The court shall stay the order removing the lien if the claimant files a bond or a deposit in lieu of a bond in the amount set in the order with the clerk of the court not later than the 30<sup>th</sup> day

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<sup>140</sup> TEX. PROP. CODE § 53.160(d).

<sup>141</sup> TEX. PROP. CODE § 53.160(e).

<sup>142</sup> *In re M & O Homebuilders, Inc.*, 516 S.W.3d 101, 107 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

after the date the order is entered by the court unless, for good cause, the court orders a later date for filing the bond or the deposit in lieu of a bond. If the court fails to set the amount of the security required, the amount required is the amount of the lien claim.<sup>144</sup>

The bond must be:

executed by a corporate surety authorized to do business in this state and licensed by this state to execute bonds as surety; and

conditioned on the claimant's payment of any final judgment rendered against the claimant in the proceeding for attorney's fees and costs to the movant under Section 53.156.<sup>145</sup>

In lieu of filing a bond, the claimant may deposit in the amount set by the court for the surety bond:

cash;

a negotiable obligation of the federal government or a federal agency; or

a negotiable obligation of a financial institution chartered by the federal or state government that is insured by the federal government or a federal agency.<sup>146</sup>

A deposit must be conditioned in the same manner as a surety bond. Any interest accrued on the deposit amount is a part of the deposit.<sup>147</sup>

If the claimant fails to file the bond or the deposit in lieu of the bond in compliance with this section, the owner may file:

a certified copy of the order; and

a certificate from the clerk of the court stating that:

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<sup>143</sup> TEX. PROP. CODE § 53.161(a).

<sup>144</sup> TEX. PROP. CODE § 53.161(b).

<sup>145</sup> TEX. PROP. CODE § 53.161(c).

<sup>146</sup> TEX. PROP. CODE § 53.161(d).

<sup>147</sup> TEX. PROP. CODE § 53.161(e).

no bond or deposit in lieu of the bond was filed within 30 days after the date the order was entered by the court; and

no order staying the order to remove the lien was entered by the court.<sup>148</sup>

The claim or lien is removed and extinguished as to a creditor or subsequent purchaser for valuable consideration who obtains an interest in the property after the certified copy of the order and certificate of the clerk of the court are filed with the county clerk. The removal of the lien does not constitute a release of the liability of the owner, if any, to the claimant.<sup>149</sup>

**§ 53.162 Revival of Removed Lien**

If an order removing the lien is not stayed as provided by § 53.161 and the claimant later obtains a final judgment in the suit establishing the validity and ordering the foreclosure of the lien, the claimant may file a certified copy of the final judgment with the county clerk.<sup>150</sup>

The filed judgment revives the lien, and the claimant may foreclose the lien.<sup>151</sup>

A lien revived under this section is void as to a creditor or subsequent purchaser for valuable consideration who obtained an interest in the property;

after the order removing the lien and the certificate from the clerk of the court was filed with the county clerk; and  
before the final judgment reviving the lien was filed with the county clerk.<sup>152</sup>

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<sup>148</sup> TEX. PROP. CODE § 53.161(f).

<sup>149</sup> TEX. PROP. CODE § 53.161(g).

<sup>150</sup> TEX. PROP. CODE § 53.162(a).

<sup>151</sup> TEX. PROP. CODE § 53.162(b).

<sup>152</sup> TEX. PROP. CODE § 53.162(c).

**BOND TO INDEMNIFY AGAINST LIEN**

If a lien is filed by a subcontractor and the general contractor disputes the claim, the general contractor may choose (or may be required by contract) to file a Bond to Indemnify. This will “rid” the owner’s property of the lien while the claim is disputed. This process is also referred to as “bonding around a lien.”

The Bond must be filed with the county clerk in the county in which the property subject to the lien is located.<sup>153</sup>

Requirements under § 53.172 state that the bond must:

Describe the property on which the liens are claimed;

Refer to each lien claimed in a manner sufficient to identify it;

Be in an amount that is double the amount of the lien referred to in the bond unless the total amount of the lien exceeds \$40,000, in which case the bond must be in an amount that is the greater of 1-1/2 times the amount of the lien or the sum of \$40,000 and the amount of the lien;

Be payable to the party claiming the lien;

Be executed by:

The party filing the bond as principal; and

By a corporate surety authorized and admitted to do business under the law in this state and licensed by this state to execute the bond as surety; and

Be conditioned substantially that the principal and surety will pay to the named obligees or to their assignees the amount that the named obligees would have been entitled to recover if their claim had been proved to be a valid and enforceable lien on the property.

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<sup>153</sup> TEX. PROP. CODE § 53.171(b).

After the bond is filed, the county clerk shall issue notice of the bond to all named obligees.<sup>154</sup> A copy of the bond must be attached to the notice.<sup>155</sup> The notice must be served on each obligee by mailing a copy of the notice and the bond to the obligee by certified mail addressed to the claimant at the address stated in the lien affidavit for the obligee.<sup>156</sup>

A party making or holding a lien claim may not sue on the bond later than one (1) year after the date on which the notice is served or after the date on which the underlying lien claim becomes unenforceable under § 53.158 (statute of limitations for lien claims).<sup>157</sup>

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<sup>154</sup> TEX. PROP. CODE § 53.173(a).

<sup>155</sup> TEX. PROP. CODE § 53.173(b).

<sup>156</sup> TEX. PROP. CODE § 53.173(c).

<sup>157</sup> TEX. PROP. CODE § 53.175(a).

### **LIEN WAIVERS AND RELEASES**

Lien waivers and releases are usually required by contract to be provided to an owner or contractor as a condition precedent to payment.

#### **Release of Claim or Lien Required by Statute on Private Projects**

When a debt for labor or materials is satisfied or paid by collected funds, the person who furnished the labor or materials shall, not later than the 10th day after the date of receipt of a written request, furnish to the requesting person a release of the indebtedness and any lien claimed, to the extent of the indebtedness paid. An owner, the original contractor, or any person making the payment may request the release.<sup>158</sup> A release of lien must be in a form that would permit it to be filed of record.<sup>159</sup> To be filed of record, the release must be acknowledged, sworn to with proper jurat or proved according to law.<sup>160</sup>

Lien waivers and releases are contracts. Lien waivers and releases therefore (1) must be supported by consideration; and (2) the parole evidence rule is applied when construing these documents.

#### **Lien Waivers and Releases: Statutory Provisions**

Contractors routinely require subcontractors to sign lien waivers and releases. The Texas Legislature determined that the forms utilized in the industry were overbroad and go beyond waiving lien rights. In 2011, the Texas Legislature created four new waiver and release forms. These forms are intended to prohibit the waiver of a person's lien rights prior to payment for work performed or materials supplied. A lien waiver must comply with the approved statutory

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<sup>158</sup> TEX. PROP. CODE § 53.152(a).

<sup>159</sup> TEX. PROP. CODE § 53.152(b).

<sup>160</sup> TEX. PROP. CODE § 12.001(a).

forms to be valid.<sup>161</sup> Texas Property Code Section 53.281 “WAIVER AND RELEASE OF LIEN OR PAYMENT BOND CLAIM” reads as follows:

Any waiver and release of a lien or payment bond claim under this chapter is unenforceable unless a waiver and release is executed and delivered in accordance with this subchapter.

A waiver and release is effective to release the owner, the owner's property, the contractor, and the surety on a payment bond from claims and liens only if:

- 1) the waiver and release substantially complies with one of the forms prescribed by Section 53.284;
- 2) the waiver and release is signed by the claimant or the claimant’s authorized agent;<sup>162</sup> and
- 3) in the case of a conditional release, evidence of payment to the claimant exists.

Texas Property Code Section 53.282(a) “CONDITIONS FOR WAIVER, RELEASE, OR IMPAIRMENT OF LIEN OR PAYMENT BOND CLAIM” reads as follows:

A statement purporting to waive, release, or otherwise adversely affect a lien or payment bond claim is not enforceable and does not create an estoppel or impairment of a lien or payment bond claim unless:

- 1) the statement is in writing and substantially complies with a form prescribed by Section 53.284;
- 2) the claimant has actually received payment in good and sufficient funds in full for the lien or payment bond claim; or
- 3) the statement is:

in a written original contract or subcontract for the construction, remodel, or repair of a single-family house, townhouse, or duplex or for land development related to a single-family house, townhouse, or duplex; and

made before labor or materials are provided under the original contract or subcontract.

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<sup>161</sup> TEX. PROP. CODE § 53.281.

<sup>162</sup> The 2021 Legislative changes to this provision indicate that the statutory waivers are no longer required to be notarized.

A person may not require a claimant or potential claimant to execute an unconditional waiver and release for a progress payment or final payment amount unless the claimant or potential claimant received payment in that amount in good and sufficient funds.<sup>163</sup>

For unconditional releases, you may rely on the accuracy of the release document as long as it is fully completed and is executed by the proper parties and contains the required statutory notice provisions in at least 10-point type and you have no information that would lead to a conclusion that the document is false.

Texas Property Code Section 53.284 details the following four statutory forms:

Conditional Waiver and Release for Progress Payments

Unconditional Waiver and Release for Progress Payments

Conditional Waiver and Release for Final Payment

Unconditional Waiver and Release for Final Payment

The difference between “conditional” and “unconditional” is that a “conditional” waiver and release may be given prior to actual receipt of payment (i.e., it is conditioned upon a payment to be made). The unconditional waiver forms can only be used to the extent actual payment has been made. Use of the “Progress Payment” form is appropriate when the contractor is still performing work on the project and subsequent payments will be made. Alternatively, use of the “Final Payment” form is appropriate when the scope of the contractor’s work is complete.

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<sup>163</sup> TEX. PROP. CODE § 53.283.