

By: Solomons

H.B. No. 3018

A BILL TO BE ENTITLED

AN ACT

relating to mechanic's contractor's or materialman's lien.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Sec. 53.053 (e), Property Code, is amended to read as follows:

(e) A claim for retainage accrues on the last day of the month in which all work called for by the contract between the owner and the original contractor has been completed or the contract between the owner and the original contractor has been terminated, finally settled, or abandoned.

SECTION 2. Section 53.055 (a), Property Code, is amended to read as follows:

(a) A person who files an affidavit must send a copy of the affidavit by registered or certified mail to the owner or reputed owner at the owner's last known business or residence address not later than the 10th [~~fifth~~] day after the date the affidavit is filed with the county clerk.

SECTION 3. Section 53.057, Property Code, is amended by amending Subsection (a) and (b) and adding subsection (f) to read as follows:

(a) A claimant may give notice under this section instead of or in addition to notice under Section 53.056 or 53.252 if the claimant is to labor, furnish labor or materials, or specially fabricate materials under an agreement with [~~an original contractor~~

1 ~~or~~] a subcontractor providing for retainage that exceeds ten  
2 percent of the agreed price for labor, materials or specially  
3 fabricated materials.

4 (b) The claimant must give the owner or reputed owner and  
5 original contractor notice of the retainage agreement not later  
6 than the 15th day of the second month following the delivery of  
7 materials or the performance of labor by the claimant that first  
8 occurs after the claimant has agreed to the contractual retainage.  
9 [~~If the agreement is with a subcontractor, the claimant must also~~  
10 ~~give notice within that time to the original contractor.~~]

11 (f) Except as specified in this section for a claimant that  
12 has an agreement with a subcontractor, no other claimant is  
13 required to give a notice under this Chapter as a requirement to the  
14 establishment of a lien for retainage other than that required  
15 under section 53.055.

16 SECTION 4. Section 53.058(a) and (b), Property Code, are  
17 amended to read as follows:

18 (a) Except as provided by Subchapter K, a claimant who  
19 specially fabricates material pursuant to an agreement with a  
20 subcontractor must give notice under this section for the lien to be  
21 valid.

22 (b) The claimant must give the owner or reputed owner and  
23 the original contractor notice not later than the 15th day of the  
24 second month after the month in which the claimant receives and  
25 accepts the order for the material. [~~If the indebtedness is~~  
26 ~~incurred by a person other than the original contractor, the~~  
27 ~~claimant must also give notice within that time to the original~~

1 ~~contractor.]~~

2 SECTION 5. Section 53.082, Property Code, is amended to  
3 read as follows:

4 Sec. 53.082. TIME FOR WHICH FUNDS ARE WITHHELD AND DURING  
5 WHICH OWNER IS LIABLE.

6 Unless payment is made under Section 53.083 or the claim is  
7 otherwise settled, discharged, indemnified against under  
8 Subchapter H or I, or determined to be invalid by a final judgment  
9 of a court, the owner shall retain the funds withheld and be liable  
10 for payment of the withheld funds until:

11 (1) the time for filing the affidavit of mechanic's lien has  
12 passed; or

13 (2) if a lien affidavit has been filed, until the lien claim  
14 has been satisfied or released.

15 SECTION 6. Section 53.084 (b), Property Code, is amended to  
16 read as follows:

17 (b) If the owner has received the notices required by  
18 Subchapter C or K, if the lien has been secured, and if the claim has  
19 been reduced to final judgment, the owner is liable and the owner's  
20 property is subject to a claim for any money owed by the owner to the  
21 original contractor for the work not paid to the original  
22 contractor before [~~after~~] the owner was authorized to withhold  
23 funds under this subchapter. The owner is liable for that amount in  
24 addition to any amount for which he is liable under Subchapter E.

25 SECTION 7. Section 53.101, Property Code, is amended by  
26 adding subsection (c) as follows:

27 (c) The owner shall be liable for payment of the retained

1 amounts under this chapter on the 31st day after the work is  
2 completed. The owner may delay payment of a portion of retained  
3 amounts equal to the amount of any affidavit of mechanic's lien that  
4 has been filed against the property until the time has passed under  
5 Section 53.082.

6 SECTION 8. Sections 53.160(b) and (d), Property Code, are  
7 amended to read as follows:

8 (b) The grounds for objecting to the validity or  
9 enforceability of the claim or lien for purposes of the motion are  
10 limited to the following:

11 (1) notice of claim was not furnished to the owner or  
12 original contractor in substantial compliance with [~~as required by~~]  
13 Section 53.056, 53.057, 53.058, 53.252, or 53.253;

14 (2) an affidavit claiming a lien failed to  
15 substantially comply with Section 53.054 or was not filed in  
16 substantial compliance with [~~as required by~~] Section 53.052;

17 (3) notice of the filed affidavit was not furnished to  
18 the owner of original contractor in substantial compliance with [~~as~~  
19 ~~required by~~] Section 53.055;

20 (4) the owner complied with the requirements of  
21 Section 53.101 and paid the retainage and all other funds owed to  
22 the original contractor before:

23 (A) the claimant perfected the lien claim; and

24 (B) the owner received a notice of the claim as  
25 required by this chapter;

26 (5) all funds subject to the notice of a claim to the  
27 owner and the perfection of a claim against the statutory retainage

1 have been deposited in the registry of the court and the owner has  
2 no additional liability to the claimant;

3 (6) when the lien affidavit was filed on homestead  
4 property:

5 (A) no contract was executed or filed as required  
6 by Section 53.254;

7 (B) the affidavit claiming a lien failed to  
8 contain the notice as required by Section 53.254; or

9 (C) the notice of the claim failed to include the  
10 statement required by Section 53.254 and

11 (7) the claimant executed a valid and enforceable  
12 waiver or release of the claim or lien claimed in the affidavit.

13 (d) At the hearing on the motion, the burden is on:

14 (1) the claimant to prove that the notice of claim and  
15 affidavit of lien were furnished to the owner and original  
16 contractor in substantial compliance with ~~[as required by]~~ this  
17 chapter; and

18 (2) the movant to establish that the lien should be  
19 removed for any other ground authorized by this section.

20 SECTION 9. Section 53.206, Property Code, is amended by  
21 amending Subsections (b), and (d) to read as follows:

22 (b) To perfect a claim under this section, a person is not  
23 required to:

24 (1) give notice to the surety under Section 53.057,  
25 unless the claimant does not have ~~[has]~~ a direct contractual  
26 relationship with the original contractor and the agreed retainage  
27 is in excess of 10 percent of the contract;

1           (2) give notice to the surety under Section 53.058(b)  
2 or, if the claim relates to a residential construction project,  
3 under Section 53.253(c); or

4           (3) file any affidavit with the county clerk.

5           (d) A person satisfies the requirement of this section  
6 relating to providing notice to the surety if the person delivers  
7 ~~[mails]~~ the notice as provided by Section 53.003 ~~[by certified or~~  
8 ~~registered mail]~~ to the surety:

9           (1) at the address stated on the bond or on an  
10 attachment to the bond;

11           (2) at the address on file with the Texas Department of  
12 Insurance; or

13           (3) at any other address allowed by law.

14           SECTION 10. Section 53.208(d), Property Code, is amended to  
15 read as follows:

16           (d) If the bond is recorded at the time the lien is filed,  
17 the claimant must sue on the bond within one year following  
18 perfection of the [his] claim or, with regard to contractual  
19 retainage, within one year after completion of the work. If the  
20 bond is not recorded at the time the lien is filed, the claimant  
21 must sue on the bond within two years following perfection of the  
22 [his] claim or, with regard to contractual retainage, within two  
23 years after completion of the work.

24           SECTION 11. Section 53.234, Property Code, is amended to  
25 read as follows:

26           Sec. 53.234. TIME FOR NOTICE. (a) The lien claimant must  
27 give notice ~~[before any payment is made to the contractor and]~~ not

1 later than the 15th day of the third [~~second~~] month following the  
2 month in which the labor was performed or the material was furnished  
3 or specially fabricated.

4 (b) If an action is filed against or a demand of a person who  
5 is a possible claimant under this chapter to recover money paid by a  
6 surety's principal to the claimant, notice must be sent under this  
7 section not later than one year after the date the action or demand  
8 is served on the possible claimant.

9 SECTION 12. Chapter 53, Property Code, is amended by adding  
10 Subchapter L to read as follows:

11 SUBCHAPTER L. WAIVER OF LIEN; AFFIDAVIT OF BILLS PAID

12 Sec. 53.281. WAIVER OF LIEN. (a) An owner or original  
13 contractor may not waive or impair the claims or liens of another  
14 person except with written consent as prescribed by this  
15 subchapter. Any term of a contract purporting to waive or impair  
16 the claim or lien of another is void.

17 (b) Any written waiver is unenforceable unless a waiver and  
18 release is executed and delivered in accordance with this  
19 subchapter.

20 (c) A waiver and release is effective to release the  
21 property for the benefit of the owner, the contractor, and the  
22 surety on a payment bond from claims and liens only if:

23 (1) the waiver and release substantially complies with  
24 one of the forms prescribed by this subchapter;

25 (2) the waiver is signed by the claimant or the  
26 claimant's authorized agent; and

27 (3) in the case of a conditional release, evidence of

1 payment to the claimant exists.

2 Sec. 53.282. CONDITIONS FOR WAIVER, RELEASE, OR IMPAIRMENT  
3 OF CLAIM. (a) An oral or written statement purporting to waive,  
4 release, or otherwise adversely affect a claim is not enforceable  
5 and does not create an estoppel or impairment of a claim unless the  
6 written waiver and release complies with this subchapter or the  
7 claimant has actually received payment in full for the claim.

8 (b) This section does not affect the enforceability of an  
9 accord and satisfaction regarding a bona fide dispute or any  
10 agreement made in settlement of an action pending in any court if  
11 the accord and satisfaction or agreement made in settlement makes  
12 specific reference to the mechanic's lien or bond claims.

13 Sec. 53.283. FORMS FOR WAIVER AND RELEASE OF CLAIM. (a) A  
14 waiver and release given by a claimant or potential claimant is  
15 unenforceable unless its substantially complies with the  
16 applicable forms described by Subsections (b)-(e).

17 (b) If a claimant or potential claimant is required to  
18 execute a waiver and release in exchange for or to induce the  
19 payment of a progress payment and is not paid in exchange of the  
20 waiver and release or if a single payee check or joint payee check  
21 is given in exchange for the waiver and release, the waiver and  
22 release must read:

23 "CONDITIONAL WAIVER AND RELEASE ON PROGRESS PAYMENT

24 "Project \_\_\_\_\_

25 "Job No. \_\_\_\_\_

26 "On receipt by the signer of this document of a check from  
27 \_\_\_\_\_ (maker of check) in the sum of \$ \_\_\_\_\_ payable to \_\_\_\_\_ (payee



1 or payees of check) and when the check has been properly endorsed  
2 and has been paid by the bank on which it is drawn, this document  
3 becomes effective to release any mechanic's lien, any state or  
4 federal statutory bond right, any private bond right, and claim for  
5 payment, and any rights under any similar ordinance, rule, or  
6 statute related to claim or payment rights for persons in the  
7 signer's position that the signer has on the property of  
8 \_\_\_\_\_ (owner) located at \_\_\_\_\_ (location) to the following extent:  
9 \_\_\_\_\_ (job description).

10 "This release covers a progress payment for all labor,  
11 services, equipment, or material furnished to the property or to  
12 \_\_\_\_\_ (person with whom signer contracted) on or before  
13 \_\_\_\_\_ (date) and does not cover any retention, pending  
14 modifications and changes, or items furnished on, before, or after  
15 that date. Retention and pending modifications and changes  
16 furnished on or before the above date total \$\_\_\_\_\_.

17 "Before any recipient of this document relies on this  
18 document, the recipient should verify evidence of payment to the  
19 signer.

20 "The signer warrants that the signer either has already paid  
21 or will use the funds received from this progress payment to  
22 promptly pay in full all of the signer's laborers, subcontractors,  
23 materialmen, and suppliers for all work, materials, equipment, or  
24 services provided for or to the above referenced project up to and  
25 including the date of this waiver.

26 "Date \_\_\_\_\_

27 "\_\_\_\_\_ (Company name)

1       "By \_\_\_\_\_ (Signature)

2       " \_\_\_\_\_ (Title)"

3       (c) If a claimant or potential claimant is required to  
4 execute an unconditional waiver and release to prove the receipt of  
5 good and sufficient funds for a progress payment and the claimant or  
6 potential claimant asserts in the waiver and release that the  
7 claimant or potential claimant has been paid the progress payment,  
8 the waiver and release must contain a notice at the top of the  
9 document, printed in bold type at least as large as the largest type  
10 used in the document, but not smaller than 12-point type, that  
11 reads:

12                               "NOTICE:

13       "This document waives rights unconditionally and states that  
14 you have been paid for giving up those rights. This document is  
15 enforceable against you if you sign it, even if you have not been  
16 paid. If you have not been paid, use a conditional release form.

17                               "UNCONDITIONAL WAIVER AND RELEASE ON PROGRESS PAYMENT

18       "Project \_\_\_\_\_

19       "Job No. \_\_\_\_\_

20       "The signer of this document has been paid and has received a  
21 progress payment in the sum of \$ \_\_\_\_\_ for all labor, services,  
22 equipment, or material furnished to the property or to  
23 \_\_\_\_\_ (person with whom signer contracted) on the property of  
24 \_\_\_\_\_ (owner) located at \_\_\_\_\_ (location) to the following extent:  
25 \_\_\_\_\_ (job description). The signer therefore waives and  
26 releases any mechanic's lien, any state or federal statutory bond  
27 right, any private bond right, any claim for payment, and any rights

1 under any similar ordinance, rule or statute related to claim or  
2 payment rights for persons in the signer's position that the signer  
3 has on the above referenced project to the following extent:

4 "This release covers a progress payment for all labor,  
5 services, equipment, or materials furnished to the property or to  
6 \_\_\_\_\_ (person with whom signer contracted) on or before  
7 (date) and does not cover any retention, pending modifications and  
8 changes on items furnished on, before, or after that date.  
9 Retention and pending modifications and changes furnished on or  
10 before the above date total \$\_\_\_\_\_.

11 "The signer warrants that the signer has already paid or will  
12 use the funds received from this progress payment to promptly pay in  
13 full all of the signer's laborers, subcontractors, materialmen, and  
14 suppliers for all work, materials, equipment, or services provided  
15 for or to the above referenced project up to and including the date  
16 of this waiver.

17 "Date\_\_\_\_\_

18 "\_\_\_\_\_ (Company name)

19 "By\_\_\_\_\_ (Signature)

20 "\_\_\_\_\_ (Title)"

21 (d) If the claimant or potential claimant is required to  
22 execute a waiver and release in exchange for or to induce payment of  
23 a final payment and is not paid in exchange for the waiver and  
24 release or if a single payee check or joint payee check is given in  
25 exchange for the waiver and release, the waiver and release must, as  
26 closely as in practicable, read:

27 "CONDITIONAL WAIVER AND RELEASE ON FINAL PAYMENT

1 "Project\_\_\_\_\_

2 "Job No.\_\_\_\_\_

3 "On receipt by the signer of this document of a check from  
4 \_\_\_\_\_ (maker of check) in the sum of \$\_\_\_\_\_ payable to \_\_\_\_\_ (payee  
5 or payees of check) and when the check has been properly endorsed  
6 and has been paid by the bank on which it is drawn, this document  
7 becomes effective to release any mechanic's lien, and state or  
8 federal statutory bond right, any private bond right, any claim or  
9 payment, and any rights under any similar ordinance, rule, or  
10 statute related to claim or payment rights for persons in the  
11 signer's position that the signer has on the property of  
12 \_\_\_\_\_ (owner) located at \_\_\_\_\_ (location) to the following extent:  
13 \_\_\_\_\_ (job description).

14 "This release covers the final payment to the signer for all  
15 labor, services, equipment, or materials furnished to the property  
16 or to \_\_\_\_\_, (person with whom signer contracted) except for  
17 disputed claims in the amount of \$\_\_\_\_\_.

18 "Before any recipient of this document relies on the  
19 document, the recipient should verify evidence of payment to the  
20 signer.

21 "The signer warrants that the signer either has already paid  
22 or will use the funds received from this final payment to promptly  
23 pay in full all the signer's laborers, subcontractors, materialmen,  
24 and suppliers for all work, materials, equipment, or services  
25 provided for or to the above referenced project up to the date of  
26 this waiver.

27 "Date\_\_\_\_\_

1 "\_\_\_\_\_ (Company name)

2 "By \_\_\_\_\_ (Signature)

3 "\_\_\_\_\_ (Title)"

4 (e) If a claimant or potential claimant is required to  
5 execute an unconditional waiver and release to prove the receipt of  
6 good and sufficient funds for a final payment and the claimant or  
7 potential claimant asserts in the waiver and release that the  
8 claimant or potential claimant has been paid the final payment, the  
9 waiver and release must contain a notice at the top of the document,  
10 printed in bold type at least as large as the largest type used in  
11 the document, but not smaller than 12-point type, that reads:

12 "Notice:

13 This document waives rights unconditionally and states that  
14 you have been paid for giving up those rights. This document is  
15 enforceable against you if you sign it, even if you have not been  
16 paid. If you have not been paid, use a conditional release form.

17 "UNCONDITIONAL WAIVER AND RELEASE ON FINAL PAYMENT

18 "Project \_\_\_\_\_

19 "Job No. \_\_\_\_\_

20 "The signer of this document has been paid in full for all  
21 labor, services, equipment, or materials furnished to the property  
22 or to \_\_\_\_\_ (person with whom signer contracted) on the property  
23 of \_\_\_\_\_ (owner) located at \_\_\_\_\_ (location) to the  
24 following extent: \_\_\_\_\_ (job description). The signer therefore  
25 waives and releases any right to a mechanic's lien, any state or  
26 federal statutory bond right, any private bond right, any claim for  
27 payment, and any rights under any similar ordinance, rule, or

1 statute related to claim or payment rights for persons in the  
2 signer's position, except for disputed claims for extra work in the  
3 amount of \$\_\_\_\_\_.

4 "The signer warrants that the signer has already paid or will  
5 use the funds received from this final payment to promptly pay in  
6 full all of the signer's laborers, subcontractors, materialmen, and  
7 suppliers for all work, materials, equipment, or services provided  
8 for or to the above referenced project.

9 "Date\_\_\_\_\_

10 "\_\_\_\_\_ (Company name)

11 "By\_\_\_\_\_ (Signature)

12 "\_\_\_\_\_ (Title)"

13 Sec. 53.284. AFFIDAVIT REQUIRED. (a) Any person who  
14 furnishes labor or materials for the construction of improvements  
15 on real property shall, if requested and as a condition of payment  
16 for such labor or materials, provide to the requesting party, or the  
17 party's agent, an affidavit stating that the person has paid each of  
18 the person's subcontractors, laborers, or materialmen in full for  
19 all labor and materials provided to the person for the  
20 construction. In the event, however, that the person has not paid  
21 each of the person's subcontractors, laborers, or materialmen in  
22 full, the person shall state in the affidavit the amount owed and  
23 the name and, if known, the address and telephone number of each  
24 subcontractor, laborer, or materialman to whom the payment is owed.

25 (b) The seller of any real property shall, upon request by  
26 the purchaser or the purchaser's agent prior to closing of the  
27 purchase of the real property, provide to the purchaser or the

1 purchaser's agent, a written affidavit stating that the seller has  
2 paid each of the seller's contractors, laborers, or materialmen in  
3 full for all labor and materials provided to the seller through the  
4 date specified in the affidavit for any construction of  
5 improvements on the real property and that the seller is not  
6 indebted to any person, firm, or corporation by reason of any such  
7 construction through the date specified in the affidavit. In the  
8 event that the seller has not paid each of the seller's contractors,  
9 laborers, or materialmen in full for labor and material provided  
10 through the date specified in the affidavit, the seller shall state  
11 in the affidavit the amount owed and the name and, if known, the  
12 address and telephone number of each contractor, laborer, or  
13 materialman to whom the payment is owed.

14 (c) The affidavit may include:

15 (1) a waiver or release of lien rights by the affiant  
16 that is conditioned on the receipt of actual payment or collection  
17 of funds when payment is made by check or draft;

18 (2) a warranty or representation that certain bills or  
19 classes of bills will be paid by the affiant from funds paid in  
20 reliance on the affidavit; and

21 (3) an indemnification by the affiant for any loss or  
22 expense resulting from false or incorrect information in the  
23 affidavit.

24 (d) A person, including a seller, commits an offense if the  
25 person intentionally, knowingly, or recklessly makes a false or  
26 misleading statement in an affidavit under this section. An  
27 offense under this section is a misdemeanor. A person adjudged

1 guilty of an offense under this section shall be punished by a fine  
2 not to exceed \$4,000 or confinement in jail for a term not to exceed  
3 one year or both a fine and confinement. A person may not receive  
4 community supervision for the offense.

5 (e) A person signing an affidavit under this section is  
6 personally liable for any loss or damage resulting from any false or  
7 incorrect information in the affidavit.

8 Sec. 53.285. PUBLIC POLICY. (a) Notwithstanding any other  
9 law and except as provided by Section 53.282, any contract,  
10 agreement, or understanding purporting to waive the right to file  
11 or enforce any lien or claim created under this chapter is void as  
12 against public policy.

13 (b) This subchapter does not apply to written agreement to  
14 subordinate, release, or satisfy all or part of a lien claimed after  
15 a notice of lien has been filed.

16 SECTION 13. (a) This Act takes effect September 1, 2003.

17 (b) The changes in law made by this Act apply only to a  
18 contract executed on or before September 1, 2003. A contract  
19 executed before September 1, 2003, is covered by the law in effect  
20 when the contract was executed, and the former law is continued in  
21 effect for that purpose.