

BILL ANALYSIS

C.S.H.B. 1428
By: Deshotel
Business & Industry
Committee Report (Substituted)

BACKGROUND AND PURPOSE

A mortgage on a home, building, or land provides for a lien by the lender and becomes an encumbrance on the property title until the mortgage is paid and the owner obtains a release, leaving the owner with a clear title to the property. Currently, there is legal provision for a mechanic's lien or materialman's lien on real property for labor or material furnished by a general contractor, subcontractor, or supplier when a property owner makes improvements to real property.

Currently, when a contractor bills an owner for work performed on a construction project, the owner must retain a percentage of the contract payment to secure payment of persons who provide labor, services, or material for any contractor, subcontractor, or other agent in the construction project. A number of cases have arisen where there is no retainage when an owner who has obtained a loan defaults on the loan or when the borrower claims that the lender is holding the retainage, the result of which is that a contractor and a subcontractor who have a claim to the retainage do not get paid.

C.S.H.B. 1428 addresses the issue of a borrower's obligations in this regard by requiring a property owner who enters into a construction loan or financing agreement that is secured by a lien on the property or improvement financed by the loan or agreement to establish and maintain a construction trust fund account and setting out related requirements and procedures for the uses and management of the fund.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 1428 amends the Property Code to require a property owner who enters into a construction loan or financing agreement secured wholly or partly by a lien on the property or improvement that is the subject of the loan or agreement to deposit in a construction trust fund account in a financial institution not later than contemporaneously with payment to a contractor the amount of retainage required for the benefit of a lien claimant with respect to a mechanic's, contractor's, or materialman's lien and other retainage retained by the owner from the contractor to be held in trust for the benefit of an artisan, laborer, mechanic, contractor, subcontractor, or materialman who is a beneficiary of any trust fund paid or received in connection with an improvement to real property. The bill requires trust funds deposited in such a construction trust fund account to be used first toward the satisfaction of the owner's obligations and a claimant's rights under a mechanic's, contractor's, or materialman's lien. The bill authorizes the owner's use of trust funds remaining in the construction trust fund account after the satisfaction of those obligations and rights for other construction payments or other purposes of the owner. The bill protects construction trust funds required under the bill's provisions from seizure, offset, or taking by the financial institution or a creditor of the owner. The bill establishes that the

requirement to establish and maintain a construction trust fund under these circumstances does not reduce the owner's obligation or liability under provisions requiring retainage for the benefit of lien claimants under a mechanic's, contractor's, or materialman's lien.

C.S.H.B. 1428 exempts a property owner who enters into a construction loan or financing agreement to pay toward the construction, remodeling, or repair of a single-family house or duplex used for residential purposes and a property owner improving real property if the value of the improvement to be made is \$250,000 or less from the bill's construction trust fund requirements.

C.S.H.B. 1428 requires a financial institution's periodic statement, if a property owner required to maintain a construction trust fund account opens and maintains a separate construction trust fund account with the financial institution for each project subject to provisions relating to construction payments and loan receipts, to refer to the account as a "construction trust fund" account and to identify the project for which the construction trust fund account is maintained. The bill requires the financial institution's periodic statement, if a property owner required to maintain a construction trust fund account opens and maintains a construction trust fund account with the financial institution into which funds for two or more such projects are deposited, to refer to the account as a "construction trust fund" account and requires the owner under those circumstances to maintain an account record for the construction trust fund account that provides information relating to the source and amount of the funds in the account and the date the funds were deposited, the date and amount of each disbursement from the account and the person to whom the funds were disbursed, and the current balance of the account. The bill requires the property owner, for each construction trust fund account maintained by the owner, to maintain the account record for each construction project for which trust funds have been deposited. The bill requires a property owner, not later than the 14th day after receipt of a written request, to provide a person who is a beneficiary of trust funds with a copy of the periodic statement regarding the construction trust fund account into which trust funds of which the person is a beneficiary have been deposited and the account record required to be maintained by the owner with respect to the construction project for which the trust funds have been deposited.

C.S.H.B. 1428 authorizes a beneficiary, if the beneficiary of the trust funds required to be maintained in a construction trust fund account incurs actual damages as a result of the property owner's failure to establish or maintain a construction trust fund account as required or failure to establish or maintain an account record for the construction trust fund account as required, to recover the beneficiary's actual damages, reasonable attorney's fees, and a civil penalty of \$500, in addition to any other remedy provided by law, from the property owner and each trustee who is an owner, officer, director, or agent of the property owner and who receives trust funds or controls or directs trust funds.

C.S.H.B. 1428 defines "construction trust fund account."

EFFECTIVE DATE

September 1, 2011.

COMPARISON OF ORIGINAL AND SUBSTITUTE

C.S.H.B. 1428 contains provisions not included in the original setting out requirements for the establishment and maintenance of a construction trust fund account by a property owner who enters into a construction loan or financing agreement that is secured wholly or partly by a lien on the property or improvement financed by the loan; requirements for the management of such construction trust fund accounts; and penalties for a person who violates any of these requirements. The substitute contains a provision not included in the original defining "construction trust fund account."

C.S.H.B. 1428 omits a provision included in the original establishing that funds retained under a retainage agreement or statutory retainage obligation by a financial institution or other lender that provides a property improvement loan or financing secured by a lien on the property are trust funds, making the lender the trustee, and exempting certain loans or financing agreements of less than \$500,000 from the original's provisions.

C.S.H.B. 1428 omits a provision included in the original establishing that it is not a misapplication of trust funds for such a trustee to make a payment of retainage funds to the property owner or a contractor providing labor or materials to the real property improvement that is security for the loan or financing agreement or to interplead the funds into a court of competent jurisdiction.

C.S.H.B. 1428 omits a provision included in the original defining "retainage."

C.S.H.B. 1428 contains a saving provision not included in the original.