TEXAS LIEN AND BOND CLAIMS HANDBOOK

Sixth Edition
[With 2012 Supplement]

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PRACTICE NOTES – COMMERCIAL (NON-RESIDENTIAL) LIEN CLAIMS

(Private Projects)

INTRODUCTION

The Practice Notes, forms and checklists in this handbook are intended to provide information based on the current State of Texas law as amended through the 2009 regular session of the Texas Legislature and have been updated for changes through 2011. The Legislature frequently makes substantial changes that affect the content and timing of mechanics lien affidavits and required notices. (See Recent Legislative Changes tab for a summary of recent changes.) Since the Legislature convenes every two years, this material should not be relied on after the next Legislature meets in 2013 without considering the effect of any changes in the law that may have occurred.

Practice Notes are presented in the order of the statutory sections to which they pertain. An index is provided at the end of the Practice Notes section with cross references that will allow you to quickly check on particular terms or issues and locate the appropriate statutory reference and comments.

This section also includes excerpts from selected cases that illustrate how the cited section has been applied or interpreted by the courts. However, neither these Practice Notes, the selected cases, nor the other materials in this handbook are intended to provide an exhaustive annotation of the case law relating to the statutes presented or as a substitute for legal advice from competent counsel. Users of this handbook are encouraged to read the entire selected case, as any excerpt will, necessarily, omit detail that may be pertinent to a particular set of facts.

This section deals only with non-residential property. Residential construction liens are treated in the **Residential Lien Claims** section under the yellow tabs. For notes on the constitutional lien available to contractors, see the blue tab under this section labeled **Constitutional Lien**.

TEXAS PROPERTY CODE CHAPTER 53 Subchapters A through J

SUBCHAPTER A. GENERAL PROVISIONS

§ 53.001. Definitions

§ 53.001(2) "Improvement"

Note the term "improvement" for purposes of a Property Code lien includes items specifically excluded from the constitutional lien such as sidewalks, streets, utilities and landscaping items. (For notes on the constitutional lien available to contractors, see the blue tab under this section labeled ***Constitutional Lien****.)*

§ 53.001(4) "Material"

*The statue says "Material" means all or part of materials incorporated into the work, consumed in the work or "**ordered and delivered for incorporation or consumption.**" This would give suppliers an argument that, as long as they delivered materials for use on a particular project, they could perfect a lien on that project, even if the materials are stolen or diverted to a different project. Interestingly, as seen in the note below, for rental equipment to be lienable, it must be "reasonably required" for the project. No such qualifier is attached to construction "materials." But, what is the significance of the statutory language that says "Material" means all or **"part of."** Does this mean that even if materials are "ordered and delivered for incorporation or consumption" that all of those materials are not, necessarily, lienable? What circumstances would render only "part of" the materials incorporated, consumed, or delivered for incorporation or consumption "Materials" under the statutory definition?*

Note that rent and repairs included in the definition of "Material" includes rent and repairs for equipment used or reasonably required and delivered for use in the prosecution of the work at the site. It also includes power, water, fuel, and other consumables delivered for prosecution of the work.

Rental suppliers face particular problems with regard to the definition of "Material" under § 53.001(4). Typically, suppliers of smaller, specialty equipment regularly convert non-returned items to a "purchase", often at replacement cost. What portion of such "convert-to-purchase" items should be lienable? Are non-returned items "consumed in the direct prosecution of the work" if stolen? What if the non-returned items significantly exceed the typical rate of non-return for such items? Should the lien amount be the cost of a new replacement item as is often charged, or the lower bailment measure of recovery, the fair market value of the item at the time it should have been returned?

Equipment suppliers often use "lease agreements" that qualify as disguised sales under the Texas Business & Commerce Code. When the "lessee" defaults, the supplier may file a lien on the project the equipment is located on for the unpaid "lease payments" after repossessing the equipment. If the "lease agreement" is established to be actually a sale, the repossession of the leased equipment voids the deficiency claim. Further, the deficiency would no longer qualify as "rent" under the definition as lienable "material."

§ 53.001(7) "Original Contractor"

Anyone contracting directly with an owner is an "original contractor." Therefore, it is possible to have several original contractors on a project. This may be the case when a construction manager has arranged for traditional subcontractors to contract directly with the owner.

The definition of "original contractor" includes a person contracting with the owner's agent. This should include contracts entered into with a leasing agent as is often the case in tenant finish out contracts in commercial office buildings.

"OWNER" is not defined - but "Owner" would appear to include owners of interests in real estate comprising less than the fee simple interest. For example, an owner of a leasehold interest, when constructing improvements to the leasehold interest, is subject to having a lien filed on that interest. This ability to lien the leasehold raises numerous questions.

What is the effect of a foreclosure of a lien in a leasehold interest? The purchaser at foreclosure would take whatever rights the lessee held. Therefore, the purchaser at foreclosure would buy the right to make monthly lease payments. However, this may be subject to the terms of the lease, which often make the filing of a lien an event of default.

What happens to a lien on a leasehold interest when the lease is breached and terminated? The "lienable" interest probably terminates with the lease.

What is the effect on a lien when the original lease runs out and a new lease is entered into between the same tenant and lessor? Legally, the lien would seem to be in jeopardy. However, in such a circumstance, it may be determined that the lien follows the lessee into the new leasehold interest.

Original contractors also benefit from a lien provided under the Constitution of the State of Texas. Texas Constitution Article XVI, § 37 allows original contractors a lien for construction or repair of "buildings and articles." This constitutional lien does not require compliance with the requirements of the Texas Property Code to enforce the lien. The constitutional lien is only available to original contractors and, is generally limited to "buildings." As an example, site improvements such as sidewalks and landscaping would not likely be lienable through a constitutional lien.

For more information and the text of the applicable Constitutional sections, see the ***Constitutional Lien*** *section of the book under the blue tab.*

§ 53.001(8) "Residence"

There is now a special set of requirements for "Residential Construction" defined as including a single residence, duplex, triplex or quadruplex where the owner intends to live in one of the units. The statutory definition also includes a unit in a multi-unit complex such as a condominium that is owned by one or more adults. Clearly excluded are residential structures being built for investment purposes only such as for sale or lease to third parties. See also, § 53.001(9) and (10). Also, if the residential property happens to be a homestead, there are additional requirements, both in the lien and notice provisions and in the form of the contract that the general contractor enters into with the owner. If you have a claim on a "Residential" project as defined above, please see the Residential Lien Claim section under the yellow tab.

Tex. Wood Mill Cabinets, Inc. v. Butter, 117 S.W.3d 98, 103 (Tex. App.—Tyler 2003, no pet.). "The term "residential construction project" means "a project for the construction or repair of a new or existing residence, including improvements appurtenant to the residence, provided by a residential construction contract." Tex. Prop. Code Ann. § 53.001(10). The record

reflects that the house was constructed by D&D, the owner, as a "spec house" and not pursuant to a residential construction contract. Therefore, the trial court correctly concluded that § 53.052(a) applies and that TWM was required to file its lien no later than the fifteenth day of the fourth calendar month after the day on which the contract is completed. See Tex. Prop. Code Ann. § 53.052(a). Consequently, TWM's lien affidavit was untimely only in the event the contract was completed in May 1999 as the Butters allege."

§ 53.001(11) "Retainage"

The concept of retainage may include more than the common 10% amount withheld from payment based on the way the statute defines "Retainage." Any number of contractual arrangements may exist where a "progress" payment would not be "required" in the month following the month in which labor was performed or material furnished. Under the statutory definition, this would be considered "contractual retainage." For example, under the increasingly popular "pay if paid" or contingent payment clause, money that would be considered progress payments in the industry could qualify as "retainage" under the statutory definition. If the claimant was untimely on their "second month" or "third month" notice letter, but has sent a "retainage notice letter" under § 53.057, would they have a timely claim? Clients who regularly send out the retainage notice letter should consider including a copy of the contract so the owner is put on notice of the presence of terms or conditions that could affect when progress payments would be due. In addition, the notice letter should reference the possible existence of such terms. Obviously, the drafters desired to separate out retainage as those payments that are contractually permitted to be withheld until after final completion of the project. However, defining the concept to cover all situations is difficult.

How does the exclusion of Subchapter E statutory retainage from the definition of "Retainage" affect the time limit for filing the affidavit of lien for contractual retainage. Is contractual retainage really different from Subchapter E statutory retainage? Under Subchapter E, the claimant's lien on the retained fund must be filed within thirty days after work is completed or the right to lien against the retained fund is lost. But since Subchapter E retainage is excluded from the definition of statutory retainage, does the claimant have a longer time to perfect a claim regarding contractual retainage? For all practical purposes the answer would seem to be no. If the owner has complied with the 10% retainage requirement of Subchapter E, and has not received a fund trapping letter, then pays out the 10% retainage to the contractor, a claim against the owner or the retainage fund cannot be perfected because there are no longer funds available to be trapped. See § 53.081(c).

Be sure and read the Legislative Update and Practice Notes for § 53.057 regarding notice of a retainage agreement.

§ 53.001(12) "Specially Fabricated Material"

The definition of specially fabricated material found under § 53.001(12) should be read in connection with § 53.058 concerning claims for specially fabricated items. As more fully explained under that section, a supplier providing specially fabricated material is able to perfect a lien even if the material is not delivered to the project.

§ 53.001(15) "Completion"

The statutory definition of "Completion" requires "the actual completion of the work, including any extras or change orders reasonably required or contemplated under the original contract, other than warranty work or replacement or repair of the work performed under the contract." The courts have enforced the requirement that the job be fully complete.[1] There has been some confusion on the issue where the original contractor is terminated. See the ***Page*** *case, noted below.*

Page v. Structural Wood Components, 102 S.W.3d 720, 730-31 (Tex. 2003). "To determine when the thirty-day period ends, [for filing a lien for retainage under Subchapter E] we look to the statutory definitions of 'work' and 'completion of an original contract.' The Property Code provides that 'completion' of an original contract means the actual completion of the work, including any extras or change orders reasonably required or contemplated under the original contract . . . ." "[W]ork ends when a contract is terminated. The history of the mechanic's lien statute demonstrates the Legislature's intent to make retainage requirements dependent on individual contracts."

But, see new changes to § 53.103 and § 53.107, which have the effect of mitigating the harsh result of Page from termination of an original contractor where subcontractors and suppliers who are not aware of the termination might be prejudiced.

See also new changes to § 53.106(a)(6), and § 53.106(d) and corresponding Practice Notes.

§ 53.003. Notices

Under § 53.003(d), if the required notice is actually received by the person entitled to receive it, the method by which the notice was delivered is immaterial. Therefore, if notices are not sent registered mail or certified mail, as required, and litigation is required to secure payment, counsel are advised to confirm via interrogatories, request for admissions or deposition whether the owner actually received the notices sent.

Further, if the notices are sent by registered or certified mail, compliance with the notice requirements are deemed to have occurred. This would appear to eliminate the necessity to prove receipt of the notices by a return receipt executed green card. As noted in Subsection (c), however, that provision does not apply when the law requires receipt of the notice. Actual receipt of the notice does not appear to be required under §§ 53.055, 53.056 and 53.057. Section 53.056 requires that a claimant other than an original contractor "give the notice prescribed by this section for the lien to be valid." Under Subsection (e) the statute further requires the notice "must be sent by registered or certified mail and must be addressed to the owner or reputed owner or the original contractor . . ." Arguably, under § 53.003, once these notices are placed in the mail, the notice requirements have been complied with regardless of

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[1] ***TDIndustries, Inc. v. NCNB Texas Nat'l Bank***, 837 S.W.2d 270 (Tex. App.—Eastland 1992, no writ).

whether they are actually received. However, you do need to put the postage on! See the ***Wesco*** *case noted below.*

Wesco Distrib. v. Westport Group, Inc., 150 S.W.3d 553, 561 (Tex. App.—Austin 2004, no writ). "Construing the statute to not require postage at all would produce absurd results. Here, the first attempt at notice would have been effective; there would be no need for [claimant] to re-send the returned correspondence because the statute's requirements for constructive notice would have already been met [had postage been applied]."

Occidental Nebraska Federal Sav. Bank v. East End Glass Co., 773 S.W.2d 687, 689 (Tex. App.—San Antonio 1989, no writ). "If in fact a written notice is received, the method by which the notice was delivered is immaterial."

SUBCHAPTER B. PERSONS ENTITLED TO LIEN; SUBJECT PROPERTY

§ 53.021. Persons Entitled to Lien

This section sets out a list of persons that have a lien on property by virtue of having provided labor, material, or services in connection with improving the property. Aside from the "usual suspects," such as contractors and subcontractors, the section carves out certain types of claimants and provides special restrictions on their lien rights. These "special" claimants are discussed below.

The architect, engineer or surveyor has lien rights in the property but with some substantial differences from other claimants. They must have a written contract with the owner or the owner's agent, a trustee or receiver of the owner or perform work "by virtue of" such a written contract. Tex. Prop. Code § 53.021(c). Although the original drafters may have intended that the language "by virtue of" provide lien rights to claimants contracting with a party who has a written agreement with the owner, there is no case law currently interpreting the statute to that end.

Accrual of indebtedness for architects, engineers and surveyors, is controlled by § 53.053 in the same manner as for other claimants. However, the time of inception for the architect, engineer or surveyor's lien, is the date of recording the affidavit of the lien. This is a significant difference between the architect, engineer and surveyor lien and most other claimants' liens. Other claimants are on an equal footing as to each other without regard to the date their liens are filed because the inception date relates back to the commencement of construction or delivery of materials to the property.

In 1999, the Legislature added Property Code subsection 53.021(d) to specifically allow a mechanic's lien for landscaping services. However, the provision only provides for a lien by a landscape contractor contracting under or by virtue of a contract with the owner. It is not clear that landscaping would otherwise not qualify as a lienable "improvement" under § 53.021(a) which allows for subcontractor liens as well. Additionally, the amendments provided that the inception date for landscape contractor liens under (d) would be the time of filing rather than the

commencement of construction as with other mechanic's liens. In 2011, the Legislature clarified § 53.021(d) to include lien rights for those providing landscaping services, not only to the owner or owner's agent, but also to contractors and subcontractors.

In 2005, § 53.021(e) was added to include lien rights for those persons providing labor or materials for demolition of a structure. There is a catch, though, as with the other "special liens" under subsections (c) and (d), the inception date is when the lien is filed, not when construction is commenced. However, unlike the liens available for the architects, engineers, surveyors and landscapers it is available to those contracting with the general contractor or a subcontractor as well.

As noted above, architect, engineer, surveyor, landscape contractor and demolition contractor liens have their inception on the date filed. For purposes of other claimants, it is not always a simple matter determining when "commencement" occurs. Miscalculating the time of commencement could have serious consequences for a lender. If the lender fails to file its deed of trust prior to commencement, all valid mechanic's liens will have their inception prior to the filing of the deed of trust giving them priority over the lender's lien. Of course, lenders diligently attempt to avoid any such possibility, and many, if not most, lenders require a lien subordination agreement with the general contractor, which would place the lender ahead of the contractor in the event the deed of trust is not filed prior to commencement of construction.

*In **Centurion Planning Corp. v. Seabrook Venture II**, the claimant provided what he claimed to be "engineering" services, albeit without an appropriate license and without a written agreement with the owner. The Court, applying the seldom cited Chapter 12 of the Civil Practice and Remedies Code (CPRC), made it clear that a party filing an invalid lien, in this case, a lien filed for engineering services without the proper requisites under Section 53.021(c), can be held liable for the penalties available for filing a fraudulent lien under CPRC Chapter 12.*

Gibson v. Bostick Roofing & Sheet Metal, 148 S.W.3d 482, 494-95 (Tex. App.—El Paso 2004). [W]here a contract for materials, labor and construction is not made with the owner or his duly-authorized agent, the owner of land may not be held liable personally, nor may a lien be fixed on his land. One merely in possession under a contract to purchase is not the owner of the land and cannot create a mechanic's lien on it; only the owner or his agent may make contracts fixing liens on lands and buildings. (citations omitted) A contractor's and materialman's lien relates back to the inception of the contract, and the time when the first material was furnished, as against the immediate parties to, or those having prior notice of, the contract, but cannot be established against the landowner without his knowledge or consent, nor predicated on a mere executory contract of purchase between others."

§ 53.022. Property to Which Lien Extends

A lien is not generally permitted on public land.[2] *However, is work on a private easement across public land lienable? Say, for example, a private pipeline company hires a contractor to make repairs to a pipeline crossing public land by virtue of a private easement. A payment bond would not be required under § 2253 of the Texas Government Code because the*

[2] ***Altascosa County v. Angus***, 83 Tex. 202, 18 S.W. 563 (1892).

governmental entity would not be entering into a construction contract. Is there any value in liening the easement?

As referred to in § 53.022, a lot is a parcel of land marked on a plat or survey.[3] *As may be discerned from § 53.022(d), subdivision lot lines may not be controlling. If the property is located outside a "city, town or village" the lien may encompass up to fifty acres. It is assumed this would require single ownership of a lot and lien rights would not extend to adjacent subdivision property under separate ownership.*

Lien rights of those providing improvements to tenants may be limited. If the original contract is with a tenant, then the lien rights of any claimant are typically limited to a claim against the leasehold interest of the tenant.[4] *Under recent case law, however, it may be possible for the claimant to show that the tenant was acting as contractor for the owner, and properly foreclose the lien against underlying property.*[5] *Even where the contract is with a tenant and the claimant's lien is limited to the leasehold interest, the filing of a lien may be an event of default in the lease agreement between the tenant and the owner. In such cases, the owner is likely to put pressure on the tenant to pay, regardless of whether the lien is valid. Filing a lien on the real property when the prime contract is with a tenant, however, carries some risk since the Property Code provides for recovery of attorneys fees by the prevailing party where legal action is required to have a lien declared invalid. See § 53.156.*

When there are newly constructed improvements on property the purchaser is under a duty to determine whether there are any outstanding mechanic's and materialman's liens against the property.[6]

Where different lots or tracts of land are contiguous, and are treated as single tract, the lien statutes do not require the affidavit and account to stipulate on which tract the material was delivered or used.[7]

§ 53.023. Payment Secured by Lien

Take special note of § 53.023, Subsection (2) concerning specially fabricated materials. Where a claim is made for specially fabricated materials that have not been incorporated into the construction, it is not clear whether the claimant has the burden to establish the fair salvage value of the materials. Claimants making a claim for such material should establish via expert testimony the salvage value of any material for which a claim is made that has not been incorporated into the job site.

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[3] ***Valdez v. Diamond Shamrock Ref. & Mktg. Co.***, 842 S.W.2d 273 (Tex. 1992).

[4] ***Diversified Mortgage Investors v. Lloyd D. Blalock, Gen. Contractor, Inc.***, 576 S.W.2d 794 (Tex. 1978).

[5] ***James C. Bond v. Kagan-Edelman Enters.***, 985 S.W.2d 253 (Tex. App.–Houston [1st Dist.] 1999, no writ).

[6] ***Inman v. Clark***, 485 S.W.2d 372 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ).

[7] ***Oil Field Salvage Co. v. Simon***, 140 Tex. 456, 168 S.W.2d 848 (1943).

§ 53.024 Limitation on Subcontractor's Lien

The amount of a lien claim by a subcontractor is based in part on the "total subcontract price". Determining the amount of the "total subcontract price" referred to in § 53.024(1) is often not a straightforward calculation. Often the project is cluttered with disputed "change orders" whose validity will affect the total subcontract price. Subcontractors and their lawyers should take care not to overlook those portions of his client's claim that may increase the subcontract price in calculating the limitation on the claimant's lien.

One popular contract clause in construction subcontracts is a "condition precedent" clause, also known as a "pay if paid" clause. Such clauses attempt to shift the risk of nonpayment by the owner down to the subcontractor/supplier level. Unless the clause contains very specific "condition precedent" language, courts are reluctant to enforce them. However, if a subcontract contains an enforceable condition precedent clause, does it effectively waive the subcontractor's lien rights? Not under Legislation passed in 2009. See Legislation update section regarding the new pay if paid statute.

Profits are secured by a statutory lien only to the extent included in the price of labor and materials actually used or delivered for use on the project. Where a contract is wrongfully terminated before completion, anticipated profits are not includable in the amount of lien.[8] *However, what if the contract specifically provides for recovery of anticipated profits in the event of a termination without cause? Many contracts provide for recovery of anticipated profits in the event of a termination for convenience. Lien rights are governed by statute. Could a contract provision extend the reach of lien rights to those items for which a lien is not allowed such as anticipated profits. Since lien rights are measured against contract price, would a contract provision allowing lost profits make those amounts subject to lien?*

§ 53.026. Sham Contract

The procedure for perfecting a lien involves additional notice requirements for those not having a contract directly with the owner. However, if the original contractor was not hired with the good faith intention of actually performing the contract, or is effectively controlled by the owner, the law will view the original contract as a sham and treat the "subcontractor" as an original contractor for lien perfection purposes. This eliminates the numerous lien perfection notice deadlines that subcontractors are required to comply with and that are the pitfall of many otherwise good lien claims. A sham contractor determination also serves to move a sub-subcontractor up one place in the construction chain thereby increasing the time it would have to perfect a lien claim.

But, does § 53.026 create an independent contract action, against the owner by the subcontractor? Does establishing a sham contract create de facto privity between a subcontractor and owner? The court in ***South West Properties, L.P. v. Lite-Dec of Texas, Inc.***,

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[8] *See* ***Texas Bank & Trust Co. v. Campbell Bros., Inc.***, 569 S.W.2d 35 (Tex. Civ. App.—Dallas 1978, writ dism'd).

989 S.W.2d 69 (Tex. App.—San Antonio 1998, pet. denied) held that the sham contract provision is solely for determining lien rights and does not create an independent contract cause of action.

The sham contractor provisions also apply where the contractor "effectively controls the owner." See § 53.026(a)(2).

Exchanger Contrs. Inc. v. Comerica Bank-Tex. (In re Waterpoint Int'l LLC), 330 F.3d 339, 348 (5th Cir. 2003). "The effect of the 'sham contract' provision is to place subcontractors in direct privity with the owner (as an original contractor would have been) for the purposes of the mechanic's lien statutes."

SUBCHAPTER C. PROCEDURE FOR PERFECTING LIEN

§ 53.051. Necessary Procedures

Don Hill Constr. Co. v. Dealers Elec. Supply Co., 790 S.W.2d 805, 810 (Tex. App.—Beaumont 1990, no writ). "No one disagrees that proper notice and warning was given to the owner in a timely mode as evidenced by the stipulation of the parties. Interesting to note is the fact that under Tex. Prop. Code Ann. sec. 53.083(b) (Vernon 1984), a provision is made for contesting of such a claim, as appellee herein made, by the original contractor. It is undisputed that the original contractor (Don Hill Construction Co.) received the 90 day notice as did the owner, furthermore, appellant (Don Hill Construction Co.), the original contractor, had 30 days to dispute the claim and if he failed to dispute same within 30 days, 'he is considered to have assented to the demand and the owner shall pay the claim.' We are left to some degree of conjecture that the reason the owner did not pay appellee's claim was based upon owner's reliance or understanding that appellee had in some way erred in its notice to original contractor pursuant to Tex. Prop. Code Ann. sec. 53.056(b) (Vernon 1984). If this was indeed the reason, then we conclude that the owner was mistaken.

. . . .

" . . . The only notice required to be given the owner of a project, is the 90 day notice which was given by the appellee in this case which included the necessary statutory warnings. Appellants' position that the failure to give the 36 day notice timely to the original contractor (Don Hill Construction) defeats the appellants' claim for part of its recovery is not a justifiable position."

Note: The 90 day and 36 day notices referenced in the ***Don Hill*** *case above have been replaced by the 15th of the third month and 15th of the second month notices required under Tex. Prop. Code § 53.056.*

§ 53.052 Filing of Affidavit

The deadline for filing a non-residential mechanics lien affidavit is the 15th day of the fourth month after "indebtedness accrues." Section 53.053 provides that:

- *Indebtedness accrues for an original contractor when the project is finally completed, terminated, or abandoned.*

- *Indebtedness accrues for a subcontractor on the last day of the last month in which the labor was performed or the material furnished.*

Note: ***If the claim is to include a "lien on retained funds," Tex. Prop. Code § 53.103 requires the claimant to file the lien affidavit before thirty days after the work is completed. However, this deadline may not be applicable if the owner fails to retain the statutory retainage.***[9]

The lien must be filed with the county clerk of the county in which the project is located. Under certain circumstances, however, a constitutional lien can be had without filing anything with the county records. See ***Cavazos v. Munoz*** *noted below. Of course, such a lien is not effective as against a purchaser of the property without notice of such a claim. See* ***Constitutional Lien*** *notes under the blue tab.*

But filing a lien is not "always" required.

Cavazos v. Munoz, 305 B.R. 661, 681-82 (D. Tex. 2004). "[H]aving found that Munoz complied with all the necessary steps for a constitutional lien, this court further holds that the Bankruptcy Court erroneously found Munoz's lien to be invalid on the ground that he failed to file a lien affidavit pursuant to Section 53.052(b) of the Property Code. The recordation of an affidavit is necessary only if Munoz was attempting to render the lien effective as to a third party without actual notice. ***Strang v. Pray***, 35 S.W. 1054, 1056 (Tex. 1896)], (constitutional lien is unenforceable against subsequent good faith purchasers of a property or lenders taking a security interest thereon who acquire the interest without actual or constructive notice of the lien claim). Munoz, however, contracted directly with the Cavazos, the owners of the property. A constitutional lien may be asserted by one in privity with the owner of the property in question for renovations to existing improvements on a homestead if the prescriptions in Article 16, Section 50(a)(5)(A)-(D) and Section 53.254(a)-(c), (e) of the Property Code are followed. Said lien's viability is not subject to compliance with the lien perfection requirement of Section 53.052(b). (internal citations omitted)"

The ***Cavazos*** *case, noted above, provides an instructive history of the mechanics' lien laws in Texas.*

§ 53.053 Accrual of Indebtedness

Section 53.053(e) defines the date the indebtedness accrues for retainage for purposes of filing a lien affidavit. Section 53.052 in combination with § 53.053(e) would appear to provide a liberal time frame in which to perfect a lien claim for retainage. However, the Property Code requires an owner of a private project to retain 10% of the contract price (or the value of the work performed) during construction and for thirty days after completion and up to 40 days, if a retainage notice is sent under new § 53.057(f).

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[9] ***General Air Conditioning Co. v. Third Ward Church of Christ***, 426 S.W.2d 541 (Tex.1968).

A notice letter to perfect a claim for statutory retainage is effective even if the statutory fund trapping language required under § 53.056 is not included. ***First Nat'l Bank v. Sledge****, 653 S.W.2d 283, 287 (Tex. 1983).*

§ 53.054 Contents of Affidavit

Section 53.054 requires that the lien affidavit contain substantially the following:

(1) a sworn statement of the amount of the claim;
(2) the name and last known address of the owner or reputed owner;
(3) 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;
(4) 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;
(5) the name and last known address of the original contractor;
(6) a description, legally sufficient for identification, of the property sought to be charged with the lien;
(7) the claimant's name, mailing address, and, if different, physical address; and
(8) 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.

- *Forms for the affidavit for contractors and subcontractors for residential and non-residential projects are found in the Forms section behind the blue and yellow tabs. (See FORMS #PRIV005, #PRIV006 and #RESI002, #RESI003)*

Note: Section 53.054(a)(1) requires a ***sworn*** *statement of the amount of the claim. Use of an "acknowledgment" without a sworn statement will likely render the affidavit ineffective. Numerous cases hold an "acknowledgment" is not sufficient to comply with the terms of the statute. In order to comply with the requirements, a "jurat" (the "subscribed and sworn to language) is required.*[10]

Although there is a general requirement to acknowledge documents for filing with the county records, that requirement has been held not to apply to lien affidavits. A jurat was found to be sufficient.[11]

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[10] ***Sugarland Bus. Ctr. Ltd. v. Norman***, 624 S.W.2d 639 (Tex. App.—Houston [14th Dist.] 1981, no writ); ***Perkins Constr. Co. v. 10-15 Corp.***, 545 S.W.2d 494 (Tex. Civ. App.—San Antonio 1976, no writ); ***Conn, Sherrod & Co. v. Tri-Elec. Supply Co.***, 535 S.W.2d 31 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.); and ***Crockett v. Sampson***, 439 S.W.2d 355 (Tex. Civ. App.—Austin 1969, no writ).

[11] ***Wood v. Barnes***, 420 S.W.2d 425 (Tex. Civ. App.—Dallas 1967, writ ref'd n.r.e.).

"A contractor or subcontractor is entitled to rely on representations of ownership made by the parties with whom the contractor deals." The subcontractor does not have to confirm ownership in the deed records prior to filing.[12]

Section 53.054(a)(3) requires a ***general statement of the kind of work done and materials furnished*** *by the claimant. Many subcontractors tend to use abbreviations or symbols customary in the trade in the description of the work in the lien affidavit. However, the use of such symbols and abbreviations is risky. A claimant using abbreviations or symbols to describe the labor and materials supplied should be careful to set forth a description that conveys a meaningful and intelligible description of the work. As a practical matter, the claimant can usually avoid questions as to the description of the work by attaching a copy of the contract or purchase order to the affidavit and incorporating it provided the contract or purchase order adequately describes the work.*

Since the notices under § 53.057 (for retainage and § 53.058 (for specially fabricated items) are preliminary notices prior to any claim arising, is it necessary to include those in the lien affidavit? Conservative practice would dictate including those notices in the lien affidavit as well.

The courts have accepted various general legal descriptions as adequate to perfect a lien under § 53.054(a)(6). [13]*Therefore, when a street address for the property is available, it is good to include it along with (not in replacement of) the legal description in the event there is some undetected flaw in the legal description. However, when foreclosing a lien, the legal description should still be independently established as a sheriff may hesitate to foreclose on a piece of property described only with a street address.*

The best source of a legal description for the lien affidavit is a copy of the current warranty deed for the property which can be obtained from any title company located in the area. Tax records are also good resources although the information is not updated as regularly as warranty deeds, and therefore, not as reliable as the warranty deed.

Marathon Metallic Bldg v. Texas Nat'l Bank of Waco, 534 S.W.2d 743 (Tex. Civ. App.—Waco 1976, no writ). A statute providing that the claimant shall give the name of the owner or reputed owner, if known, implies that if the claimant in good faith gives the name of

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[12] ***Valdez v. Diamond Shamrock Ref. & Mktg. Co.***, 842 S.W.2d 273 (Tex. 1992).

[13] ***Scholes & Goodall v Hughes & Boswell***, 77 Tex. 482, 14 S.W. 148 (1890). ("[I]f there appear[s] 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 it will be sufficient."); ***Houston v. Myers***, 88 Tex. 126, 30 S.W. 912 (1895). ("(Myers) shall erect and finish the Maverick Printing House. Said building to be erected on Avenue E, just north of the United States postoffice building, in the city of San Antonio, Texas, etc." sufficient.); ***Scholes v. Hughes***, 77 Tex. 482, 14 S.W. 148 (1890) ("The brick city hall building to be erected in the city of Hillsboro" sufficient); ***Rheem Acceptance Corp. v. Rowe***, 332 S.W.2d 353 (Tex .Civ. App.—Amarillo 1959, writ ref'd n.r.e.).

the reputed owner, he shall not lose his lien if he shall afterward ascertain that some other person is the owner.

§ 53.055. Notice of Filed Affidavit

Section 53.055 requires that anyone filing a lien affidavit must forward a copy of the filed affidavit via registered or certified mail to the Owner within five calendar days after the date the lien is filed. Section 53.055 also provides that if the claimant is not an original contractor, they must also send a copy of the affidavit to the original contractor via registered or certified mail. This must be done within the same time limits as required for sending a copy of the lien affidavit to the owner. But, if the lien is filed to secure a claim as the "retained fund" under § 53.101 it is recommended that claimants not wait till the last minute to file and mail a copy to the owner since it is unclear if the owner can be held liable for a claim on the retained fund if he or she does not receive notice of the lien till after 30 days from completion, if they pay the contract balance to the contractor on day 31 and do not get notice of the lien till day 32.

- *A form for the notice of filed lien is found in the Forms section behind the blue tab. (See FORM #PRIV007)*

New AAA Apt. Plumbers, Inc. v. DPMC - Briarcliff, L.P., 145 S.W.3d 728, 731 (Tex. App.— Corpus Christi 2004, no writ). "DPMC-Briarcliff argued at trial that AAA Plumbers failed to provide its predecessor-in-interest, Briarcliff Housing, with proper notice because the copy of the lien affidavit was sent to the property owner and the original contractor before it was actually filed. The statute does not, however, require that the lien affidavit actually be filed before notice is sent. Section 53.055 of the Texas Property Code is intended to ensure that the owner receives actual notice of an affidavit being filed against his property so that he can take steps to protect himself. In this case, the purpose of the statute was fulfilled. AAA Plumber's return-receipt "green cards," which were admitted into evidence, confirm that both the property owner and the original contractor received copies of the lien affidavit by certified mail not more than five days after it was filed. Although the notice of the affidavit was sent before the affidavit was actually filed, the contents of the affidavit comply with section 53.054 of the code."

§ 53.056. Derivative Claimant: Notice to Owner or Original Contractor

*Third Month Notice: Under § 53.056(c), **all** claimants who do not have a contract directly with the owner, must send notice of the unpaid claim by the fifteenth day of the third calendar month (second month for residential construction) after each month in which the claimant provided labor or material for which they have not been paid. These notices must be sent certified mail to the owner or reputed owner's last known business or residence address. Of particular importance in the notice required under § 53.056 is the inclusion of the "magic words" under Subsection (d). **The notice must contain, in substance, the following statement:***

> **If this claim remains unpaid, you may be personally liable and your property may be subjected to a lien unless you withhold payments from the contractor for payment of the claim or the claim is otherwise paid or settled.**

This section should be read in conjunction with Subchapter D, which authorizes "trapping" of funds pursuant to a notice of claim. Although Subsection (f) states that a copy of the statement or billing in the usual and customary form is sufficient as notice under this section, unless the specific language required under Subsection (d) is incorporated in those statements or billings, simply forwarding these statements or billings to the owner, without an accompanying notice that includes the Subsection (d) language will probably be insufficient.

It should be noted that the owner's liability is limited to those amounts for which it has received timely and proper fund trapping notices and notices of retainage agreement. (Note the new deadlines to send a notice of retainage under § 53.057.) Claimants should be cautious when determining the deadline to send fund trapping notices at the end of a project. Normally, a fund trapping notice on a commercial (non-residential) project is due on or before the 15th day of the third month following the month in which the unpaid labor and materials were provided. § 53.056(b)(d). However, the interaction between § 53.103 and the newly revised § 53.057 makes the deadline to provide a notice for labor or material provided at the end of a job the earlier of the 15th of the third month after providing the unpaid labor and/or materials, OR, the earliest date the owner can safely release retainage under § 53.057(f).

- *A form for this third month notice is found in the Forms section behind the blue tab. (See FORM #PRIV004)*

See also new § 53.057 Practice Notes for notice of retainage under § 53.057.

Second Month Notice: Even where a notice is sent under §§ 53.056, 53.057 or 53.058, if there are several other claimants and insufficient funds to go around, they can be forced to share the remaining funds proportionately. See Property Code § 53.104(b).

If the claimant does not have a contract with the original contractor under § 53.056(b), they must also give written notice via certified mail to the original contractor not later than the fifteenth day of the second calendar month following each month in which all or part of the labor or material was provided to the project. In addition, the same third month (fund trapping) notice as described above must be given to the owner by the fifteenth day of the third calendar month ("third month" notice) as required for those having a contract directly with the original contractor.

- *A form for this second month notice is found in the Forms section behind the blue tab. (See FORM #PRIV003)*

A statement or billing in the usual or customary form is not a requirement, but merely a suggested one as being sufficient.[14]

See also new § 53.057 Practice Notes for notice of retainage under § 53.057.

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[14] ***Hunt Developers, Inc. v. Western Steel Co.***, 409 S.W. 2d 443(Tex. Civ. App. – Corpus Christi 1966, no writ).

Wesco Distrib. v. Westport Group, Inc., 150 S.W.3d 553, 561 (Tex. App.—Austin 2004, no writ). "Texas's materialman's lien statute strikes a balance between interests of materialmen and general contractors by imputing notice to contractors to whom notice has been properly mailed. This scheme mirrors the evidentiary presumption that a properly mailed notice is received at its destination. When a sender has done everything necessary for notice to arrive, notice is considered effective as to the intended recipient."

Stolz v. Honeycutt, 42 S.W.3d 305, 313 (Tex. App.—Houston 2001, no writ). "[T]he ability to "trap" funds is extinguished if the 'claim is otherwise paid or settled.' Here, it is clear that Wendy Honeycutt's accepting of the post-dated check from Kyle and signing of the mutual release operates as a payment and settlement of the underlying claim. If the underlying claim ceases to exist the derivative claims also cease to exist."

Don Hill Constr. Co. v. Dealers Elec. Supply Co., 790 S.W.2d 805, 807 (Tex. App.–Beaumont 1990, no writ). "Section 53.083 requires the owner to pay the subcontractor from funds withheld if the original contractor does not timely object to the subcontractor's claim. The record reflects no objection by the original contractor, Don Hill Construction Co., to the notice of claim made to the owner by the appellee herein. Furthermore, all parties stipulated that a notice of non-payment pursuant to Tex. Prop. Code Ann. sec. 53.056 (Vernon 1984) was forwarded by plaintiff, appellee herein, to the subcontractor (Downing & Downing Electric), the general contractor (Don Hill Construction) and owner (Brookshire Brothers) by certified mail, return receipt requested, on November 11, 1985.

. . . .

" . . . There was no evidence before the trial court but that the appellee gave proper notice to the defendants of its claim and furthermore, there was no evidence before the trial court but that appellee properly and timely filed its lien against the owner's property. It is abundantly clear from the record that the owner, Brookshire Brothers, did not withhold funds after being properly noticed by appellee, nor even after appellee filed and perfected its lien. Appellants also state that the claimant, appellee herein, has the burden of proving that the funds were paid to the original contractor after the owner received the appellee's notices. As defendant's exhibit two was properly before the court for consideration as evidence, there can be no doubt but that the appellee met that burden."

Note: The 90 day and 36 day notices referenced in the ***Don Hill*** *case above have been replaced by the 15th of the third month and 15th of the second month notices required under Tex. Prop. Code § 53.056.*

§ 53.057. Derivative Claimant: Notice for Contractual Retainage Claim

Although withholding retainage is common throughout the construction industry, the lien laws treat retainage like any other failure to pay. Therefore, if the subcontract provides for the contractor to withhold retainage, to protect its rights the subcontractor should send the owner a notice of retainage agreement. The 2011 Legislature completely rewrote § 53.057, which defines derivative claimants' required notice for contractual retainage. It is strongly suggested that

lawyers and industry professionals, alike, review the new § 53.057 carefully so that you can send appropriate notices to comply with the new notice requirements for retainage. In summary, a derivative claimant may give an owner notice of contractual retainage on the earlier of the date the claimants' agreement providing for retainage is completed, terminated, or abandoned or the 30th day after the date the original contract is terminated or abandoned. This is substantially different from the somewhat onerous requirement under the prior law that the claimant provide a notice of retainage by the 15th day of the second month following the claimant's first delivery of materials or performance of labor that first occurs after the claimant has agreed to the contractual retainage. If the agreement for retainage is with a subcontractor, the claimant must also give the notice of retainage to the original contractor with the same deadline noted above. A new section has been added, § 53.057(f) that may serve to extend an owner's liability on a claim for retention from 30 days after final completion until the time that a claimant may file a lien under § 53.052. Section 53.052 allows for the filing of a lien affidavit up to the 15th day of the fourth calendar month after the date indebtedness accrues. An owner may shorten the deadline for filing of the subcontractor's lien for retainage, but only upon compliance with the notice requirements identified in § 53.057(f)(1)(B).

The new notice of retainage agreement required under § 53.057 must generally state the existence of a requirement for retainage and contain a name and address of the claimant, and, if the agreement is with a subcontractor, the name and address of the subcontractor.

The 2011 Legislature deleted the requirement stated in § 53.057(d) that the notice must be sent by registered or certified mail However, practitioners and their clients should note that § 53.003(c) provides that notices sent by registered or certified mail are effective upon deposit or mailing of the notice in the United States mail. Notwithstanding deletion of the § 53.057(d) requirement that a retainage notice must be sent by registered or certified mail, claimants and their attorneys are advised to continue the practice of sending such notices by registered or certified mail so that notice is effective upon mailing.

Texas Property Code Chapter 53, Subchapter E has, typically, defined the extent of an owner's liability for a lien on retained funds. However, the new § 53.057(f) expands the owner's potential liability beyond that set forth under Subchapter E, where the claimant provides notice in accordance with this new section and complies with Subchapter E, or files its affidavit claiming a lien not later than the earliest deadlines set forth under § 53.057(f)(1)(B). Under certain circumstances, a claimant could secure a lien on retainage by filing its affidavit by the 15th of the fourth month after its indebtedness accrued. Sending the notice of retainage eliminates the requirement to send monthly fund trapping notices for retainage, but does not require the owner to withhold any additional funds until the subcontractor actually files a lien affidavit. Section 53.081(c) and 53.082(2). ***If the claim is to include a lien on the "retained fund," the claimant must file a lien for the retainage before thirty days after completion of the work.*** *See PN under § 53.103.*

- *A form for the notice of retainage is found in the Forms section behind the blue tab. (See FORM #PRIV001 for subcontracts where the original contract was entered into before September 1, 2011 and see FORM #PRIV001A for*

subcontracts where the original contract was entered into on or after September 1, 2011.)

Even where a fund trapping notice is sent under §§ 53.056, 53.057 or 53.058, and even if a claimant timely makes a claim under this subchapter, if there are several other claimants and insufficient funds to go around, they can be forced to share the remaining funds proportionately. § 53.104(b).

Where a Property Code payment bond is filed, § 53.206(b)(1) appears to create a gap in the notice laws so that no deadline exists for giving notice of a retainage claim to a bonding company. Subchapter I tracks the notice requirements set out for lien claims. To perfect a retainage claim under the lien laws, a claimant may treat retainage as unpaid monthly progress payments and send notices accordingly, or, in the alternative, send a § 53.057 notice at the beginning of the job. Since Subchapter I eliminates the parallel requirement of § 53.057 retainage notice to the bonding company, arguably there are no statutory notice deadlines for perfecting a bond claim for retainage.

§ 53.058. Derivative Claimant: Notice for Specially Fabricated Items

Notice for Specially Fabricated Items must be sent not later than the fifteenth day of the second month after the month in which the claimant receives and accepts an order for the specially fabricated materials. If their contract is with a person other than the original contractor, they must also give notice within that same time to the original contractor.

The notice must contain a statement that the order has been received and accepted and the price of the order. This notice must be sent by registered or certified mail to the last known business address or residence address of the owner or reputed owner and/or the original contractor as applicable.

- *A form for this Specially Fabricated Materials Notice is found in the Forms section behind the blue tab. (See FORM #PRIV002)*

With respect to specially fabricated materials, the idea is that such materials are unique to the project and have no market value once fabricated except for the project for which they were made. Once fabricated, these materials should not have to be incorporated into the project to be lienable. However, notice in compliance with § 53.058 must be sent to the owner and the prime contractor if the claimant's contract is with a subcontractor. This notice must be sent not later than the fifteenth day of the second month after the order is received and the claimant accepts the order.

It is clear that the claimant must also timely file a proper affidavit of lien to perfect its lien claim for specially fabricated materials. It is less clear what additional notices, if any, are required to be sent and how to determine <u>when</u> to send said notices.

Section 53.081(a) provides that an owner who receives a notice under § 53.058 may withhold funds upon receipt of that notice. Section 53.081(d) goes on to provide that if the owner

receives a notice of specially fabricated materials in accordance with § 53.058, the owner is authorized to withhold funds after receiving a notice in accordance with subsection (e) of § 53.058. It is unclear if that is a limitation or addition to the authority given to the owner in subsection (a). Further, subsection (e) of § 53.058 suggests that no other notices are required to be sent for these materials if delivery is prevented, such as when the contract and/or purchase order is terminated.

*However, additional notice is specifically required by this subsection "if the normal delivery time for the job has passed." § 53.058 (e). What is the "normal" delivery time when the project has been accelerated or delayed? Can a lien be perfected without sending additional notice(s) if one can conclusively establish the normal delivery time has not passed? Even if the delivery time has passed, how does one determine the § 53.056 notice deadlines if there has been no delivery? The notice deadlines in § 53.056 are triggered by **delivery** of materials. Arguably, the conservative approach would be to send additional notice(s) in accordance with § 53.056 and 53.057, if applicable, based upon the "normal delivery time." But, it is unclear if such a step is required to perfect with undelivered specially fabricated materials.*

Notwithstanding the language in § 53.058(a) that a claimant providing specially fabricated material must give notice under this section for the lien to be valid, a claimant who fails to give notice under this section will still have a valid claim for specially fabricated materials actually ordered and delivered for incorporation on the project if notice is provided under § 53.056.

SUBCHAPTER D. FUNDS WITHHELD BY OWNER FOLLOWING NOTICE

§ 53.081. Authority to Withhold Funds for Benefit of Claimants

Section 53.081, commonly known as the "fund trapping" provision, provides one of the most important tools available for the subcontractor or supplier for recovery of unpaid accounts. Although this section provides that the owner "may" withhold funds after a notice of claim, § 53.084 makes the owner liable to the subcontractor or supplier claimant for any money paid to the original contractor after receipt of a proper notice of claim. This remedy is in addition to the claimant's share of retained funds under Subchapter E. It is important to note, however, that even if notice of a claim has been sent under §§ 53.056, 53.057 or 53.058, the notice, in and of itself, is not sufficient to perfect a lien. The notice "traps funds" and secures those funds for payment to the subcontractor or supplier claimant only if the appropriate lien affidavit is timely filed. See § 53.082. It is important to understand the fund trapping provisions are in addition to the protection provided under the retainage requirements of Subchapter E.

Although withholding retainage is common throughout the construction industry, the lien laws treat retainage like any other failure to pay. Therefore, to protect its rights, a subcontractor, should send notices of retainage under § 53.057 to the owner. Such notice letters do not require the owner to hold back additional amounts necessary to pay the subcontractor's claim from the original contractor's payment until the subcontractor actually files a lien affidavit. Section 53.081(c).

Page v. Marton Roofing, 102 S.W.3d 733, 734-35 (Tex. 2003).

The statutory fund-trapping provision allows subcontractors to 'trap, in the owner's hands, funds payable to the general contractor if the owner receives notice from the subcontractors that they are not being paid.' ***First Nat'l Bank v. Sledge***, 653 S.W.2d 283, 286, 26 Tex. Sup. Ct. J. 463 (Tex. 1983). Specifically, the statute provides that an owner who receives such notice 'may withhold from payments to the original contractor an amount necessary to pay the claim for which he receives notice.' Tex. Prop. Code § 53.081(a). The statute further provides a remedy if the owner fails to withhold funds from the original contractor: 'the owner is liable and the owner's property is subject to a claim for any money paid to the original contractor after the owner was authorized to withhold funds under this subchapter.' *Id.* § 53.084(b).

"Marton Roofing argues that it is entitled to a lien on Page's property because Page paid money to the replacement contractors after receiving notice that Sepolio had failed to pay Marton Roofing. It is undisputed, however, that Page neither made nor owed any further payments to Sepolio at any time after Page received notice of Marton Roofing's claims. As with retainage liens, fund-trapping liens must be judged in relation to individual original contracts. Marton Roofing's notice authorized Page to withhold funds from Sepolio, because Sepolio was the original contractor that hired Marton Roofing. Page was not authorized to withhold funds from the replacement contractors who had no relationship to Marton Roofing. Consequently, Page cannot be liable under the fund-trapping statute for any funds paid to the replacement contractors. . . ."

Note: The legislature amended the Texas Property Code by adding § 53.107 relating to termination of original contractors and requiring notice of such termination to subcontractors and suppliers. These changes would alter the result in cases like ***Page,*** *cited above.*

Stolz v. Honeycutt, 42 S.W.3d 305, 311 (Tex. App.—Houston [14th Dist] 2001, no pet.) "Under the Trapping Statute, when an owner receives proper notice that the original contractor has failed to pay funds owed on work done on the property, the owner may withhold payments to the contractor in an amount sufficient to cover the claim for which he received notice. . . If the owner pays any of the "trapped" funds to the contractor after receiving notice, the claimant may obtain a lien on the property to the extent of the money paid."

§ 53.082. Time for Which Funds are Withheld

Under § 53.082, if the subcontractor/supplier claimant fails to properly file the lien affidavit and the time for filing the affidavit passes, the owner may proceed to pay the contractor without liability.

Raymond v. Rahme, 78 S.W.3d 552, 559-60 (Tex. App.—Austin 2002, no pet.). "'Trapped' funds are funds not yet paid to the original contractor at the time the property owner receives notice that a subcontractor has not been paid; on receiving such notice, the owner may withhold those funds from the original contractor until the claim is paid or settled or until the time during which a subcontractor may file a lien affidavit has passed. 'Retained' funds are

funds withheld from the original contractor either under a contractual agreement or under section 53.101, which requires a property owner to retain ten percent of the contract price for thirty days after the project is completed. (internal citations omitted)"

Stolz v. Honeycutt, 42 S.W.3d 305, 313 (Tex. App.—Houston [14th Dist.] 2001, no pet). "[T]he ability to 'trap' funds is extinguished if the 'claim is otherwise paid or settled.'. . . Honeycutt's accepting of the post-dated check from Kyle and signing of the mutual release operates as a payment and settlement of the underlying claim. If the underlying claim ceases to exist the derivative claims also cease to exist."

§ 53.083. Payment to Claimant on Demand

If a demand has been properly sent and not timely disputed in writing and therefore is assented to by the general contractor, is the claimant under an obligation to file a lien affidavit subsequently? Of course, conservative practice would dictate filing the lien affidavit if the owner delays paying the claimant. However, the Property Code arguably creates an independent cause of action upon the failure of the general contractor to timely contest a claim.

Once proper notice and demand has been made under § 53.083, if the contractor does not dispute the claim within thirty days, the owner is required by statute to pay the claim. If the claim is by a supplier against a subcontractor, the subcontractor should also be sent a copy of the demand. A demand for payment under § 53.083 may be made at any time up to the deadline for filing the affidavit of lien. If the claimant fails to file an affidavit of lien by the deadline, the remedies provided under this subchapter are arguably lost. Nevertheless, a claimant faced with an expired deadline for filing of a lien affidavit should probably go ahead and send a demand letter. If substantial funds remain in the hands of the owner, the owner, though not required, may still pay claims out of the contractor's account. The claimant, however, should not file a lien affidavit if the time to file such an affidavit has passed since § 53.156 allows an award of costs and reasonable attorneys fees, in any proceeding "to declare that any lien or claim is invalid or unenforceable in whole or in part."

Important: Notice and demand alone will not preserve a lien claim. If the owner does not pay the claim, the claimant must still file an affidavit of lien within the time required by the statute.

Subchapter D creates a dilemma for the general contractor regarding claims by sub-subcontractors. The general contractor may have no personal knowledge of the dispute between its subcontractor and lower tier parties. Without such knowledge it is difficult to dispute a claim. Should the general contractor fail to dispute the claim in writing when a real dispute exists, the owner might pay the claimant directly. The subcontractor might not acknowledge an offset and sue the general contractor for the funds paid directly to the claimant. This would place the general contractor in danger of paying twice.

Likewise, a subcontractor disputing payment to a lower tier claimant should dispute the claim in writing to the general contractor and owner and should use care to encourage the general contractor to timely dispute any claim in writing.

Could the general contractor protect itself by providing in its contract with the owner a presumption that all lien claims are disputed? General contractors and subcontractors are advised to include a provision in their contract that requires actual notice and a reasonable time to object before the upstream party pays a downstream claimant directly.

Don Hill Constr. Co. v. Dealers Elec. Supply Co., 790 S.W.2d 805, 807-10 (Tex. App.—Beaumont 1990, no writ). See note under § 53.052.

Bond v. Kagan-Edelman Enters., 985 S.W.2d 253, 259-60 (Tex. App.—Houston 1999), *rev'd on other grounds*, 20 S.W.3d 706 (Tex. 2000). "Bond sent notice of his claim and demand for payment to Irwin and Kagan-Edelman, with a copy of the lien affidavit, on July 21, 1994 and on July 29, 1994. Kagan-Edelman admitted receiving these notices from Bond. Irwin did not give written notice to Kagan-Edelman of any intent to dispute the claim; therefore, Kagan-Edelman was required to withhold the funds and pay Bond's claim."

§ 53.084. Owner's Liability

Section 53.084 limits the owner's liability to subcontractor/supplier claimants to the extent of retainage required under Subchapter E and funds trapped under Subchapter D. Owners, however, can release funds 30 days after completion absent proper notice of claim. But, see ***Don Hill Const. Co. v. Dealers Elec. Supp. Co.***, *790 S.W.2d 805 (cited above).*

Page v. Marton Roofing, 102 S.W.3d 733, 734-35 (Tex. 2003). "In order to perfect a statutory retainage lien, therefore, a subcontractor must file its lien affidavit within thirty days of the time that the original contract is completed, terminated, or abandoned. *Id.*; Tex. Prop. Code § 53.101. Here, Marton Roofing filed its affidavit two months after the original contract was terminated, and consequently failed to perfect a lien on the statutory retainage.

"Marton Roofing's attempt to perfect a fund-trapping lien fails for similar reasons.

" . . . Marton Roofing argues that it is entitled to a lien on Page's property because Page paid money to the replacement contractors after receiving notice that Sepolio had failed to pay Marton Roofing. It is undisputed, however, that Page neither made nor owed any further payments to Sepolio at any time after Page received notice of Marton Roofing's claims. As with retainage liens, fund-trapping liens must be judged in relation to individual original contracts. . . . Page cannot be liable under the fund-trapping statute for any funds paid to the replacement contractors."

Bond v. Kagan-Edelman Enters., 985 S.W.2d 253, 259-60 (Tex. App.—Houston [1st Dist.] 1999), *rev'd on other grounds*, 20 S.W.3d 706 (Tex. 2000). "We find that Kagan-Edelman is liable to Bond for trapped funds to the extent of the amount it paid Irwin after receiving notice from Bond. . . . The second method of perfecting a lien is the statutory retainage method provided for in Subchapter E, 'Required Retainage for the Benefit of Lien Claimants' (sections 53.101-53.105). Kagan-Edelman was required by its agreement with Irwin to retain 10% of the $27,732 construction allowance. Kagan-Edelman admitted the 10% to be withheld under the

agreement is the statutory retainage required to be withheld by the statute. Kagan-Edelman was required to retain it during the progress of the work and for 30 days after the construction work was completed. . . ."

Don Hill Constr. Co. v. Dealers Elec. Supply Co., *790* S.W.2d 805, 810 (Tex. App.—Beaumont 1990, no writ). "The only notice required to be given the owner of a project, is the 90 day notice which was given by the appellee in this case which included the necessary statutory warnings. Appellants' position that the failure to give the 36 day notice timely to the original contractor (Don Hill Construction) defeats the appellants' claim for part of its recovery is not a justifiable position."

Note: the 90 day and 36 day notices referenced in the ***Don Hill*** *case above have been replaced by the 15th of the third month and 15th of the second month notices required under Tex. Prop. Code § 53.056.*

§ 53.085. Affidavit Required

Section 53.085 provides that, as a condition for payment, a contractor must furnish an affidavit of bills paid if requested by the owner. The affidavit may also include a waiver or release of lien rights that is conditioned upon actual payment by the owner, or if payment is by check, actual collection of funds. Note that, for all contracts and subcontracts entered into on or after January 1, 2012, bond claims are also specifically included in the release forms mandated by the new Subchapter L, § 53.281 et seq. Under § 53.085(d) and (e) civil liability and criminal penalties are now available for false information in a bills paid "affidavit." However, the new Subchapter L, § 53.281 et seq., provides new statutory forms that are mandatory to effect either a conditional release of lien or an unconditional release of lien. See Practice Notes for new Subchapter L.

The possibility of community supervision (probation) is not allowed under the current version of the statue, making jail time more likely. Note that criminal sanctions and personal liability are also available under defined circumstances under Property Code Chapter 162, also know as the Texas Construction Trust Fund Statute.

Where a statutory bond is provided, however, the owner can not require the surety to provide the bills paid affidavits as a condition to payment of monies otherwise due to the contractor. See the ***Beard Family Partnership*** *case, cited below.*

Beard Family P'ship v. Commercial Indem. Ins. Co., 116 S.W.3d 839, 846 (Tex. App.—Austin 2003, no writ). "When we read together and harmonize the underlying contract's provision regarding the requirement of an all-bills-paid affidavit from the contractor, together with the bonds, the intent of the parties makes clear that the affidavit is not a requirement also imposed upon the surety. In addition to the affidavit, paragraph 9.10.2 also requires the 'consent of surety, if any, to final payment.' Because the surety is the assurance of payment--and continues to be liable on the bond until the expiration of a specified time period . . . the affidavit would under these circumstances perform no function."

Lesikar Constr. Co. v. Acoustex, Inc., 509 S.W.2d 877, 881 (Tex. Civ. App.—Ft. Worth 1974, writ ref'd n.r.e.). The court did not enforce a condition requiring the furnishing of an affidavit of bills paid when it was shown that the subcontractor had fully performed and paid for all labor and material used on the job. But see, ***TA Operating Corp. v. Solar Applications Eng'g, Inc.***, 191 S.W.3d 173, 180-81 (Tex. App.—San Antonio 2006, pet. granted) (enforcing a condition precedent requiring the furnishing of a bills paid affidavit resulting in a windfall for the owner).

SUBCHAPTER E. REQUIRED RETAINAGE FOR BENEFIT OF LIEN CLAIMANTS

§ 53.101. Required Retainage

Under § 53.101, the owner is only required to retain a maximum of 10% of the contract price for a period of 30 days after the work is completed. However, revisions to § 53.057, for perfecting a claim on retainage, complicate matters. For all subcontracts where the original contract was entered into on or after September 1, 2011, there are several potential deadlines for filing a lien on unpaid retainage, the earliest of which the claimant must meet. One of the deadlines for filing a lien for unpaid retainage under § 53.057(f) is the 15th day of the fourth month following final completion. However, § 53.057(f) gives the owner control over the deadline by permitting the owner to file an Affidavit of Completion § 53.057(f)(1)(B)(ii) or to send written demand that claimant file a lien. § 53.057(f)(1)(B)(iv).

At Least one court put the burden of proving the amounts required to be retained on the claimant.[15]

Bond v. Kagan-Edelman Enters., 985 S.W.2d 253, 259-61 (Tex. App.—Houston 1999), *rev'd on other grounds*, 20 S.W. 3d 706 (Tex. 2000). "If the owner does not comply with Subchapter E, the persons who make claims under this subchapter have a lien for the amount that should have been retained from the original contract; and, the owner is liable for the amount that should have been retained. . . . Kagan-Edelman does not dispute that Bond followed the statute and gave the required notice. Kagan-Edelman admits receiving the notices. Bond timely filed an affidavit claiming his lien. Under the statute, Kagan-Edelman may be liable only for 10% of the original contract price, which equals $ 2,732."

Page v. Structural Wood Components, 102 S.W.3d 720, 722 (Tex. 2003). "A subcontractor or other claimant who wants to make a claim on that retainage must properly give notice and file 'an affidavit claiming a lien not later than the 30th day after the work is completed.' *Id.* § 53.103. The period during which a claimant can and must file a lien affidavit under section 53.103 is therefore the same period that an owner can and must hold retainage under section 53.101 - thirty days after the completion of work. It is consequently in the best interest of all construction participants to know when the thirty-day period terminates - the owner

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[15] ***Weaver v. King Ready Mix Concrete, Inc.***, 750 S. W. 2d 913 (Tex. App.—Waco 1988, no writ).

so that it can release the remaining funds, the original contractor so that it can budget for its final payment, and the claimant so that it can file the lien affidavit before that date. To determine when the thirty-day period ends, we look to the statutory definitions of 'work' and 'completion of an original contract.' The Property Code provides that 'completion' of an original contract means the actual completion of the work, including any extras or change orders reasonably required or contemplated under the original contract . . . we conclude that the greater weight of authority supports Page's contention that the work ends when a contract is terminated."

Page v. Marton Roofing, 102 S.W.3d 733, 735 (Tex. 2003). "Our decision today in *Page v. Structural Wood Components, Inc.*, 102 S.W.3d 720, 2003 Tex. LEXIS 42, 46 Tex. Sup. Ct. J. 561, rejects the court of appeals' approach. In *Structural Wood*, we held that 'work must be defined in relation to a particular contract.' *Id.* In order to perfect a statutory retainage lien, therefore, a subcontractor must file its lien affidavit within thirty days of the time that the original contract is completed, terminated, or abandoned. *Id.*; Tex. Prop. Code § 53.101. Here, Marton Roofing filed its affidavit two months after the original contract was terminated, and consequently failed to perfect a lien on the statutory retainage."

Note: The ***Page*** *court suggested the disclosure statement required on residential construction contracts in Tex. Prop. Code § 53.255 provides a good plain English explanation of an owner's retainage obligations on both commercial and residential projects.*

Note: Tex. Prop. Code § 53.107 requires that the owner send written notice to certain subcontractors no later than the 10th day after an original contractor is terminated or abandons performance. The notice must include a statement that the subcontractor must file its lien affidavit not later than the 30th day after the termination or abandonment.

McKalip v. Smith Bldg. & Masonry Supply, Inc.*, 599 S.W.2d 884 (Tex. Civ. App.—Waco 1980, writ ref'd n.r.e.). The Legislature's Amendment . . . was intended to and does have the effect of limiting the retainage fund . . . to 10% of a particular original contract, in situations where there are multiple original contracts executed for the construction of a single project.*

The term "contract price" is to be construed to mean the cost to the owner for any construction or repair, or any part thereof, which is performed pursuant to an original contract.

§ 53.102. Payment Secured by Retainage

Bond v. Kagan-Edelman Enters., 985 S.W.2d 253, 259-60 (Tex. App.—Houston 1999), *rev'd on other grounds*, 20 S.W.3d 706 (Tex. 2000). See notes under § 53.101.

Page v. Structural Wood Components, 102 S.W.3d 720, 722 (Tex. 2003). See notes under § 53.101.

§ 53.103. Lien on Retained Funds

For all subcontracts where the original contract was entered into BEFORE September 1, 2011, § 53.103 provides that the affidavit claiming a lien on statutory retainage must be filed not later than the thirtieth day following the date that the project is completed. Note that the lien on the retained fund must be filed before the owner is authorized to release the retainage. If a § 53.057 retainage notice has been sent, does the thirty day time limit apply? See also definition (11) at § 53.001! For all subcontracts where the original contract was entered into on or AFTER September 1, 2011, there are now several potential deadlines for filing a lien on unpaid retainage. By adding the words "except as allowed by Section 53.057(f)" to the beginning of subsection 53.103(2), this subsection regarding deadlines for filing lien affidavits for unpaid retainage states only one of several potential deadlines for filing a lien affidavit for retainage. Section 53.057(f) provides that a lien on retainage must be filed ***not later than*** *the earliest of:*

- *the 15th day of the fourth month after the original contract is completed, finally settled, terminated or abandoned;*
- *the 40th day after the date stated in a proper Affidavit of Completion, if any;*
- *the 40th day after the termination or abandonment of the original contract, if applicable; or*
- *the 30th day after the date the owner sent to the claimant a written demand to file its lien affidavit, if any.*

What is the real difference between retainage as defined under § 53.001 and retainage under Subchapter E? Is "ordinary" retainage under § 53.025 different from so called "statutory" retainage under Subchapter E § 53.103? If there is no retainage specified in the contract does a claimant still have a claim for statutory retainage under § 53.103? Note: "retainage" as defined under § 53.001(11) excludes Subchapter E retainage! A claimant otherwise precluded from recovery under § 53.103 may still recover if the owner has failed to retain the statutory retainage under Subchapter E. See ***James Mech. Contr. v. Tate, Inc.****, 647 S.W.2d 347 (Tex. App.—Corpus Christi 1982, no writ).*

Subchapter E may also provide for an avenue of recovery even if a second tier claimant fails to give proper notice to the general contractor under § 53.056. See ***Don Hill Const. v. Dealers Elec. Supply****, 790 S.W.2d 805 (Tex. App.—Beaumont 1990, no writ), cited above. Practitioners should be familiar with this case and note the emphasis the court places on the contractor's failure to notify the owner that it disputed the claim.*

A notice letter to perfect a claim for statutory retainage is effective even if the statutory fund trapping language required under § 53.056 is not included. ***First Nat'l Bank v. Sledge****, 653 S.W.2d 283, 287 (Tex. 1983).*

See ***Page v. Structural Wood Components***, 102 S.W.3d 720, 721 (Tex. 2003). See notes under § 53.101.

See ***Bond v. Kagan-Edelman Enters.***, 985 S.W.2d 253, 259-61 (Tex. App.—Houston 1999) *rev'd on other grounds*, 20 S.W.3d 706 (Tex. 2000). See notes under § 53.101.

§ 53.104. Preferences

Even where a notice is sent under Section 53.056, 53.057 or 53.058, even if a claimant timely makes a claim under this subchapter, if there are several other claimants and insufficient funds to cover all perfected claimants, then the claimants share the remaining funds proportionately. Section 53.104(b).

Texas Crushed Stone Co. v. Nat'l Housing Ind., Inc., 576 S.W.2d 917, 919 (Tex. Civ. App.—Austin 1978, no writ). The statute gives a preference to individual artisans and mechanics in payment of their wages and fringe benefits and the statutory retainage will be used first to pay their lien claims. Any balance will be divided ratably among other lien claimants.

§ 53.105. Owner's Liability for Failure to Retain

See ***Page v. Structural Wood Components***, 103 S.W.3d 720 (Tex. 2003). See notes under § 53.101.

§ 53.106. Affidavit of Completion

An owner may file an affidavit of "completion," which constitutes prima facia evidence of completion if it is filed not later than the 10th day after the date of completion. Section 53.106(d). A copy of the affidavit must be sent to each person who furnishes labor or materials for the property and who furnishes the owner with a written request for a copy. Note that the date in the affidavit will not apply to any person to whom the affidavit was not sent as required by the statute. § 53.106(d). There is no deadline for submitting a request for such an affidavit to the owner. Those traditionally working at the end of a project would gain an advantage by routinely sending such a request letter at the beginning of their work. Note that for all subcontracts where the original contract was entered into on or after September 1, 2011 this affidavit must contain a statement that the claimant may not have a lien on retained funds unless the claimant files a lien affidavit not later than the 40th day after the date the original contract was completed. § 53.106(a)(6).

- *A form for this request is provided in the Forms section behind the blue tab. (See FORM #PRIV012 for subcontracts where the original contract was entered into before September 1, 2011 and see FORM #PRIV012A for subcontracts where the original contract was entered into on or after September 1, 2011.)*

§ 53.107. Notice of Termination

This new section will correct some of the unfairness perceived in the ***Page v. Structural Wood*** *case cited above, requiring owner to notify subcontractors and suppliers when the general contractor is terminated or has abandoned the project so they do not lose their lien rights. After the 2011 Legislative session this Notice must provide specific information that claimants need in order to perfect their lien rights as well as a statement that the claimant may not have a lien on*

retained funds unless the claimant timely files its lien affidavit. This new requirement applies to contracts entered into on or after September 1, 2011.

SUBCHAPTER F. PRIORITIES AND PREFERENCES

§ 53.121 Preference Over Other Creditors

This section appears to give a straightforward preference to subcontractors, laborers and materialmen over other creditors of the original contractor. ***Exchanger Contrs., Inc. v. Comerica Bank – Tex.*** *(In re* ***Waterpoint Int'l, LLC****) 279 B.R. 209 (S.D. Tex. 2002) held that a perfected "subcontractor's lien is superior to a secured interest" under this section. However, see In re* ***Huber Contracting, Ltd.****, 347 B.R. 205 (Bkrtcy W.D. Tex. 2006) holding to the contrary that this section only gives a preference over unsecured creditors.*

§ 53.123. Priority of Mechanic's Lien Over Other Liens

Section 53.123 has been interpreted to give Mechanic's and Materialmen's Liens priority over a prior filed deed of trust with regard to improvements on the real property that are "removable."

It has long been held that "removable" items are materials that can be removed without injury to the portion of the structure it is attached to. ***Dallas Plumbing Co. v. Harrington****, 275 S.W. 190 (Tex. Civ. App.—Dallas 1925, no writ). It has more recently been required that the items be removable without injury to the item itself and without opening the structure to the elements.*[16] *However, it is not necessary to show that the claimant will realize an "economic benefit" from the removable.*[17] *In order to qualify as a removable, the material must be so "affixed" to the property as to no longer qualify as personal property. For example, a refrigerator attached to the structure only by a plug and water hose, is not so affixed as to qualify as a removable. Any claim for such items of personal property must be perfected under the UCC. On the other hand, a garbage disposal connected to the sink and sewer is sufficiently attached to the real property to qualify as a removable. What goods typically qualify as removables? A creative claimant can argue for a broad application of the term. Arguments can be made that conduit, electrical wire, lighting fixtures, interior doors, hardware, trim and a wide range of other goods qualify as removable.*

Foreclosure of a deed of trust filed prior to the commencement of construction will extinguish mechanic's liens on the project.[18] *Advances made after inception of a mechanic's lien under a "future advances clause" of a prior filed deed of trust will have priority over the mechanic's lien.*[19]

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[16] ***First Nat'l Bank in Dallas v. Whirlpool Corp.***, 517 S.W.2d 262 (Tex. 1974); ***Exchange Savings & Loan Ass'n v. Monocrete Prop., Ltd.***, 629 S.W.2d 34 (Tex. 1982).

[17] ***Exchange Sav. & Loan Assoc. v. Monocrete Pty, Ltd.***, 629 S.W.2d 34 (Tex. 1982).

[18] ***Diversified Mortgage Investors v. Blaylock***, 576 S.W.2d 794 (Tex. 1978).

[19] ***Coke Lumber & Mfg. Co. v. First Nat'l Bank in Dallas***, 529 S.W.2d 612 (Tex. Civ. App.—Dallas 1975, writ ref'd).

The right to removables becomes significant when the deed of trust lender forecloses on the project in question. The lender's interest is junior to any lien claim regarding removables. However, the interest in removables are often subordinated by agreement to the deed of trust lender. Subordination agreements have been enforced by the courts.

After foreclosure by the lender on the property, in the absence of a subordination agreement, the lien claimant may rely on his superior claim against removables to recover on his lien. Technically, the claimant's remedy is the right after a judicial foreclosure, to have a sheriff or constable remove the removables for resale. Since it is often more expensive for the lender to pay to reinstall the material threatened with removal than to pay the claim itself, the threat of such action usually results in a negotiated payment.

Is the claimant's priority only in removables the claimant installed or does it extend to all removables on the project? If the former, then those persons providing work that is not removable, such as painters, are prejudiced. In ***Sikes, Inc. v. L&N Consultants, Inc.,***[20] *a general contractor claimant was allowed a preference on removables even though some of the removables had been supplied by subcontractors. Recent cases have declined to allow a subcontractor to claim a preference for removables that they did not supply.*[21] *However, there is support in the case law for the proposition that removables need not consist exclusively of materials furnished by the claimant.* ***Wallace Gin Co. v. Burton-Lingo, Co.,*** *104 S.W.2d 891, 892 (Tex. Civ. App.—Austin 1937, no writ).*

Mbank El Paso Nat'l Ass'n v. Featherlite Corp., 792 S.W.2d 472, 475 (Tex. App.—El Paso 1990, writ denied). "Featherlite cites ***Citizens Fidelity Bank and Trust Company v. Fenton Rigging Company***, 522 S.W.2d 862, 863 (Ky. 1975) for the proposition that once the materialman's lien was filed, the debt was no longer an account receivable of the contractor owed by the owner but became a direct obligation of the owner to the subcontractor which had filed a mechanic's lien on the owner's property and therefore, the amount owed by the owner to contractor was not covered by the bank's prior security interest in the contractor's account receivables. There are no Texas cases on this exact point, primarily for the reason that, generally speaking, under Sections 53.123 and 53.124 of the Texas Property Code and the rules relating to priority of liens, inception of the mechanic's lien and relation back, the lien of a materialman, properly perfected, is superior and has priority over any other lien against the land or a security interest in goods or accounts that has not actually attached prior to the inception of the materialman's lien. Inception of the lien takes place when there first is a delivery of construction materials to the construction site and a properly filed lien relates back to that time. MBank's security interest could not attach to an account receivable until it had come into existence and therefore would not be a perfected security interest under Section 9.303 of the Tex. Bus. & Com. Code. Compare with Section 9.310 which gives a mechanic or artisan a priority of lien for work enhancing or improving goods in his possession over a prior perfected security interest. . . . At

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[20] ***Sikes, Inc. v. L&N Consultants, Inc.***, 586 S.W.2d 950 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).

[21] ***Dorsett Bros. Concrete Supply, Inc. v. Safeco Title Ins. Co.***, 880 S.W.2d 417, 423 (Tex. App. –Houston [14th Dist.] 1993, writ denied).

the time of its creation by the delivery of materials to DMR, the account receivable immediately became subject to the materialman's lien and MBank's security interest, while it would have attached while that lien remained an outstanding charge against the owner's property, was inferior to the lien except as to any amount owed by the contractor or subcontractor to the lienholder in excess of the latter's claim. (internal citations omitted)"

The following materials have been found to be removable:

1. Windows and doors that can be removed by temporarily taking out surrounding brick without causing ultimate damage to a residence, ***First Continental Real Estate Inv. Trust v. Continental Steel Co.*, 569 S.W.2d 42 (Tex. Civ. App.—Fort Worth 1978, no writ)** (the improvements were capable of being removed even though the nonremovable fixtures had to be dismantled in order to remove the removables);

2. Air conditioning units and heating units, ***American Amicable Life Ins. Co. v. Jay's Air Conditioning & Heating Inc.*, 535 S.W.2d 23 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.); *Houk Air Conditioning Inc. v. Mortgage & Trust Inc.*, 517 S.W.2d 593 (Tex. App.— Waco 1974, no writ)**;

3. Carpets, appliances, air conditioning and heating components, smoke detectors, burglar alarms, light fixtures, and door locks, ***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.)**;

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

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

6. Mirrors, ***Occidental Nebraska FSB v. East End Glass Co.*, 773 S.W.2d 687 (Tex. App.—San Antonio 1989, no writ)** (the mirrors were removable even thought they would be broken at the rate of 6% during the removal process);

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

8. A ticket booth, a speaker stand, and a screen at a drive-in theater. ***Freed v. Bozman*, 304 S.W.2d 235 (Tex. Civ. App.—Texarkana 1957, writ ref'd n.r.e.)**.

The following materials have been found to be non-removable:

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

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

3. Roof repairs, ***Citizens' Nat'l Bank v. Strauss,*** **69 S.W. 86 (Tex. Civ. App.—1902, writ ref'd);**

4. Window frames, ***McCallen v. Mogul Prod. & Ref. Co.,*** **257 S.W. 918 (Tex. Civ. App.—Galveston 1923, writ dism'd);**

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

6. Certain types of cabinets, ***Houk Air Conditioning v. Mortgage & Trust Inc.,*** **517 S.W.2d 593 (Tex. Civ. App.—Waco 1974, no writ);**

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

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

§ 53.124. Inception of Mechanic's Lien

Liens that have their inception prior to the filing of the deed of trust have priority.[22]

Section 53.124 places most lien claimants on equal footing, regardless of when their lien was filed, by establishing the inception date for a mechanic's lien as the commencement of construction or delivery of materials to the project. See § 53.124(a). However, for whatever reason, the Legislature has seen fit to carve out several broad categories of claimants from the application of subsection (a). Subsection (e) establishes that liens created under § 53.021(c),(d) or (e) establish priority with respect to other mechanic's liens based on the date of recording. Subsections (c), (d) and (e) include architects, engineers, surveyors, landscaping contractors, and persons who provide demolition services. Interestingly, subsections (c) and (d) require that the claim be under "or by virtue of" a written contract with the owner in order for the person to have a lien. There is no requirement of a written contract, generally, for lien rights granted under § 53.021(a) and (b). Does the addition of "contractor" and "subcontractor" under § 53.124(e) mean that architect, engineer, surveyor, and landscaper claimants under subsections (c) and (d) who are not retained directly by the owner will find that they have no lien rights against the property?

Section 53.124 also allows for filing of an "affidavit of commencement" with the county clerk of the county in which the property is located. The affidavit of commencement, if properly filed, is prima facie evidence of commencement for the purposes of lien inception dates set forth in § 53.021, except, of course, for the § 53.021 (c), (d) and (e) claimants.

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[22] ***University Sav. & Loan Ass'n v. Security Lumber Co.,*** 423 S.W.2d 287 (Tex. 1967).

Of course, it is recommended that the parties file an affidavit of commencement, to avoid any confusion later on.

Diversified Mortg. Investors v. Lloyd D. Blaylock Gen. Contractor, Inc., 576 S.W.2d 794, 802-03 (Tex. 1978). "[U]nder most circumstances, the commencement of construction of the improvements in the form of a building or a structure must entail the excavation for or the laying of the foundation. Accordingly, under the commencement of construction category in Article 5459 [the predecessor statute to the Property Code], the inception of the mechanic's and materialman's lien occurs only when the activity: (1) is conducted on the land itself; (2) is visible upon the land; and (3) constitutes either (a) an activity which is defined as an improvement under the Texas statute or (b) the excavation for or the laying of the foundation of a building or a structure. The second category of activities under Article 5459, Section 2(a), which can give rise to the inception of a mechanic's lien is 'the delivery of material to the land upon which the improvements are to be located. . . .'

"Accordingly, under such a definition only the delivery of certain types of material will constitute the inception of a mechanic's lien: specifically, either material which will be incorporated into the permanent structure or material which will be consumed or used up during the construction of the permanent structure. Therefore, in order for the delivery of material to constitute the inception of a lien, the court must find: (1) that there has been a delivery of material to the site of construction; (2) that such material is visible upon inspection of the land; and (3) that such material constitutes either (a) material which will be consumed during construction or (b) material which will be incorporated in the permanent structure.

"The facts indicate that Blaylock's activity on the Fort Worth project was insufficient to constitute commencement of construction or delivery of material prior to recordation of the deed of trust on March 9, 1973. The construction activities performed by Blaylock prior to March 9 consisted of the following: subsurface investigation, topographical survey work, the spreading of fill dirt, staking, erection of batter boards, excavation for a retaining wall, and erection of a sign. Such activities constitute merely preliminary or preparatory work for construction and do not constitute the actual commencement of construction."

SUBCHAPTER G. RELEASE AND FORECLOSURE; ACTION ON CLAIM

§ 53.151. Enforcement of Remedies Against Money Due Original Contractor or Subcontractor

Many creditors of contractors believe that if the contractor has contract work in progress it will be easy to collect the amounts owed through garnishment or similar collection procedures. Section 53.151(a) would appear to protect those monies from such collection efforts if subcontractors or suppliers to be paid out of those funds will be prejudiced. However, a recent case may cast doubt on this assumption.

The case of ***Exchanger Contrs. Inc. v. Comerica Bank-Tex.*** *represents a worst case scenario for a subcontractor. It is important, however, to note that the claimant failed to perfect its lien rights by filing proper notice and lien, and this appeared to be key to the court's analysis.*

Exchanger Contrs. Inc. v. Comerica Bank-Tex. (In re Waterpoint Int'l LLC), 330 F.3d 339, 348 (5th Cir. 2003). "The upshot of Exchanger's argument is that § 53.151 precludes a creditor of a contractor from ever collecting the proceeds of an account receivable in which the creditor has a security interest when the owner has not first ensured that all derivative claimants - regardless of their compliance with the provisions on lien perfection - have been paid by the contractor. However, if it were this easy for a subcontractor to trap a general contractor's receivable, there would be no need for the elaborate trapping and retention schemes found in Chapter 53. These provisions are designed to protect those subcontractors and materialmen who provide adequate notice to the owner of their presence and their rights to funds owed the contractor. . . .

"The courts interpreting article 5466, the predecessor to § 53.151, demonstrate the presumption (at least under article 5466) that a derivative claimant must comply with the lien perfection procedures in order to assert rights to funds held by the owner. These cases further persuade us to reject Exchanger's argument that § 53.151 was meant to overrule Interkal as inconsistent with the framework and function of Chapters 53 and 162.

"When faced with a situation where it could not go after funds in the hands of Exxon directly (because it was not in contractual privity with Exxon and failed to comply with the notice and filing provisions of Chapter 53), Exchanger crafted an argument to 'trap' the Waterpoint receivable still in the hands of Exxon (as envisioned in Chapter 53) without complying with the notice and filing procedures for perfecting a lien under Chapter 53. While perhaps rich in creativity, we find the argument lacking in merit. (internal citations omitted)"

Note: The court does not appear to have been aware of the legislative history behind this section, which appears inconsistent with the court's holding:

> SECTION 19: amends Section 151 of the Property Code to clarify claimant's rights to contract proceeds (including retained funds from, and funds earned, or to be earned by, the contractor) in preference to competing third-party creditors of the next highest-tier contracting party. By way of example, a party holding a security interest in receivables would only have a claim to any contract funds that would remain after their debtor-contractor paid all of its suppliers or subcontractors. This clarification is necessary because of confusion that has arisen under Section 162.004 of the Property Code. Although persons and entities enumerated in that section are not subject to the Trust fund statute, the amendments to Property Code Section 53.151 make it clear that the entities enumerated under Section 162.004(a)(1) and (2) may not divert construction funds from the beneficiaries of what would otherwise be trust funds.

Committee on Business and Commerce, BILL ANALYSIS, Tex. S.B. 1321, 71st Leg. (1989).

§ 53.152 Release of Claim or Lien

Section 53.152 requires a release of any lien claimed from a party receiving payment within 10 days after receipt of a written request for the release. The release must be in a form that can be filed of record. Therefore, any such release should contain an acknowledgment. See also Practice Notes to new Subchapter L. Do these new forms apply to a lien filed of record? Is a release of filed lien that does not comply with the forms under Subchapter L effective to clear title? Would adding language to the Final Unconditional Release form under Subchapter L referencing the release of a recorded lien render the Release invalid? The authors suggest owners obtain a final release utilizing the Subchapter L form and, if a lien is recorded, obtain a release of filed lien utilizing the form provided at PRIV026.

- *Form for release of a lien filed of record is provided in the Forms section behind the blue tab. (See FORM #PRIV026)*

Contractual "No Lien" Provisions:

Prior to the Legislature adding the new Subchapter L, Texas law allowed a contractor to expressly waive its right to a mechanic's lien, even before the right to file a lien arises. ***Barker and Branton Steel Works, Inc. v. North River Insurance Company****, 541 S.W.2d 294 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.). See also* ***Collinsville Manufacturing Co. v. Street****, 196 S.W. 284 (Tex. Civ. App.—Amarillo 1917 no writ). Such lien waivers were strictly construed and, absent clear language, the law presumes that an intentional waiver has not occurred. See* ***Shirley-Seif Motor Company v. Simpson****, 195 S.W.2d 951 (Tex. Civ. App.—Fort Worth 1946, no writ). This practice is now prohibited under § 53.283.*

§ 53.153. Defense of Actions

In most litigation involving enforcement of mechanic's liens by subcontractors, the owner, the contractor, and the subcontractor or materialman claimant are all parties to the suit. Such claims usually do not reach the courthouse unless there is some dispute as between the owner and the general contractor, or between the general contractor, and the subcontractor or supplier claimant, or both. Practitioners should keep in mind that § 51.153(a) does not condition the contractor's obligation to defend the owner on the owner's liability for non payment. Question: can the contractor be held liable for the owner's attorneys' fees in defense of a subcontractor/supplier lien claim, when it is determined after a trial on the merits that the owner's nonpayment was unjustified?

§ 53.154. Foreclosure

Section 53.154 requires that judgment of a court foreclosing a lien include an order of sale. Failure to contain an order of sale in the judgment of foreclosure would arguably leave the judgment creditor without the remedy of foreclosure.

While it is clear that a mechanic's lien may be "foreclosed only on judgment of court of competent jurisdiction," the Texas Supreme Court has now held that a binding arbitration

agreement can give the arbitrator power to determine the validity of the mechanic's lien in the first place. [23]

§ 53.156. Costs and Attorney's Fees

Although filing of a mechanics' lien affidavit often results in payment by the owner in exchange for a release of lien, this is not always the case. If the owner continues to refuse payment, suit must be brought to foreclose the lien. A suit must be brought to foreclose the lien within two years after the date of filing of the lien affidavit (one year on residential construction) or within one year after completion of the work under the original contract under which the lien is claimed, whichever is later.

For contracts signed before September 1, 2011, Section 53.156 provides that a "court may award" recovery of costs and reasonable attorneys' fees by the prevailing party. For contracts signed on or after September 1, 2011, this section now says the court "shall" award such costs and fees. It is not clear whether the award of attorneys' fees is a fact issue for the jury or a determination for the court at the end of the case. Does any inaccuracy in the amount of the lien place the claimant at risk of being assessed attorneys fees? Several practical circumstances lead to the very high risk of some inaccuracy in a lien claim. For example, calculating the precise amount of labor performed during a calendar month always involves a certain amount of subjectivity. Exactly what percentage of the lump sum contract was performed during the month? Further complicating the issue is that the typical subcontractor must submit his monthly bill by the 25th of the month leaving it to estimate the work that will actually be performed in the remaining days of that billing period.

Although attorney fees are "recoverable" in the suit to foreclose on the lien, these fees are not subject to payment out of the proceeds from the foreclosure sale since they are not labor or materials for which a lien may be perfected!

In cases where the owner, contractor, and a subcontractor/supplier claimant are in litigation together, what is the effect of Property Code § 53.153, requiring the contractor to defend the subcontractor suit against the owner? Can defense of subcontractor lien claims always be at the contractor's expense in a tri-party proceeding, given that § 53.156 allows recovery by the contractor against the owner in connection with the contractor's claim to enforce its mechanic's lien?

Note, the Texas Constitution may not authorize recovery of attorney's fees upon foreclosure of a lien on a homestead.

What if the majority of attorneys' fees incurred are a result of the trial court's error? See the ***Westco v. Westport*** *case below. Of course, there is always the chance that the court will deem the fact that Texas lien law is confusing as sufficient reason to deny attorneys' fees to either party. See the* ***Stoltz v. Honeycutt*** *case, cited below.*

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[23] ***CVN v. Delgado***, 95 S.W.3d 234 (Tex. 2002).

Wesco Distrib. v. Westport Group, Inc., 150 S.W.3d 553, 562 (Tex. App.—Austin 2004, no writ). "Wesco argues that the district court improperly awarded attorney's fees because Westport incurred the majority of those fees after and because of the court's error. The district court initially denied Westport's summary motion to remove an invalid or unenforceable lien, but later granted Westport's motion for partial summary judgment made on the same grounds: untimely notice because of insufficient postage. At the attorney's fees hearing, the district court acknowledged that granting the first motion would have resulted in lower attorney's fees. Wesco puts great emphasis on the court's comment: 'Some of this burden might need to be mine.'

. . . .

"Westport responds by identifying a variety of factors the district judge should consider in determining attorney's fees, including the quality of legal work, the time and effort required, the nature and intricacies of the case, the extent and type of the attorney's responsibilities, and any benefits from the litigation. Consideration of such factors is important in determining attorney's fees. Where, as here, the court took evidence and considered such factors, it did not act without reference to guiding principles.

. . . .

"Obviously, disposing of any case earlier would result in lower attorney's fees for all involved. Not all cases are resolved as efficiently as, in hindsight, they could have been. However, the touchstone of whether attorney's fees can be awarded is whether they were reasonable and necessary at the time the party incurred them. This determination of reasonableness is a question for the trier of fact. The district court found that the fees were reasonable and necessary, including those incurred between the initial summary motion and the motion for partial summary judgment. Wesco continued to pursue its lien. Westport had no choice but to continue to incur attorney's fees in defending its position. We cannot say that the district court acted unreasonably, arbitrarily, or without reference to guiding principles in so finding. We leave the award of attorney's fees undisturbed. (internal citations omitted)"

Stolz v. Honeycutt, 42 S.W.3d 305, 315 (Tex. App.—Houston [14th Dist] 2001, no pet.) "Stolz next contends that if the judgment of the trial court is reversed, he should be awarded attorney's fees in this case. Section 53.156 of the Property Code states that in any proceeding regarding a mechanics lien or various related matters, 'the court may award costs and reasonable attorney's fees as are equitable and just.' The trial court declined to award attorney's fees to either party. Given the confusion exhibited on the issues in this case and the basic failure of any of the parties to have followed the letter of the law on mechanic's liens, we agree with the trial court's assessment that neither Honeycutt nor Stolz is entitled to recover attorney's fees from the other. We therefore overrule this point of error."

§ 53.157. Discharge of Lien

Section 53.157 lists a series of ways a lien is discharged by record. Such a listing gives a title company assurance that a particular lien no longer clouds title to property if one or more of the means of discharge are satisfied. Unfortunately, some title companies refuse to recognize

discharge of a lien by virtue of filing a bond in compliance with Subchapter I, and require filing of a Subchapter H bond to indemnify against the specific lien, in addition to a payment bond filed under Subchapter I. Title companies cite, as an excuse for such a "belt and suspenders" approach, the potential for claims filed directly against the owner, notwithstanding a Subchapter I bond in place. However, as can be seen from the ***Stolz v. Honeycutt*** *case, cited below, even a Subchapter H bond does not always protect the owner from potential liability.*

Stolz v. Honeycutt, 42 S.W.3d 305, 315 (Tex. App.—Houston [14th Dist] 2001, no pet.). "Section 53.171 permits anyone to file a bond to indemnify against a mechanic's lien. Tex. Prop. Code Ann. § 53.171(a). An action on the bond must be filed no later than one year after the date on which notice of the bond is served. *Id.* § 53.175(a). Stolz obtained an indemnity bond from Universal Surety of America and gave notice to Honeycutt. As the trial court correctly ruled in the amended judgment, Honeycutt's failure to timely sue on the bond precludes recovery against the surety of the bond. See *Id.*; ***Roylex v. Langson***, 585 S.W.2d 768, 773 (surety was released because not sued until after statute of limitations had run). The question, then becomes, having failed to sue on the bond, did Honeycutt retain a viable claim for personal judgment against Stolz?

. . . .

"The owner may indeed obtain an indemnity bond, but the purpose of this bond is to remove the lien on the property. The bond protects absolutely someone acquiring an interest in the property, be he purchaser, insurer of title, or lender, from prosecution of the mechanic's lien. The bond does not supplant the underlying claim on which the lien is based. A claimant on a properly filed mechanic's lien has a right to pursue a personal judgment against the property owner that continues even after the owner obtains and records an indemnity bond to remove the lien. Attacking the bond should certainly be the preferred method, as collection would generally be much easier and more assured, but the right to pursue personal judgment remains. (internal citations omitted)"

§ 53.158. Period for Bringing Suit to Foreclose Lien

A lien is discharged by failing to institute suit to foreclose it in the county in which the property is located within the period dictated by § 53.158. If suit is brought in an improper venue and not challenged does the discharge still operate because of the language in § 53.157(2)? If so, there is a venue aspect to the statute of limitations. Since venue is subject to waiver, this should not be the result.

§ 53.159. Obligation to Furnish Information

Under Property Code Section 53.159, owners and contractors are required to furnish certain information to claimants needed to perfect their lien rights. An owner is required to furnish within ten days of a request a description of the property being improved legally sufficient to identify it. The owner must also state whether there is a bond in place and, if so, the name of the bonding company and a copy of the bond, whether there are any prior recorded liens or security interests on the property and the name and address of any persons having lien

or security interests. For all contracts executed on or after September 1, 2011, the owner must also provide the date on which the original contract was executed. § 53.159(a)(4). This requirement was added to aid claimants who are trying to determine whether recent statutory changes regarding requirements for perfecting liens on retainage are applicable to their claims or not. Owners who fail to provide the date the original contract was executed enable a claimant to file their lien affidavits as late as the 15th day of the 4th month following completion of the project without the necessity of sending notices under § 53.057. § 53.159(a) and § 53.159(g). But, this penalty will only apply for contracts executed between September 1, 2011 and September 1, 2013.

An original contractor is required to provide within ten days of a written request (1) the name and last known address of the person to whom the original contractor has furnished labor and materials for the project (usually the owner) , (2) whether the contractor furnished or was furnished with a payment bond and, if so,(3) the name and address of the surety, and(4) a copy of the bond. § 53.159(b). Original contractors are also required to provide the date on which the original contract was made to aid claimants filing liens on unpaid retainage for contracts executed on or after September 1, 2011. Section 53.159(c) sets out the information that subcontractors are required to provide upon written request. However, there are no penalties for the original contractor's failure to provide the requested information. Hence, it is prudent to send the request for information to the owner as well. §§ 53.159(a) and 53.159(g).

Similarly, an owner who has received notice of a claim may request that the claimant furnish a copy of any applicable written agreement, purchase order, or contract and any billing statement, or payment request reflecting the amount claimed. If requested, the claimant must provide the estimated amount due for each calendar month in which the claimant has performed labor and furnished material. § 53.159(d).

If the person from whom information is requested does not have a direct contractual relationship with the person requesting the information, the person requesting the information may be required to pay for costs to produce the information not to exceed twenty-five dollars.

- *Request forms are provided in the Forms section behind the blue tab.*

The effect of § 53.159(d) is uncertain. Although it requires the contractor, surety and/or claimant to furnish information regarding the claim within 30 days of a written request it fails to state any consequence for the failure to provide this information. Part of the information required from claimants is an estimated amount due for each calendar month in which the claimant has performed labor or furnished materials. It is often difficult to establish with certainty the amount of labor and materials provided for a particular month, particularly on large projects.

For a limited time (for original contracts executed up to September 1, 2013), owners are penalized for failing to provide the date on which the original contract was executed. § 53.159(g). For contracts executed after September 1, 2013, that penalty will be eliminated. The only other sanction set out in § 53.159 for failure to furnish the information required is liability for the reasonable and necessary cost incurred in procuring the information. Section 53.159(f).

What happens if an owner provided an improper legal description? It is uncertain whether an owner would be estopped from defending against the lien on those grounds or would only be liable for the costs of procuring a proper description. The latter would provide little consolation for a claimant whose lien was voided for lack of a proper legal description.

Section 53.159(a)(2) requires the owner to furnish information regarding whether there is a surety bond. This is not limited to the existence of a statutory payment bond but would presumably cover the existence of a "private" bond. Such a bond provides an alternative avenue for collecting past due monies, does not discharge lien claims, and does not automatically incorporate harsh statutory notice deadlines. However, private bonds should be examined for any special notice requirements or other restrictions they may include.

Section 53.159(a)(3) requires the owner to furnish information regarding whether there are any prior recorded liens or security interests on the real property being improved. Because § 53.124 makes the inception of most mechanic's liens the time of commencement of the project, does that mean that Section 53.159(a)(3) is only really a request for the deed of trust information or lien filings preceding the commencement of construction? The language of the statute would suggest otherwise. A full response should properly include all prior filed liens including those on the project in question. This, of course, will be a more time-consuming task for the owner.

Section 53.159(e) allows the party responding to the request to require up to $25.00 from the party requesting the information if that party is not in a direct contractual relationship with the responder. Once the information is provided there is little leverage to insure payment. Can the responder make payment a condition precedent to furnishing the information? Is the responder excused from responding within ten days by nonpayment? To insure payment, a responder could offer to provide such information immediately upon payment of designated costs and refuse to provide such information prior to receipt. However, conservative practice would dictate furnishing the information and requesting payment in the response letter.

Do actual costs include the administrative time of personnel in responding? If so, the costs will probably always exceed the $25.00 ceiling.

Caution: Requesting information necessary to perfect a lien does not toll (suspend) the time limit for filing a lien or notice except for the owner's failure to provide the date the original was executed. See § 53.159(g). However, this only applies to original contracts executed up to September 1, 2013. If you have requested information other than the date that the original contract was executed from the owner, and it is not provided, this will not extend the time for filing notice or a lien affidavit. Therefore, you should always allow enough time to obtain the required information elsewhere should the upstream contracting party fail to provide it.

§ 53.160. Summary Motion to Remove Invalid or Unenforceable Lien

An even quicker method of resolution may be through arbitration, if the parties provided for arbitration in a written agreement.

Dalton Contractors, Inc. v. Bryan Autumn Woods, Ltd., 60 S.W.3d 351, 354 (Tex. App.—Houston [1st Dist.] 2001, no pet.). "While the Property Code provides a mechanism for determining the validity of a lien, there is nothing to indicate that the issue may not also be resolved by an arbitrator, if the parties have agreed to arbitration. . . . ***Hearthshire Braeswood Plaza, Ltd. v. Bill Kelly Co.***, 849 S.W.2d 380, 390-91 (Tex. App.—Houston [14th Dist.] 1993, writ denied)] is a clear indication that arbitration is an appropriate mechanism for resolving the validity of liens, despite the existence of other avenues of legal recourse."

See also ***CVN Group, Inc. v. Delgado***, 95 S.W.3d 234 (Tex. 2004).

SUBCHAPTER H. BOND TO INDEMNIFY AGAINST LIEN

§ 53.171. Bond

A lien can be discharged by filing a bond to indemnify against lien as provided for in this subchapter.

Section 53.171 excludes contractual liens granted by the owner; therefore, a bond to indemnify against lien could not be used to discharge a deed of trust granted for repairs or improvements.

- *A form for a bond to indemnify is provided in the Forms section behind the blue tab. (See FORM #PRIV021)*

Do documents bonding around a lien give full value to the lien if the lien would have been cut off by a lender's foreclosure of the owner's property? The argument against this position is that the bond is conditioned on proof of the amount that the claimant would have been entitled to recover if the liens were valid and enforceable. Since the lien would have been cut off by the foreclosure except for a claim against removables, does this mean the claimant would be limited to any removable rights of the claimant?

Stolz v. Honeycutt, 42 S.W.3d 305, 311-12 (Tex. App.—Houston [14th Dist] 2001, no pet.). "Section 53.171 permits anyone to file a bond to indemnify against a mechanic's lien. Tex. Prop. Code Ann. § 53.171(a). An action on the bond must be filed no later than one year after the date on which notice of the bond is served. *Id.* § 53.175(a). Stolz obtained an indemnity bond from Universal Surety of America and gave notice to Honeycutt. As the trial court correctly ruled in the amended judgment, Honeycutt's failure to timely sue on the bond precludes recovery against the surety of the bond. (Citation omitted) The question, then becomes, having failed to sue on the bond, did Honeycutt retain a viable claim for personal judgment against Stolz?

. . . .

"The owner may indeed obtain an indemnity bond, but the purpose of this bond is to remove the lien on the property. *See* Tex. Prop. Code Ann. §§ 53.157, 53.171(a). The bond protects absolutely someone acquiring an interest in the property, be he purchaser, insurer of title, or lender, from prosecution of the mechanic's lien. *See* Tex. Prop. Code Ann. § 53.174(b).

The bond does not supplant the underlying claim on which the lien is based. A claimant on a properly filed mechanic's lien has a right to pursue a personal judgment against the property owner that continues even after the owner obtains and records an indemnity bond to remove the lien. Attacking the bond should certainly be the preferred method, as collection would generally be much easier and more assured, but the right to pursue personal judgment remains. (internal citations omitted)"

§ 53.172. Bond Requirements

Section 53.172 allows a bond to cover multiple liens. Aggregating several liens may allow a party to file one bond in one and one-half times the amount of the liens rather than filing several bonds in twice the amount of individual liens at much greater bond exposure and premium costs.

§ 53.173. Notice of Bond

Notwithstanding the statutory mandate, some county clerks refuse to send notice of the bond as required by § 53.173(a), but will only "issue" the notice and require the party bonding around the lien to send the notices. Does a notice sent by the party bonding around the lien under such circumstances have the same effect as one issued ***and sent*** *by the county clerk?*

- *A form for this notice is in the Forms section behind the blue tab. (See FORM #PRIV022)*

§ 53.174. Recording of Bond and Notice

Section 53.174 requires the bond, and notice of the filing of the bond to be filed of record. Failure to record the bond and notice prevents the bond from acting as a discharge of the lien. Section 53.174(b) (See, § 53.157(4)). Presumably an action to foreclose a lien could be pursued until all documents are properly recorded. However, if such a bond is filed, the claimant would be at some risk in relying exclusively on the lien claims pending proper filing of a return. The one year statute of limitations for suit on the bond, which is shorter than the limitation for suit on a lien action, runs not from the filing of the return but from notice to the claimant. Note: Notice is now accomplished by mailing by certified mail return receipt requested. As seen by the ***Stolz*** *case cited above under § 53.171, bonding around the lien does not necessarily provide a safe harbor for the owner.*

Stolz v. Honeycutt, 42 S.W.3d 305 (Tex. App.—Houston [14th Dist] 2001, no pet.). See note under § 53.171.

§ 53.175. Action on Bond

How are limitations determined if a claimant sends a series of notice letters covering the same claim? If an initial bond claim notice letter is followed up by a subsequent bond claim notice letter, will limitations run from the first letter or can suit be timed from the second letter? The possibility is a real one, as it is not unusual for a claim to have a series of notice letters. Of

course, the conservative approach, whether it is actually necessary under law, is to file based on the first perfection of any part of the claim.

Stolz v. Honeycutt, 42 S.W.3d 305, 311-12 (Tex. App.—Houston 2001, no writ). "Section 53.171 permits anyone to file a bond to indemnify against a mechanic's lien. Tex. Prop. Code Ann. § 53.171(a). An action on the bond must be filed no later than one year after the date on which notice of the bond is served. *Id.* § 53.175(a). Stolz obtained an indemnity bond from Universal Surety of America and gave notice to Honeycutt. As the trial court correctly ruled in the amended judgment, Honeycutt's failure to timely sue on the bond precludes recovery against the surety of the bond."

SUBCHAPTER I. BOND TO PAY LIENS OR CLAIMS

§ 53.201 Bond

§ 53.202. Bond Requirement

Under Subchapter I of Chapter 53, an original contractor who has a written contract with the owner may furnish a bond for the benefit of claimants. If a valid bond is recorded with the county clerk as required under § 53.203, the claimant may not file suit against the owner or the owner's property and the owner is relieved of their obligations under Subchapters D and E. See § 53.201.

Laughlin Envtl., Inc. v. Premier Towers, L.P., 126 S.W.3d 668, 671-74 (Tex. App.—Houston [14th Dist] 2004, no pet.). "If a payment bond meets the statutory requirements, a claimant may not file lien claims against the property owner or seek foreclosure of the claimant's lien on the owner's property. *See* Tex. Prop. Code § 53.201. Instead of looking to the property, claimants must look to the payment bond. *See* Tex. Prop. Code § 53.201(b). Premier asserts the Bond complies with section 53.202. The undisputed summary-judgment evidence shows otherwise.

"Nonetheless, although section 53.202 speaks in terms of mandatory requirements for statutory payment bonds, the Texas Property Code does not require perfect compliance with these requirements. The legislature included a savings provision in section 53.211(a), which allows a nonconforming payment bond to be treated as a conforming one as long as there is 'attempted compliance with [Subchapter I of Chapter 53 of the Texas Property Code]' or the bond evidences by its terms an 'intent to comply with [Subchapter I of Chapter 53 of the Texas Property Code].' Tex. Prop. Code § 53.211(a). Ordinarily, one who furnishes labor or materials for construction or repair under a private contract is entitled to a lien on the property if he is not paid. *See* Tex. Prop. Code § 53.021, et seq. The legislature sought to provide an owner a means of protecting his property from such liens while, at the same time, protecting those furnishing labor and materials for construction on the owner's property. Simply stated, the legislative quid pro quo for the forced surrender of these valuable lien rights is compliance or attempted compliance with the statute. In the absence of compliance or attempted compliance, the bond will not qualify for treatment as a statutory payment bond and thus will not protect the owner from suit or the property from liens.

. . . .

"Notably, the Bond does not contain any of the recitations one would expect to see if it were intended to be construed as a statutory payment bond. For example, the Bond does not recite that it is issued under the Hardeman Act or under §§ 53.201- 53.211 of the Texas Property Code or that it is the parties' intent to comply with this statute. Nor does the Bond incorporate the statute, track the statutory language, or recite that the statute has priority over any conflicting language in the Bond. Though Premier points to the Bond's title – 'Payment and Performance Bond' -- and its provision for the protection of subcontractors and materialmen who are not paid for services or materials provided to the general contractor as evidence of an intent to comply, these features are common to any payment bond; their presence can hardly be viewed as an indication of intent to create a statutory bond. If anything, the lack of conformity with the particulars of the statute suggests a lack of intent to meet the statutory criteria and instead tends to show that the Bond is a common-law payment bond.

"If there were an intent to comply, the terms of the Bond should show some semblance of compliance with the requirements of § 53.202 of the Texas Property Code. They do not. It is reasonable to expect that a bond intended to fall within the statutory payment-bond provision would use statutory terminology, such as 'prompt payment' or make reference to the '15 percent' in § 53.202(5). *See* Tex. Prop. Code § 53.202(5). The Bond does not. In fact, there is not even a hint of the drafter's awareness of the statute's terms and provisions, and certainly no attempt to track its language or incorporate its concepts.

. . . .

"The legislature set the penal sum for a statutory payment bond by reference to the original contract amount, stating that the bond must 'be in a penal sum at least equal to the total of the original contract amount.' *See* Tex. Prop. Code § 53.202(1). Under the plain wording of the statute, the original contract amount is the minimum amount for the penal sum of a statutory payment bond under § 53.202 of the Texas Property Code. The practical effect of a payment bond with a penal sum in an amount less than the total of the original contract could be significant. Payments under the bond will deplete the penal sum; if the penal sum is less than the contract amount, it might not be sufficient to cover all potential claims, i.e. 'provide full payment to laborers, subcontractors and materialmen . . . in lieu of an action against the owner and his property.' Consequently, any deviation in the required penal sum necessarily jeopardizes an owner's ability to show 'attempted compliance.' It would have been the work of a moment to provide an affidavit establishing that, though the Bond facially fails to comply with the statute, the parties intended to meet the requirements for a statutory payment bond. The record, like the face of the bond, is silent on intent to comply with the statute. (internal citations omitted)"

§ 53.203. Recording of Bond and Contract

Note that as part of the requirements a copy of the general contract must be filed as well as a copy of the bond. Section 53.203(a).

Section 53.203(b) eliminates the need to file voluminous technical documents such as plans and specifications which usually are incorporated by reference in the general contract.

Note that a certified copy of the contract and bond constitute prima facie proof of those documents both of which are usually essential documents to proving a claim at trial. Section 53.203(e). A claimant can use this provision to satisfy this the evidentiary portion of his burden of proof.

No time limit is prescribed for the filing of the bond. Arguably such a bond could be filed at a time after construction has begun on a project. Section 53.203(a).

§ 53.204. Reliance on Record

If a valid statutory payment bond is in place, liens filed on the project do not attach to the property but only create a claim against the bond. Section 53.201(b) and Section 53.204.

§ 53.205. Enforceable Claims

See comments on ***Pavecon, Inc. v. R-Com, Inc.****, 159 S.W.3d 219 (Tex. App.—Ft. Worth 2005, no writ), below under § 53.206.*

§ 53.206. Perfection of Claim

A claim can be perfected on a payment bond in one of two ways. First, the claimant may perfect a lien claim under Subchapter C. However, failure to include the "statutory warning" is not fatal if perfecting a bond claim.[24] *In the alternative, the claimant can provide the original contractor any applicable notices required under Subchapter C and, give to the surety on the bond, instead of the owner, all notices otherwise required to be given to the owner under Subchapter C. The conservative approach would be to perfect a lien claim under Subchapter C, AND send copies of all notices to the surety on the bond in addition to the owner and the original contractor.*

- *Forms for the notices are provided in the Forms section behind the blue tab.*

Section 53.206(b)(1) appears to create a gap in the notice laws so that no deadline exists for giving notice of a retainage claim to a bonding company. Subchapter I tracks the notice requirements set out for lien claims. To perfect a retainage claim under the lien laws, a claimant may treat retainage as unpaid monthly progress payments and send notices accordingly, or, in the alternative, send a § 53.057 notice at the beginning of the job. Since Subchapter I eliminates the parallel requirement of § 53.057 retainage notice to the bonding company, arguably there are no statutory notice deadlines for perfecting a bond claim for retainage.

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[24] ***Industrial Indem. Co. v. Zack Burkett Co.***, 677 S.W. 2d 493 (Tex. 1984).

Pavecon, Inc. v. R-Com, Inc., 159 S.W.3d 219, 223-24 (Tex. App.—Ft. Worth 2005, no writ). "Pavecon . . . argues that the bond only incorporates the provisions of property code 'sections 53.201 et seq.' and thus did not require Pavecon to comply with any notice provisions in earlier- numbered sections of the property code. . . .

"[Pavecon's] interpretation of 'the appropriate subchapter' in section 53.206 would render meaningless the bond's provision that a claimant's rights and remedies 'shall be determined in accordance with the provisions, conditions, and limitations of said Property Code.' IFIC, on the other hand, asserts that the 'appropriate subchapter' in section 53.206 refers to Subchapter C or K, and in this case, Subchapter C. We agree.

"IFIC further contends that section 53.206(a) applies Subchapter C's notice provision, which is found in section 53.056(b), to a subcontractor's claims against a surety bond. Section 53.056(b) requires a subcontractor to give the owner written notice of the unpaid balance of a claim by the 15th day of the third month after the month in which the materials or services were provided. Section 53.206(a)(2) requires the subcontractor desiring to perfect a claim against a surety bond to give this notice to the surety instead of the owner. IFIC asserts that the bond, which incorporates these statutory provisions, required Pavecon to give this notice to IFIC and that, because Pavecon failed to do so, Pavecon cannot recover on its claims against IFIC's bond. This construction gives effect to the bond provision and is also in accordance with the plain meaning of sections 53.206(a) and 53.056(b). (internal citations and footnotes omitted)"

§ 53.208. Action on Bond

A claimant must wait at least sixty (60) days after perfection of the claim on a payment bond for suit. Once the sixty (60) days is past, if the bond is recorded at the time the lien is filed, the claimant must sue on the bond within one year following perfection of the claim. If the bond is not recorded at the time the lien is filed, the claimant must sue on the bond within two (2) years following perfection of the claim. See § 53.208.

Note venue for a suit on a payment bond is mandatory in the county where the work is done. Section 53.208(c).

§ 53.211. Attempted Compliance

To qualify as a statutory payment bond it must meet the requirements set out in § 53.202. Failure to attempt to comply with any one requirement arguably causes the bond to fail as a statutory payment bond and operate only as a common law bond. This voids the lien protection typically afforded an owner by such a bond while leaving the surety still liable for claims. The argument has been successfully advanced that failure of the owner to endorse its approval on the bond - a seemingly ministerial task - caused the bond to operate only as a common law bond notwithstanding the attempted compliance provisions of § 53.211. Many payment bonds state on their face that they are being issued with the intent of complying with the provisions of the Property Code in an attempt to try and substantially comply through § 53.211(a)(2).

See comments regarding ***Laughlin Envtl., Inc. v. Premier Towers, L.P.****, 126 S.W.3d 668, 671-672 (Tex. App.—Houston [14th Dist] 2004, no pet.) under § 53.201 and 53.202.*

SUBCHAPTER J. LIEN ON MONEY DUE PUBLIC WORKS CONTRACTOR

§ 53.231. Lien

- *A form for this notice is provided in the Forms section behind the blue tab. (See FORM #PRIV025)*

City of LaPorte v. Taylor, 836 S.W.2d 829, 831-32 (Tex. App.—Houston [1st Dist.] 1992, no writ.). "Mechanic's liens can only be created against public buildings and grounds when the right is *expressly* conferred by the statutes. As a matter of public policy, liens are not permitted on public improvements where payment and performance bonds are required. . . A subcontractor on a public building is prohibited from asserting a mechanic's lien, the normal remedy available to him on private construction projects. Under § 53.231, a subcontractor may claim a statutory lien on money due the general contractor for public improvements where the prime contract does not exceed $25,000.00, but where the contract exceeds $25,000, no such statutory lien attaches to retained funds."

SUBCHAPTER K. RESIDENTIAL CONSTRUCTION PROJECTS

See Practice Notes under **Residential Lien Section** behind the yellow tab.

SUBCHAPTER L. WAIVER AND RELEASE OF LIEN OR PAYMENT BOND CLAIM

This new subchapter was added by the 2011 Legislature. It is not tied to the date of the original contract but is effective for all contracts entered into on or after January 1, 2012. For all contracts entered into before January 1, 2012, the old law still applies.

Contractors, subcontractors and suppliers can no longer be required to release or waive lien and payment bond claim rights on commercial projects unless they have been paid. §§ 53.281 and 53.282(a). Four new release and waiver forms have been statutorily mandated: (1) conditional release for progress billings form, (2) unconditional release for progress billings, (3) conditional release for retainage/final payment and (4) unconditional release for final payment. All four forms are required to be notarized. § 53.284. No one can be required to sign an unconditional release for payment of any kind unless the claimant or potential claimant actually received payment in that amount in good and valuable funds. § 53.284(a).

Further, potential claimants cannot be required to contractually waive their lien and bond claim rights unless it is for a residential project, the contract is in writing and is entered into ***before*** *any labor or materials are provided. § 53.282(a)(3). However, Section 53.282(c) does not apply to those providing materials only (i.e. no jobsite labor) on a residential project.*

Once a lien is filed or payment bond claim is made, a claimant may waive/release their rights using the written forms set forth in the statute. A claimant can not be required to sign an unconditional release for payment unless they have received the funds. An unconditional release will only be enforceable if there is evidence of payment. §53.282(a). If an owner is unable to obtain an unconditional release from a claimant, a conditional release should suffice to clear title to the owner's property if proof of payment such as a canceled check is included with the signed, notarized conditional release that is filed with the county clerk. § 53.281(b).

Although §§ 53.281 and 53.282 are somewhat self-explanatory, the lien forms required under § 53.284 present some problems. The four statutory forms include a blank in or at the end of the first paragraph following the words "to the following extent," which is then followed by "(job description)." It is not clear why "the extent" to which the lien is released is followed by the cue to fill in the "job description" in this blank. Without guidance from the legislature, it is suggested the claimant fill in this blank with a general description of the labor and materials furnished for which the release is provided and the date, in the case of a progress payment release, through which the release is to be effective. From the author's perspective, something like "to the extent of all labor and materials furnished in connection with [repeat description of scope of work][and, if applicable, through the last day of payment period]" would seem to work, if there are no other claims outstanding.

*Note that the scope of the release, which is defined in the second paragraph of both of the Conditional Waiver and Release forms states that the release covers a progress payment for all labor, services, equipment, or materials . . . "except for unpaid retention, pending modifications and changes, **or other items furnished** (emphasis ours)." Prior to the mandated statutory forms, many release forms, including the ones provided in the Texas Lien and Bond Claims Handbook, allowed for a carve out of retainage and pending claims. But, what is the effect of including "or other items furnished" in the progress payment release? Further, by including a generic exclusion for "pending modifications and changes," the Legislature has introduced ambiguity, where clarity might have been provided by a requirement that any claims <u>not</u> released should be specifically enumerated.*

Note that the new § 53.281 states the release is effective when "notarized." A simple acknowledgement may be notarized. But, to have the benefit of Property Code § 53.085, or its companion provision for residential construction, Property Code § 53.259, the statement must be in the form of an "affidavit." These Property Code sections provide for personal liability for false statements in a bills paid "affidavit." Thus, authors believe the signature line should include a jurat, not just an acknowledgement.

Note also that the new statutory forms do not contain an indemnity paragraph. Nor, do the new statutory forms include any representation or warranty that the claimant has not assigned and will not assign its accounts receivable in connection with the claim. Since the new statutory forms are mandatory, practitioners are cautioned against adding these types of additional paragraphs into the new forms. To the extent that a contractor or owner would prefer to have an additional indemnity available in connection with payments made, or wants an additional representation and warranty that the account has not been assigned, it is suggested

that these warranties and representations be contained in a separate document signed by the claimant at the time of payment.

Further, note that the party asserting a conditional waiver and release in defense of a lien claim bears the burden of proving payment in order to establish the validity and effectiveness of the conditional waiver and release.

Section 53.152 requires a release of any lien claimed from a party receiving payment within 10 days after receipt of a written request for the release. The release must be in a form that can be filed of record. Do these new Subchapter L forms apply to a lien filed of record? Is a release of filed lien that does not comply with the forms under Subchapter L effective to clear title? Would adding language to the Final Unconditional Release form under Subchapter L referencing the release of a recorded lien render the Release invalid? The authors suggest owners obtain a final release utilizing the Subchapter L form and, if a lien is recorded, obtain a release of filed lien utilizing the form provided at PRIV026.

Contractual "No Lien" Provisions:

Prior to the Legislature adding the new Subchapter L, Texas law allowed a contractor to expressly waive its right to a mechanic's lien, even before the right to file a lien arises. ***Barker and Branton Steel Works, Inc. v. North River Insurance Company****, 541 S.W.2d 294 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.). See also* ***Collinsville Manufacturing Co. v. Street****, 196 S.W. 284 (Tex. Civ. App.—Amarillo 1917 no writ). Such lien waivers were strictly construed and, absent clear language, the law presumes that an intentional waiver has not occurred. See* ***Shirley-Self Motor Company v. Simpson****, 195 S.W.2d 951 (Tex. Civ. App.—Fort Worth 1946, no writ). This practice is now prohibited under § 53.283.*

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(Private Projects)