

❖ The Construction Report ❖

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So You Filed A Mechanic's Lien, Now What?

The Texas Property Code, Chapter 53, requires a mechanic's lien claimant to jump hurdles to perfect a lien claim. Assuming you have properly done so, now what?

1. Write a Demand Letter.

The first rule of debt collection: "The squeaky wheel gets the grease." A demand letter puts your name and claim in front of the owner and those persons with payment authority. A demand letter is necessary to recover attorney's fees should you later have to file suit.

The demand letter should advise the owner that all or part of the debt owed is past due. Send a copy of the demand to the original contractor (the contractor with a contract directly with the owner). Notices must be sent by certified mail. The

***The first rule in debt collection:
The squeaky wheel gets the
grease. So, be the squeaky
wheel.***

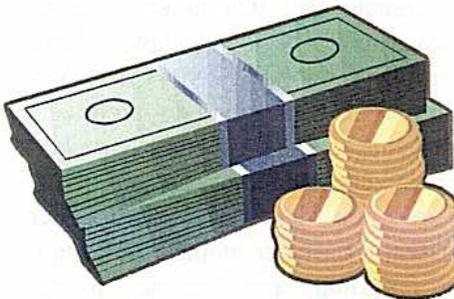
original contractor may give the owner written notice that the contractor intends to dispute the claim. If the original contractor does not do so within thirty days, he is considered to have assented to the demand, and the owner must pay the claim.

Do not demand a specific amount of interest unless you truly know Texas interest law. Overstating your interest claim could violate Texas usury laws, and result in a

loss of your claim, and liability to the deadbeat.

2. Follow Up on the Demand Letter.

Again, the squeaky wheel gets the grease. See if the persons with payment authority need supporting documentation. The owner is entitled to reasonable proof that the debt



claimed is owed, and that the lien was timely and properly filed. Again, voluntarily providing such documentation can ease the subsequent recovery of attorney's fees by showing the court that the owner had all the evidence it needed to confirm the debt owed.

3. Reduce Your Lien Claim if it is Overstated.

If your lien claim is overstated, reduce it to reflect the actual amount owed. Overstating the lien claim can subject you to a claim for a fraudulent lien under Chapter 12 of the Texas Civil Practice & Remedies Code. A person can be liable for a fraudulent lien if he files a mechanic's lien with knowledge that the lien is fraudulent. If the lien is

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Lawyer Quips and Quotes

How many lawyers does it take to change a light bulb?

A: How many can you afford?

When judges make mistakes, we should realize they are only human. It's too bad they don't agree.

Overheard in the supermarket checkout line: "Her lawyer is honest, but not enough to hurt her case."

It is hard to believe that a man is telling the truth when you know that you would lie if you were in his place.

— H.L. Mencken

In a desperate act, Felix, a bank teller, quietly let himself into the vault, filled his briefcase with \$100 bills, and then fled home. He quickly came to his senses and realized the enormity of his action.

He phoned his attorney and said, "I've stolen \$50,000 from the bank I work for! I don't know what came over me! What should I do?"

"Steal \$50,000 more and bring it to me," the attorney directed calmly.

Felix was astounded, but he did it, and after he brought her the cash, she wrote the following letter, which served to get the man off:

"Gentlemen: Your teller, Felix Fingers, took \$100,000 from your bank. The hard-pressed family, despite their most valiant efforts, was unable to raise more than \$50,000, which they offer to return if you will not prosecute . . ."

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overstated, war could wage over whether you knew that some or all of the lien claim was fraudulent.

Penalties for a fraudulent lien include the greater of \$10,000 or the actual damages that the lien caused, plus court costs, attorney's fees, and such exemplary damages as the court deems appropriate.

If you receive partial payment, you should reduce your lien claim to the appropriate amount remaining. Upon full payment, you should release your lien entirely.

4. File Suit on Time.

Chapter 53 of the Texas Property Code requires that you file suit to enforce your lien within two years of the last day a claimant may properly file a lien, or within one year after completion, termination, or abandonment of the original contract work, whichever is later.

If the lien concerns a residential construction project, you must file suit within one year after the last day a claimant may properly file a lien, or within one year after completion, termination, or abandonment of the original contract work, whichever is later.

The deadline for filing suit changes depending on the nature of the project or whether a bond has been posted.

If they post a bond to indemnify against your lien, you must file suit within one year of the date of service of the bond filing notice or the date that the underlying lien claim becomes unenforceable.

5. Request a Settlement Conference or Mediation.

Lawyers generally do not settle cases, trial dates do. But you cannot get to trial in most courts without first mediating. If you are going to have to mediate anyway, you might as well do so at the earliest opportunity. A debt collection axiom: Se-

cure your money as fast as possible at the least possible cost. Statistics indicate that a talented mediator settles ninety percent plus of his or her cases. In mechanic's lien cases, the court has discretion to award attorney's fees to the prevailing party. The prospect of having to pay for both sides' attorney's fees is a powerful settlement inducement.

What Has the Texas Legislature Done to Us Now?

All in all, the 80th Texas Legislature was fairly quiet, with little or no impact on mechanic's lien provisions. An assessment of one piece of legislation that affects design professionals follows.

Senate Bill 924 amends Texas Government Code Chapter 2252 (adding section 2252.904). The section tosses a lifeline to architects and engineers whose ship is rocked by a construction change order. Too often, when a change order arises, the owner blames the design professional, and schemes to recover the change order cost. In short, the section mandates that state agencies set up a process to evaluate suspected errors and omissions by design professionals before asserting a claim. The section essentially makes it fairly cumbersome for the agency to assert and process an error and omissions claim, lessening the chances that one will be made.

The section pertains to those agencies with rules or policies to deal with errors or omissions by registered architects and licensed engineers. If a state agency adopts a rule or policy to recover costs arising from an engineering or architectural error or omission by a private design professional, the agency must first notify the design professional at the time that the

The Editor's Corner

The Construction Report is published periodically by Quilling, Selander, Cummiskey & Lownds, P.C., to highlight construction matters of interest to at least the Editor, Brian W. Erikson. The information we provide is a community service and is not intended to displace the legal judgment of real (expensive) attorneys. We invite your comments. Write us c/o Brian W. Erikson, 2001 Bryan Street, Suite 1800, Dallas, Texas 75201. Call us at (214) 880-1844.

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agency identifies a problem with project plans or specifications. The agency must allow the design professional an opportunity to be involved in the resolution of the problem. The act requires that the agency create guidelines for distinguishing an error or omission from other reasons necessitating a change order, and provide a process for determining the cost of such errors or omissions.

The agency must evaluate the totality of project services by the design professional, including the level of quality, performance, and value provided over the term of the entire project. The act allows for internal management review without first requiring payment of the claim. The agency must create a process for tracking the cost of errors or omissions by agency employees. Finally, the act requires that the agency recognize that some errors, omissions, or changes are likely to occur during a design and construction project.



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trial, the jury and judge agreed, and declared that the lien was fraudulent. The court found the mechanic's lien to be fraudulent because there was no written contract, and the claimant did not qualify as an engineer. (Because the project was never built, the claimant had to be a design professional to be able to perfect a valid lien.) The claimant challenged the fraudulent lien finding, arguing that Chapter 12 was solely intended to remedy the "paper terrorism" wrought by the Republic of Texas ilk. The claimant contended that Chapter 12 was enacted to "protect citizens from persons, particularly members of an anti-government group called 'the Republic of Texas,' who were flooding courts and clerks' offices with the filing of fake documents purporting to be under laws other than the laws of the State of Texas."

The appellate court declared that Chapter 12 did not limit liability only to fraudulent court documents or records which were made, presented or used by anti-government groups. The court observed that Chapter 12 applies to any document or record that is "a fraudulent lien or claim" against real or personal property and is intended to be "given the same legal effect" as a court record or document "evidencing a valid lien or claim against real property."

The court held that Chapter 12 provided a civil action for injunctive relief and monetary damages to all persons owning an interest in real or personal property against which a fraudulent lien was filed, not just victims of anti-government groups filing purported liens from sham courts.

In the *Centurion* case, the claimant was not an engineering firm and had no written contract with the owner. Without both, the claimant had no valid mechanic's lien under Texas law. When the claimant filed a mechanic's lien anyway, the court felt that fraudulent lien liability was

appropriate.

In *Taylor Electrical Services, Inc. v. Armstrong Electrical Supply Co.*, 167 S.W.3d 522 (Tex.App. — Fort Worth 2005), Taylor was an electrical contractor on a project to replace interior electrical fixtures in two churches in Denton County, Texas. Armstrong supplied electrical materials. Taylor's purchase orders to Armstrong contained liquidated damages provisions charging Armstrong for each day that Armstrong delayed Taylor's progress due to untimely deliveries. Armstrong did not make all deliveries timely, and Taylor back charged Armstrong \$6,110 for the delays, deducting that amount from one of Armstrong's invoices. Armstrong did not cash one of Taylor's checks and filed mechanic's liens against both projects for the full amounts that Armstrong had invoiced. At the time of trial, Armstrong claimed that it was owed \$6,169.05.

Under Taylor's contract with the church, Taylor was required to defend and indemnify the church



against all liens filed against church property. To satisfy that obligation, Taylor retained legal counsel to demand that Armstrong release its liens. When Armstrong refused, Taylor filed suit to compel removal and to recover damages arising from the fraudulent liens.

At trial, the jury found that an Armstrong lien was fraudulent, and awarded Taylor \$13,262. On appeal, Armstrong challenged the jury's finding that Armstrong had filed a mechanic's lien with knowl-

edge that it was asserting a fraudulent lien. Armstrong also contended that Taylor lacked standing for a fraudulent lien claim since Taylor was not the property owner. By cross appeal, Taylor attacked the award to Armstrong of \$57,567.50 for attorney's fees.

On appeal, the appellate court first found that a contractor such as Taylor that was required to keep the property free from liens had standing to file a Chapter 12 fraudulent lien claim. The court then found that the evidence indicated that Armstrong knew that Taylor owed less money than Armstrong claimed when it filed a mechanic's lien against church property. The court then upheld the \$10,000 statutory penalty assessed against Armstrong for filing a fraudulent lien. Finally, the court reversed Armstrong's award of attorney's fees finding that Taylor was the prevailing party on the main issue in the case.

The teaching of the *Taylor* case is that a mechanic's lien claimant should only file a lien for the amount of money that is truly owed. Left undecided was the question of whether a lien claimant could face fraudulent lien liability simply because it ultimately lost a lien contest where there was an honest difference of opinion as to the lien's propriety. Chapter 12 should only impose liability where the claimant actually knew that the lien amount was overstated, and then refused to reduce it despite demands that it do so. There should also only be liability where the claimant did not exhibit good faith in the lien filing, regardless whether the claimant eventually lost at trial. Cases such as *Taylor* underscore the need for competent legal counsel to assess the risks and propriety of filing a mechanic's lien.

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A lawyer is a man who makes his dishonest clients look innocent — by contrast.

Let's File a Mechanic's Lien Just to Get Them to Talk

It happens frequently. A contractor performs work, and the owner does not pay. The owner stops talking — signaling that there's little chance of payment. The contractor just has to make the owner respond and pay the debt. So, the contractor files a mechanic's lien just to get the owner to talk. The contractor figures that he can always release the lien, and assumes there is no downside. But, Chapter 12 of the Texas Civil Practice & Remedies Code can bite.

In 1997, the Texas Legislature passed House Bill 1185, better known as the Fraudulent Lien Bill (now codified in Chapter 12 of the Texas Civil Practice & Remedies Code). At that time, the Legislature intended to curb a plague of "paper

terrorism" from groups like the Republic of Texas. In the 1990's, the Republic of Texas filed hundreds of frivolous liens against government officials. Prison inmates also filed bogus liens, targeting the prosecutors who helped put them in jail.



Others filed illegitimate liens to retaliate against the police officer who issued them a traffic ticket.

Chapter 12 established a statutory scheme for invalidating a fraudulent lien, enjoining further lien filing, and imposing civil liability. The act created civil monetary

penalties including the greater of \$10,000 or the actual damages caused by the lien, plus court costs, reasonable attorney's fees, and such exemplary damages as the court deemed appropriate.

Despite its roots and purpose to combat "paper terrorism", the act increasingly is being used against mechanic's lien claimants who simply overstate or improperly state their lien claims.

In *Centurion Planning Corp. v. Seabrook Venture II*, 176 S.W.3d 498 (Tex.App. — Houston [1st Dist.] 2004), a developer sued to remove a mechanic's lien. The lien had been filed by the firm that prepared a preliminary plat for a development that the developer had planned. The developer claimed that the lien was fraudulent because it had no legitimate basis under Texas law, and that the lien violated Chapter 12. At

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