

LIENS: PERFECTING AND ENFORCING

I. Introduction to Construction-Related Lien Claims

In days of old when knights were bold, an artisan would manufacture or repair an item, and then have the legal right to hold the item to ensure payment. If the artisan relinquished possession of the item, the artisan effectively released all right to any lien on the item. The key to the artisan's legal position was possession of the item. In other words, possession was more than nine-tenths of the law. Contractors, on the other hand, did not enjoy such rights. When a contractor constructed a building for an owner, the contractor invariably released possession of the building perhaps at nights or on weekends, and certainly at the completion of the project. When the contractor released possession of its work, the contractor legally released any lien against the property for the value of the work.

Mechanics' liens as we know them did not exist under the common law either in England or the United States. Although courts in equity had greater inherent ability to do justice, they too were powerless to enforce a mechanic's lien. If a contractor built a project for an owner, and then was not paid, the contractor had only a personal action against the owner, and no lien on the owner's property. Recognizing this inherent inequity, legislatures in the United States began passing remedial statutes to allow an enforceable lien to those who worked on real property.

The first mechanics' lien law in the United States was passed by the Maryland legislature in 1791 to promote development of the new city of Washington. Pennsylvania followed in 1803. Since then, every state in the country has passed some variation of mechanics' lien law. Mechanics' lien laws allowed contractors some security of payment and enticed them to invest capital in buildings

and other projects. Mechanics' lien laws have been credited with the expansive growth of cities and towns across the country in the nineteenth century.

The first mechanic's lien statute in Texas was passed in 1839, just three years after independence from Mexico. At first, mechanic's liens in Texas were remarkably easy to perfect -- there was no filing or notice requirement. Although today, Texas protects the right to a mechanic's lien under both the Texas Constitution and state law, perfecting a lien is no longer easy for subcontractors or suppliers.

A mechanic's lien is a legal attachment to real property which arises with the occurrence of specified conditions. A mechanic's lien is created only by the operation of law, not by grant or contract.

There are two schools of legal thought underlying mechanic's lien statutes — New York versus Pennsylvania. The fundamental difference between the views is the way in which they treat subcontractors' rights. Texas follows the New York approach, which limits the value of the subcontractor's lien to that portion of the contract price that the owner owes to the original contractor at the time that the lien notice is given, plus any amount which may become due thereafter. To succeed on a lien claim, the subcontractor must show that the owner owed the amount of the claim or more to the original contractor. The owner usually owes no more than the contract price. Under the New York scheme, the owner is not liable to claimants for amounts which he has already paid to the original contractor prior to the filing of liens. The owner can freely pay the original contractor without concern for potential subcontractor claims, provided that (in some New York-scheme states) the owner does not deliberately try to defraud subcontractors.

The Pennsylvania approach is much more subcontractor friendly. With this approach, subcontractors have a direct lien, not merely a derivative right, on the owner's property for the full value of the claim, regardless how much the owner has already paid to the original contractor. Under this view, the original contractor is considered the owner's agent for hiring and directing subcontractors. As a result, payments to the original contractor do not reduce the owner's liability to subcontractors. Owners in Pennsylvania-scheme states may face subcontractor claims far in excess of the original contract price.

A. Who is Eligible to Claim a Lien

The mechanic's lien statute, as first enacted in Texas, was intended to benefit those contractors with whom the owner directly contracted. Contractors were enticed to provide labor and materials on credit in return for some security on the owner's property,. By 1844, Texas subcontractors were granted limited lien rights, but they have never gained the level of rights which original contractors enjoy.

Texas statutes and cases, as well as the Texas Constitution, have historically differentiated between the rights of original contractors or master mechanics, and materialmen, subcontractors, laborers, and others, but today there are only two principal classes of mechanic's lien claimants: original contractors and subcontractors (in addition to special provisions for architects, engineers, and surveyors who prepare plans and plats). The law controlling mechanic's liens is set out in Chapter 53 of the Texas Property Code.

1. Original Contractor

An original contractor is defined under Texas law as “a person contracting with an owner either directly or through the owner’s agent.” Texas Property Code § 53.001(7). The owner under Chapter 53 is a person who owns any legal or equitable interest in the property sought to be charged with the lien. *Diversified Mortgage Investors v. Blaylock*, 576 S.W.2d 794 (Tex. 1978). An original contractor is not required to do any actual work on a construction project, only be responsible for it to the owner. Any person who contractually agrees with the owner to furnish the labor and materials used in the construction of an improvement is an original contractor, regardless whether subcontractors or vendors actually do the heavy lifting. *Wilson v. Hinton*, 116 S.W.2d 365 (Tex. 1938).

Contracting with the owner’s agent suffices to make one an original contractor. However, one who contracts to construct improvements as the owner’s agent, and not as an independent contractor, cannot be an original contractor. *Dallas National Bank v. Peaslee-Gaulbert Co.*, 35 S.W.2d 221 (Tex.Civ.App. -- Dallas 1931, writ dismissed). A contractor with a cost plus contract with the owner may be an original contractor, as long as the contract evinces intent that the contractor be independent of the owner and not be the owner’s agent. *Associated Sawmills, Inc. v. Peterson*, 366 S.W.2d 844 (Tex.Civ.App. -- Dallas 1963, no writ).

(a) Sham Contracts

Sometimes, the owner contracts with or arranges for a party to procure labor or materials for a construction project. That party need not perform any actual work, and ordinarily would be an

original contractor based on the direct contract with the owner. However, a sham contract exists if the owner can effectively control the party or if the contract lacked any good faith intent that the other party have responsibility for performing the contract. When a sham contract exists between the owner and its agent, then any person who furnishes labor or materials under contract with the agent is elevated in status to an original contractor, with all the rights of an original contractor.

For example, some owners will contract with a construction manager, who in turn contracts with trade contractors for labor and materials for the project. Under the owner-construction manager contract, the construction manager may not be responsible for any of the actual construction and is really the owner's agent for scheduling and coordination. In that case, the construction manager is not construed as the original contractor. Each trade contractors who contracts with the construction manager becomes an original contractor with concomitant rights of an original contractor.

2. Subcontractors

A subcontractor is a person who has furnished labor or materials to satisfy an obligation to an original contractor or to a subcontractor, where the obligation involves the performance of some or all of the work required by the original contract. Tex. Prop. Code §53.001(13). An original contract is defined as “an agreement to which an owner is a party directly or by implication of law.” *Id.* at § 53.001(6). The term “work” means “any part of construction or repair performed under an original contract.” *Id.* at § 53.001(14). Translating these definitions, the term “subcontractor” includes anyone who provides labor or material under a contract with an original contractor or another subcontractor, where the labor or material forms any part of the construction or repair

required under an agreement to which the owner is directly or impliedly a party.

To define the term “subcontractor,” the statute unfortunately uses the very term to be defined. This causes some confusion as to whether the term subcontractor is limited to only those who have contracted either directly with the original contractor or with one who has contracted with an original contractor. In other words, one could construe the statute to exclude liens for third-tier subcontractors, that is, those who have contracted with a sub-subcontractor to a subcontractor to an original contractor. However, a third-tier subcontractor becomes a “subcontractor” under the Property Code because it is furnishing labor or materials to fulfill an obligation to a subcontractor, the second-tier subcontractor. A provider to the third-tier subcontractor would be in a similar position, as would the fourth-tier provider, and all lower tier providers. Under Tex. Prop. Code § 53.021(a), anyone furnishing labor or material under a contract with any higher tiers is entitled to a lien if the work performed is required by the original contract for the project.

3. Others

It appears from the Property Code that anyone who furnishes labor or material for a specific project for some part of the work required by an original contract is entitled to a lien. It matters not whether the person to whom it is furnished is a supplier or a contractor. It matters not what particular tier the person occupies in the series of contracts pertaining to the project. Under Tex. Prop. Code §53.021, the class of persons entitled to a lien is defined broadly to include anyone who furnishes labor or material “under or by virtue of a contract with the owner or the owner’s ... contractor, or subcontractor.”

Architects who were engaged not only to design a structure, but also to supervise the

construction of a building, have historically been entitled to a mechanic's lien because they were expending labor for the erection of the improvements. Today, an architect, engineer or surveyor is entitled to a lien for the mere preparation of a plan or plat, without regard to supervision of construction, if he or she complies with the requirements of Tex. Prop. Code §53.021(c).

B. Defining What Property is Subject to Lien

A mechanic's lien attaches to privately owned real estate, that is, houses, buildings, fixtures, and improvements for which labor or materials were provided, or for which services were furnished. A mechanic's lien cannot attach to publicly owned property. See Texas Property Code § 53.022(b). A constitutional lien attaches to the building or structure under construction and the land necessary to its enjoyment and use. Fee simple estates, leaseholds, and any other interest or estate in land are all potentially lienable.

The Texas Supreme Court has declared that a mechanic's lien attaches to whatever interest is owned in the land or improvement by the party contracting for the improvement or repair at the time of the contract. *Diversified Mortgage Investors v. Blaylock*, 576 S.W.2d 794 (Tex. 1978). If the owner of a fee simple estate contracts for improvements, the mechanic's lien arising from the performance of the original contract for those improvements will attach to the fee simple estate.

If the owner of a lesser estate in the land contracts for the improvements, it is only the lesser estate in the land to which the mechanic's lien attaches. For example, a construction contract with a lessee of land can only result in a mechanic's lien on the leasehold estate in the land or improvements because that is all that the lessee owns. Should the lease terminate and the

improvements become a permanent part of the fee simple estate, the rights of the lessee, and correspondingly, of his contractor, are lost by virtue of the landlord's reversionary rights in those improvements.

C. Issues of Personal Liability

1. Owner

The owner of real property may lose its property with a foreclosure of a mechanic's lien on the property. The owner of real property may also face personal liability under the Texas Property Code to mechanic's lien claimants.

The owner can be liable to the original contractor for the full value of the labor or materials furnished under a contract for improvements. The owner's liability to a subcontractor or any other lower tier claimant, however, is significantly less. Property Code § 53.084 sets out the extent of the owner's liability to a subcontractor or other lower tier claimant:

(a) Except for the amount required to be retained under Subchapter E, the owner is not liable for any amount paid to the original contractor before the owner is authorized to withhold funds under this subchapter.

(b) If the owner has received the notices required by Subchapter C or K, if the lien has been secured, and if the claim has been reduced to final judgment, 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. The owner is liable for that amount in addition to any amount for which he is liable under Subchapter E.

Translating the statute, the owner has two sources of potential liability. First, the owner must hold the ten percent statutory retainage for the specified time period. Second, the owner must not pay out money to the original contractor after the owner receives a notice of non-payment under Subchapter C. The owner's liability is not automatic. The claimant must submit the proper notice under Subchapter C. The claimant must properly file its lien affidavit, and provide notice of the filing to the owner and original contractor. The claimant must file suit timely and obtain a judgment for the amount allegedly owed. *Royal Palms Corp. v. A. Minella Plumbing Supplies, Inc.*, 355 S.W.2d 585 (Tex.Civ.App. — Houston 1962, no writ).

The mechanic's lien statutes do not create a debt from the owner to the claimant. Instead, the statutes merely appropriate, after compliance with the statutory requirements, as much of the money which the owner may owe to the original contractor, at and after the time of service of the notice upon it. The owner is also personally liable for the withholding and payment of the statutory ten percent retainage.

Importantly, the Property Code does not impose any liability on the owner for payments to the original contractor before receipt of the first statutory notice from a subcontractor or other claimant. Prior to receipt, the owner is perfectly free to pay out all of the contract amount to the original contractor, excepting, of course, the ten percent statutory retainage. Payment of ninety

percent of the original contract amount to the original contractor before any funds trapping notices deprives potential claimants of any right to the money.

Section 53.084(b) defines the owner's liability for post-authorization payments to the original contractor. The owner's liability is limited exclusively to perfected claimants. Any misstep by a claimant will defeat its claim. Any failure by the claimant to send the funds trapping notice by the 15th day of the third month to the owner, or to file its lien affidavit, or to provide notice of the lien affidavit filing to the owner and the original contractor, will disqualify the claim. *Crockett v. Sampson*, 439 S.W.2d 355 (Tex.Civ.App. — Austin 1969, no writ). But compare, *Don Hill Construction Co. v. Dealers Electric Supply Co.*, 790 S.W.2d 805 (Tex.App. — Beaumont 1990, no writ). In *Don Hill*, a sub-subcontractor timely sent a funds trapping notice to the owner. However, because the claimant did not send notice to the original contractor, the owner contended that it had no liability to the claimant for ignoring the notice, and continuing to pay money to the original contractor. The Beaumont Court of Appeals held that the only requirement for funds trapping under § 53.084 is notice to the owner, notwithstanding the further statutory step that the lien must have "been secured." The court simply rejected the owner's contention that the owner has no liability to a subcontractor unless the claimant also properly sent notices to the original contractor.

The owner has no defense to failing to withhold funds trapped with a proper and timely notice if the claimant has fulfilled its other Property Code obligations. In *First National Bank of Paris v. Lyon-Gray Lumber Co.*, 194 S.W. 1146 (Tex.Civ.App. — Texarkana 1917), *aff'd*, 110Tex. 162, 217 S.W. 133 (1919), the owner maintained that it had to pay the original contractor money after receiving funds trapping notices since without the money, the original contractor would fail and

the project would not be completed. The court held that the mere possibility that the original contractor might not complete the project without payment or that the owner may have to takeover and complete the project did not override the subcontractor's right to the trapped funds.

In *Texas Fidelity & Bonding Co. v. Elliott*, 195 S.W. 301 (Tex.Civ.App. — San Antonio 1917, writ refused), the court of appeals rejected an owner's excuse that money had to be paid to the original contractor after a funds trapping notice so that weekly payrolls could be met. In *W.L. MacAtee & Sons, Inc. v. House*, 137 Tex. 259, 153 S.W.2d 460 (1941), the court did not excuse the owner for paying the original contractor so that the contractor could pay some but not all of the subcontractors, after receipt of a funds trapping notice.

The owner's liability to subcontractors and other claimants is derivative of the debt that the original contractor owes to the claimant. If the original contractor owes nothing, then the owner owes nothing. In effect, the perfection of the claim operates as a writ of garnishment on money the owner has not yet paid to the original contractor. The funds trapping notice appropriates so much of the money in the hands of the owner as is then due and payable, or may become due and payable, to the original contractor to the extent necessary to satisfy the subcontractors' claims. *Lonergan v. San Antonio Loan & Trust Co.*, 101 Tex. 63, 104 S.W. 1061 (1907).

In sum, the owner is liable under the funds trapping statute to the same extent as the owner is to the original contractor. When an original contractor abandons the project and the owner incurs the cost of completion, the owner is entitled to use the trapped funds, and does not have to pay perfected claimants, since the owner has an offset against the trapped funds against the original contractor. *Lennox Industries, Inc. v. Phi Kappa Sigma Education & Building Ass'n*, 430 S.W.2d

404 (Tex.Civ.App. — Austin 1968, no writ).

Property Code § 53.101 details the retainage the owner is required to hold:

(a) During the progress of work under an original contract for which a mechanic's lien may be claimed and for 30 days after the work is completed, the owner shall retain:

(1) 10 percent of the contract price of the work to the owner; or

(2) 10 percent of the value of the work, measured by the proportion that the work done bears to the work to be done, using the contract price or, if there is no contract price, using the reasonable value of the completed work.

(b) In this section, "owner" includes the owner's agent, trustee, or receiver.

Each original contract controls its own retainage fund. That is, the owner's statutory retainage obligation is measured by the contract price the owner is to pay under each particular original contract, not the contract price for the entire building or project.

As the price of the original contract increases or decreases, the ten percent retainage must be recalculated. If the contract is abandoned, the calculation must be based on the value of the work performed. In *Dowdy v. Hale Supply Co.*, 498 S.W.2d 716 (Tex.Civ.App. — Fort Worth 1973, no writ), the original contract was for \$25,000. The owner had paid the contractor \$13,000, by the time that the contractor abandoned the project. The owner used the balance of the contract money to complete the project and, as a result, owed the contractor no further money. The value of the contractor's work was determined to be \$13,000. As a result, the only retainage the owner had to

retain was \$1,300, ten percent of the value of the work performed by the original contractor.

Although the owner may use trapped funds to complete a project, the owner must hold the retainage for subcontractors regardless how much it costs to finish the work. In *Lennox Industries, Inc. v. Phi Kappa Sigma Education & Building Ass'n*, 430 S.W.2d 404 (Tex.Civ.App. — Austin 1968, no writ), the court held that the plain letter of the law required the owner to maintain the statutory retainage despite the contractor's abandonment of the project. The owner, however, need only retain ten percent of the value of the contractor's work, not of the contract price.

The owner must hold the statutory retainage during the progress of the work, and for 30 days after the work is completed. *Id.* at § 53.101. An owner must withhold sufficient retainage from each payment to the original contractor to ensure that it is holding the proper amount of retainage. Under the statute, the owner must withhold from progress payments ten percent of the value of the work. The value of the work is measured by dividing the value of the portion of the work done by the value of the work to be done. If there is a set contract price, then the fraction derived from dividing the value of the work by the total contract price must equal ten percent. If there is no contract price, then the fraction is applied to the reasonable value of the work completed. It is the burden of the claimant to prove the appropriate amount of retainage which the owner should maintain, but did not. *Weaver v. King Ready Mix Concrete, Inc.*, 750 S.W.2d 913 (Tex.App. — Waco 1985, no writ).

The owner must hold the ten percent retainage until 30 days after the original contract work has been completed. Mandatory retainage is required only in connection with “work under an original contract for which a mechanic's lien may be claimed.” Tex. Prop. Code § 53.101. In other words, if the owner has contracted with several contractors to construct the project, each would be

an original contractor. The owner would have to retain 10% of each contract until 30 days after the work under that particular contract was completed. Significantly, a claimant under one original contractor could not reach retainage retained from another original contractor.

If no mechanic's lien is possible, then the owner need not retain any retainage. For example, in order to perfect a mechanic's lien for construction work on a person's homestead, the contractor must observe certain formalities (including filing a copy of the contract with the county recorder of mortgages and conveyances). Without honoring those formalities, a contractor and all those who furnish labor or materials for work on a homestead cannot perfect a mechanic's lien on homestead property. If a lien cannot be perfected on certain property, then the owner need not maintain ten percent (or indeed any percent) retainage. See, *Langford v. Reeves*, 478 S.W.2d 259 (Tex.Civ.App. — Tyler 1972, writ ref'd n.r.e.).

Mandatory retainage is also not required where all subcontractor liens have been released, *Mbank El Paso National Ass'n v. Featherlite Corp.*, 792 S.W.2d 472 (Tex.App. — El Paso 1990, writ denied), or where a payment bond under Section 53.201 has been properly issued. *Industrial Indemnity Co. v. Zack Burkerr Co.*, 677 S.W.2d 493 (Tex. 1984).

The retainage funds that the owner holds are for the benefit of any and all properly perfected retainage claimants on the project. Texas Property Code § 53.102 states:

The retained funds secure the payment of artisans and mechanics who perform labor or service and the payment of other persons who furnish material, material and labor, or specially fabricated material for any contractor, subcontractor, agent, or receiver

in the performance of the work.

In comparison, the lien on funds retained under Subchapter E (required retainage) is entirely for the benefit of subcontractors and suppliers and lower tier claimants. Persons with privity of contract with the owner (i.e. original contractors) have no statutory benefits under this Subchapter.

D. Fund Trapping Notices

Under the Texas Property Code, the owner is “authorized” to withhold funds otherwise owing to the original contractor if the owner receives a proper notice to trap funds. The owner is then required to retain such funds until the time for perfecting mechanic’s liens has passed, or, if perfected, until the claim is satisfied or released. Otherwise, the owner may be personally liable and its property subjected to any perfected lien. The owner’s liability is limited to the extent of funds that it pays to the original contractor after it has been “authorized” by the statute to withhold them. If the claimant makes a written demand on the owner for payment and sends a copy to the original contractor, the owner must pay that demand if the original contractor does not give the owner written notice, within 30 days after receipt of its copy of the demand, that it intends to dispute the claim.

Property Code § 53.081 provides:

- (a) If an owner receives notice under Section 53.056, 53.057, or 53.058, the owner may withhold from payments to the original contractor an amount necessary to pay the claim for which he receives notice.

(b) If notice is sent in a form that substantially complies with Section 53.056, the owner may withhold the funds immediately on receipt of the notice.

(c) If notice is sent under Section 53.057, the owner may withhold funds immediately on receipt of a copy of the claimant's affidavit prepared in accordance with Sections 53.052 through 53.055.

(d) If notice is sent under Section 53.058, the owner may withhold funds immediately on receipt of the notices sent under Subsection (e) of that section.

Subsection (a) details the effect of receipt of a subcontractor notice. The notice effectively "traps" funds in the owner's hands which the owner may then or subsequently owe to the original contractor. The owner may then withhold the trapped payments, without liability to the original contractor. If the owner is "authorized" to withhold payments, the money cannot then be paid to the original contractor without incurring potential liability to the subcontractors to the extent of such trapped funds.

The failure to withhold trapped funds is not unlawful, it simply results in certain specified legal consequences. The owner may use trapped funds as it wishes, but at the risk of having to pay subcontractors or other perfected claimants or having its property subjected to a mechanic's lien.

Funds are truly trapped by a funds trapping notice only if the claimant subsequently perfects its lien under the Property Code. If the claimant fails to file its lien affidavit within the prescribed time, the owner is no longer authorized (required) to withhold money from the original contractor.

If the claimant is in fact owed nothing, the claimant has no valid lien claim. However, the

fact that the original contractor has fully paid its subcontractors and suppliers is irrelevant to a remote claimant's claim. *Padgitt v. Dallas Brick & Construction Co.*, 92 Tex. 626, 50 S.W. 1010 (1899). In contrast, the owner must owe eventually something to the original contractor for a claimant to be able to trap funds. If an owner owed nothing to the original contractor at the time of the owner's receipt of a funds trapping notice, the claimant acquires an interest in nothing. *LeCouteur Bros. Stair Mfg. Co. v. Lyon-Gray Lumber Co.*, 110 Tex. 177, 217 S.W. 136 (1919).

E. Payment Bond Claims

The payment bond or "Property Code Payment Bond" (also called "Statutory Bond") is a payment bond posted by an original contractor (i.e., a contractor with a direct contract with the owner) which meets the requirements listed in the next paragraph. Bonds posted by subcontractors are not Property Code payment bonds. When a valid Property Code payment bond has been filed, subcontractors and suppliers cannot foreclose liens against the Project, or file suits against the owner, but must look to the bond as their security in case the contractor does not pay.

1. Requirements for a Property Code Payment Bond

The requirements for a valid Texas Property Code bond follow:

- ☞ The bond must be issued by a bonding company authorized and admitted to execute bonds in Texas.
- ☞ The "penal sum" of the payment bond must at least match the amount of the original contract price between the original contractor and the owner.

- ☞ The bond must be signed by both the original contractor and the bonding company.
- ☞ The bond must be conditioned on (i.e., guarantees) prompt payment for all labor and materials used on the project and payment for normal extras, not to exceed 15% of the contract price.
- ☞ The owner must endorse the bond with its written approval.
- ☞ The bond must be filed, together with a copy of the written original contract or memorandum of the contract, with the county clerk of the county in which the project is located.

2. Claims Against Property Code Payment Bond

The best way to perfect a claim against a Property Code payment bond is to follow all the requirements for filing a lien against the project. An alternate method for perfecting a claim against a Property Code payment bond is to provide the bonding company with the notices otherwise required for the owner to perfect a lien against the owner's property. Note the distinction here is that the notices which normally are to be given to the owner, must instead be given to the bonding company.

3. Claims on Non-Property Code Payment Bonds

Not all payment bonds qualify as Property Code bonds. For example, all payment bonds furnished by someone other than an original contractor (i.e., subcontractors) do not meet Property

Code requirements. Because of the unlimited variety of terms which may be included in non-Property Code payment bonds, a claimant must take great care in dealing with these bonds. The claimant should obtain and read the original contractor's or subcontractor's payment bond, as payment bonds may have terms which are more lenient or more strict than the Property Code bond, and may or may not allow recovery where recovery would be available on a Property Code bond.

F. Contractor's License Bonds

License bonds are not generally required of original contractors in Texas.

G. Owner, Lender, General Contractor - Who is the Real Interested Party?

The owner has liability which is theoretically limited to the full amount of the original contract, and no more. Provided that the owner abides by funds trapping notices and retainage notices, the owner should face no more exposure on a construction project than the full amount of the original contract. The lender has virtually no liability to subcontractors, suppliers, and other claimants on a construction project. The general contractor (known as the original contractor under the Property Code), however, faces much more exposure. The original contractor may have to pay twice or more for the labor and materials for a construction project.

It is no defense for the original contractor that it made payment to its subcontractor for particular work. If the subcontractor failed to pay its sub-subcontractors or suppliers, and the sub-subcontractors and suppliers perfect lien claims, the original contractor will have to pay again for the work.

The original contractor is also liable to reimburse the owner for claims made for payments to the original contractor. Property Code § 53.153.

II. Enforcement and Preparation of Litigation

A. Formal Requirements to Claim a Lien, Funds Trapping Notice, or Bond Claim

1. Original Contractor's Liens

(a) Constitutional Lien

The Texas Constitution provides for a lien. A constitutional lien is available only to those who have a contract with the owner. It protects prime or "original contractors," as they are referred to in the Property Code, but not subcontractors.

(b) Perfection of Constitutional Lien

A contractor does not have to comply with the notice provisions of the Property Code to enforce the lien against the owner. For the contractor to be protected against the rights of third parties, such as subsequent purchasers of the property, the contractor must see that the third party has notice of the lien. This may be accomplished by filing a lien affidavit. (See Private Form #6, attached to this section of the paper.)

(c) Original Contractor's Property Code Lien

In order to perfect a lien under the Property Code, an original contractor must file a lien affidavit not later than the 15th day of the fourth month following the month in which the original

contract has been: a) materially breached and thus terminated by the contractor or by the owner; b) completed; c) finally settled; or d) abandoned. The original contractor must also within 5 days after filing the lien affidavit send to the owner by certified or registered mail, addressed to the owner's last known business or residence address, a copy of the affidavit claiming lien.

(d) Definition of "Original Contractor"

An original contractor is one who has a direct relationship with the owner, either directly or through the owner's agent. A subcontractor has no contract with the owner, but may have a contract with, and may furnish the labor or material to an original contractor or to another subcontractor. The difference between an original contractor and a subcontractor is significant. An original contractor has very simple notice procedures. A subcontractor, whether first or second tier, has additional notice requirements. In addition, a subcontractor's lien only secures payment of funds trapped in the hands of the owner or retainage funds which the owner is required to keep by law.

2. Suppliers' and Subcontractors Property Code Lien and Bond Claims

Generally, a subcontractor or supplier, is dealing with one of the following situations:

1. There is no payment bond since bonds on private construction projects in Texas are optional. In this situation you only have your rights to a lien to secure payment of the "trapped funds" and/or the "10% statutory retainage fund".

2. The original contractor may have given the owner a payment bond. In this situation you can perfect a claim against the bond by giving the appropriate notices and/or by filing a perfected lien.

3. The subcontractor/supplier is dealing with another subcontractor who has provided a payment bond. In this situation you have lien rights against "trapped funds" or "statutory retainage" and a claim against the subcontractor's payment bond, and possibly a claim against the original contractor's bond.

A safe course of action is always to file notices and a lien in accordance with the requirements of the Property Code. Safer yet is to perfect and file a lien, and to furnish copies of the lien affidavit and notice letters to the payment bond surety, if there is one, by certified mail.

(a) Trapping Funds Due Under the Original Contract (Unbonded Projects)

The legal effect of a timely and proper notice of claim by a subcontractor or supplier to the owner is to "trap" funds due the original contractor in the hands of the owner. It is essential that a claimant "trap funds" because unless funds are trapped in the hands of the owner, the claimant's recovery under its lien is limited to his share, if any, of the original contractor's 10% statutory retainage being withheld by the owner. It is to a claimant's advantage to send notices to the owner as soon as a payment problem is evident. In addition, the claimant should send a written demand for payment (Private Form #5) to the owner and the prime contractor.

(b) Statutory Retainage Fund (Unbonded Projects)

During the progress of work under the original contract and for 30 days after that work is completed, the owner of an unbonded project is required to retain either 10% of the amount of each original contract or 10% of the value of the work, measured by the proportion that the work done bears to the work to be done, using the contract price or, if there is no contract price, using the reasonable value of the completed work. This retainage fund is for the benefit of claimants who have filed lien affidavits within 30 days after completion of the original contract and who have sent required notices. The 10% retainage requirement does not apply if there is a payment bond.

(c) Requirements for Subcontractors and Suppliers

(i) Claimants contracting with an original contractor

Optional Retainage Only Notice — for all persons contracting with the original contractor to furnish material, labor and/or specially fabricated material, a notice may be sent to the owner not later than the 15th day of the second month following first delivery of materials or the performance of labor after the agreement was made (see Private Form #1). Any claimant who fails to provide the optional retainage notice must provide notice to the owner of each month's retention billed but unpaid within the time requirements described in Paragraph (c)(iii) below.

(ii) Additional Notice for Specially Fabricated Materials

To perfect a claim for specially fabricated items, the claimant must send a notice to the owner (and to the original contractor if dealing with a subcontractor or another supplier) not later than the

15th day of the second month following the month in which the order was received and accepted (see Private Form #2); and when the material is delivered, give notice described in Paragraph (c)(iii) below (Private Form #4).

(iii) Notice for Labor and Materials Delivered

(Including specially fabricated materials and retainage if optional retainage notice not given).

Notice to owner (Private Form #4) and original contractor not later than the 15th day of the third month following each month during which labor or materials were furnished (DATE OF DELIVERY CONTROLS - NOT DATE OF INVOICE).

WARNING: If original contract is nearing completion, do not wait the full number of days as there may be no funds to "trap" in the owner's hands to insure your claim can be paid. To be safe, notice to the owner should be given no later than 30 days after completion of the original contract.

(iv) Filing Lien Affidavit (Private Form #6):

☞ You must file not later than the 15th day of the fourth month following the last month in which you provided labor or material; or

☞ If claim is for specially fabricated materials, the lien affidavit must be filed by the 15th day of the fourth month from the earliest of (i) the last month the material was delivered; or (ii) the last month material would normally have been required; or

- ☞ For a portion of the statutory retainage held by the owner, within 30 days after completion of the original contract.

- ☞ After you have filed the Affidavit with the county clerk of the county in which the project is located, you must send copies of the Affidavit by registered or certified mail to the owner and original contractor, at their last known business or residence address, within 5 days after filing.

WARNING: The safest practice is to be sure that the lien affidavit is filed no later than 30 days after completion of the original contract.

(d) Claimant's contract is with a subcontractor or a supplier

(i) Optional Retainage Only Notice

(Applicable to all persons contracting with a subcontractor or a supplier to furnish material, labor and/or specially fabricated material)

A notice may be sent to the owner and original contractor not later than the 15th day of the second month following the month of first delivery of materials or labor under the agreement providing for retainage (see Private Form #1). Any claimant who fails to provide the optional retainage notice must provide notice to the original contractor and/or owner of each month's retention billed but unpaid within the time requirements described in Paragraph (d)(iii) below.

(ii) For Undelivered Specially Fabricated Fabricated Materials

- ☞ Notice to owner and original contractor not later than the 15th day of the second month following the month in which the order was received and accepted. (Private Form #2).

- ☞ When material is delivered, give notice described in Paragraph (d)(iii) below.

(iii) For Labor and Materials Delivered including specially fabricated materials and retainage if optional notice not given

- ☞ Notice to original contractor (Private Form #3) not later than the 15th day of the second month following each month during which labor or materials were furnished;
AND

- ☞ Notice (Private Form #4) to owner and original contractor not later than the 15th day of the third month following each month during which labor and materials were furnished.

(iv) Filing Lien Affidavit (Private Form #6):

- ☞ You must file not later than the 15th day of the fourth month following the last month during which labor was performed or material was furnished; or

- ☞ If claim is for specially fabricated materials, file by the earliest date of (i) last month material delivered; or (ii) last month material would normally have been required; or
- ☞ If the original contract has been breached or terminated by the owner or prime contractor, or if the party with whom you contract commits a breach or terminates your sub-contract, file based on the date of the breach or termination.
- ☞ If claim is for a portion of the statutory retainage, file within 30 days after completion of the original contract.
- ☞ After you have filed the Affidavit with the county clerk of the county in which the property is located (Section 53.052(a)), you must send copies of the Affidavit by registered or certified mail to the owner's and original contractor's last known business or residence address. This notice has to be sent within 5 days after filing the Affidavit.

WARNING: The safest practice is to be sure that the lien affidavit is filed no later than 30 days after completion of the original contract.

(e) Enforcement

To enforce your lien claim you must file suit within two years after the date of filing your

affidavit claiming lien or within one year after completion of the prime/original contract, whichever is later. These time limits are strict and for a claim against a bond they are even shorter.

(f) How to Obtain Information

In order to properly notify the Owner and Original Contractor, and in order to properly file a lien, various items of information must be available to a claimant. The Property Code has a provision to make this process easier. The Property Code allows a claimant to obtain, among other things; (1) a legal description of the property from the owner; (2) a copy of any bond furnished to the Owner or furnished to the Original Contractor or to any Subcontractor; (3) information on whether there is prior liens filed on the property; and (4) the name and address of the Owner (Private Forms 7 through 9). You may be charged up to \$25 for asking for this information from a person with whom you do not have a contract, but if the information is not provided to you, you may recover your reasonable and necessary costs incurred in obtaining the information requested.

B. Preparing Mechanic's Liens, Funds Trapping Notices and Bond Claims

See the attached forms.

C. Investigating and Preparing a Proper File

To investigate a Property Code claim, one must focus on selected facts and documents. The dates, and more specifically the months in which the claimant performed labor or furnished materials

determine the proper date by which Property Code notices must be provided. Documents which show when labor was performed or materials were furnished can support or defeat a claim. Relevant documents may consist of daily reports, daily diaries, contractor's reports, inspection reports, shipping tickets, bills of lading, freight tickets, etc. These documents can be used to verify the month that the labor was performed or materials were furnished.

For example, a claimant may have sent an invoice on April 15, for labor performed during March. If the claimant is a direct subcontractor to the original contractor, notice to the owner to trap funds is due by the 15th day of the third month (here, June) after the month (here, March) in which the work was performed. Thus, the funds trapping notice would be due by June 15. However, if just the invoice was examined, a claimant may incorrectly think that April started the counting of months, and that the due date was July 15.

Change orders pose a more difficult problem. Often with change orders, the extra work is performed long before the change order is issued and the original contractor has a right to bill the owner for the work. Still, any claimant performing work, extra or not, must submit notices of non-payment by the 15th day of the third month (for direct subcontractors) or 15th day of the second month and the third month (for more remote claimants, that is, sub-subcontractors or suppliers to a subcontractor) after the month in which they performed the extra work.

Another class of documents to review is the notices to the original contractor and the owner. If the claimant is a direct subcontractor or supplier to the original contractor, the claimant will have funds trapping notices to the owner, notices of retainage to the owner (if the optional retainage notice was furnished), and notices of non-payment of progress payments or retainage. A claimant more

remote (sub-subcontractors or suppliers to subcontractors) will also have notices of non-payment directed to the original contractor by the 15th day of the second month after the month in which the work was performed.

Another class of documents to review is the lien affidavit, with its notices of filing directed to the owner and original contractor.

Finally, you must review the invoices of the claimant to ensure that the invoices correspond with the notices and the supporting documentation. If all of the documents correspond and coordinate with one another, and none are missing, then the investigation may be over. If documents are missing, you may be able to retrieve them, or some of them, from the owner or original contractor. The owner is required to furnish information about the project, and may be able to supply missing documentation.

D. Options for Enforcement

If all of the notices were properly and timely submitted, and the lien affidavit was properly and timely filed, you may then examine your options for enforcement. Once the owner is advised of the claim, you may have to do nothing further. The owner may ensure that the claim is paid from funds retained from the original contractor. Or the owner may apply pressure to the original contractor or withhold funds from the original contractor to ensure that the claim is paid.

The filing of a lien on the owner's property may violate a debt covenant that the owner has with its lender. As a result, the owner may have incentive to expedite payment to the claimant.

The filing of a lien may disrupt the owner's plan to convert from interim or construction

financing to permanent financing or simply to refinance the property. As a result, the owner may take steps to arrange for payment of the claim

The least favored option is, however, to do nothing. A claimant should write, telephone, and visit with the owner, the architect, and the original contractor on a regular and systematic basis to raise the profile of the claim and to draw attention to it. The squeaky wheel does truly get the grease.

If informal negotiations and brow beating are not successful, the claimant may have to file suit. The claimant has to file suit in any event to perfect the lien claim and to avoid the running of the statute of limitations. Suit to foreclose a Property Code lien must be filed by the later of (a) two years after the date of filing of the lien affidavit, or (b) one year after the completion of the work under the original contract. See Property Code § 53.158.

The filing of suit is the only way to foreclose on a mechanic's lien, although arbitration of the underlying debt may occur as a precursor to the suit. *Hearthshire Braeswood Plaza Ltd. Partnership v. Bill Kelly Co.*, 849 S.W.2d 380 (Tex.App. — Houston [14th Dist.] 1993, writ denied). A suit to foreclose a lien must be filed in the state where the property is located, despite the fact that contracts involving the property may have been signed elsewhere. *Nuclear Corp. Of America v. Hale*, 355 F.Supp. 193 (N.D. Tex. 1973).

Unlike a mortgage, a mechanic's lien cannot be foreclosed by a non-judicial sale of the property under an agreed power of sale. Even if a construction contract appeared to provide a mechanic's lien to a contractor, the lien created is at best, a contract lien, not a mechanic's lien, despite the language used to create the lien.

A mechanic's lien attaches against not only the house, building or improvement, but also

against the land on which they are situated or with which they are “necessarily connected. Property Code § 53.022. As a result, a mechanic’s lien may be enforced against the house or improvement alone, without regard for the land. In *Bankers Life Co. v. John E. Quarles Co.*, 88 S.W.2d 613 (Tex.Civ.App. — Dallas 1935), aff’d, 112 S.W.2d 1044 (Tex. 1938), the court held that a mechanic’s lien claimant held a first lien both on a removable building and the land on which the building was located. The court allowed the claimant to waive its right against the land, and to enforce its lien only against the removable building.

Likewise, a mechanic’s lien may attach to removables placed on the property under the original contract. The claimant may decide to exercise only its rights to remove fixtures which are easily detached from the project, and not foreclose on the land. For example, the contractor may have placed an air conditioning condensing unit on the roof of a project. The contractor may elect to threaten to remove the condensing unit to extract payment for its services. This approach works better in hot weather.

A lien claimant may seek to have a receiver appointed to foreclose on the liened property. The trial court has discretion to appoint a receiver based on a prima facie showing of the lien’s propriety, and the requisite statutory grounds for the receiver. The claimant may wish to have a receiver collect the rents on the liened property while the foreclosure proceeding progresses.

A lien claimant may file a declaratory judgment action under Chapter 37 of the Texas Civil Practice and Remedies Code. The Declaratory Judgments Act may be used to obtain a declaration from the court as to the propriety of a lien. However, the Declaratory Judgments Act may not be employed for a counterclaim for disputes already pending before the court. *Staff Industries, Inc. v.*

Hallmark Contracting, Inc., 846 S.W.2d 542 (Tex.App. — Corpus Christi 1993, no writ).

E. Preparing the Lawsuit

In preparing a foreclosure suit for a subcontractor or supplier to an original contractor, you should ordinarily include both the original contractor and the owner as defendants. You cannot foreclose on the lien without naming at least the owner of the lien land as a defendant. You should allege that you provided labor or materials for a particular construction project under an agreement to do so. You must set out the amount you are owed. You should allege that proper notices were furnished, and that a lien affidavit was filed.

You should sue for breach of contract, quantum meruit and unjust enrichment, foreclosure of the mechanic's lien, and attorney's fees. See the attached sample suit by a supplier to the original contractor.

III. Prosecuting and Defending Claims

A. Owner, Lender, Title & Bond Company Positions

1. Owner

A mechanic's lien claimant must show that its notices and lien affidavit were timely and proper and sent by certified mail to the appropriate persons or entities. The owner may defend against the claim by contesting each of these matters — the notices were not timely, did not cover each of the months in which the claimant provided labor or materials, or were not sent by certified mail to the appropriate persons or entities.

The owner may force the original contractor to defend the owner, at the original contractor's expense, from lien claims by the original contractor's subcontractors or suppliers. Property Code § 53.153(a). If the suit results in a judgment against the owner or the owner's property, the owner may deduct the amount of the judgment and costs from any remaining amounts due the original contractor under the original contract. *Id.* at § 53.153(b). If the owner has already paid all the money owing to the original contractor, the owner is entitled to reimbursement from the original contractor of any amount of the judgment and costs that the owner pays to the subcontractor for which the original contractor was originally liable. *Id.*

Regardless of whether the subcontractor obtains a judgment against the owner; the owner is entitled to reimbursement from the original contractor for the owner's attorney's fees and costs incurred to defend the subcontractor's claim. *Bettye-Jen, Inc. v. Riley*, 614 S.W.2d 623 (Tex.Civ.App. — Austin 1981, no writ).

If the owner paid the original contractor disregarding a funds trapping notice, the owner may have to pay the claimant again, and then seek reimbursement from the original contractor. If the owner failed to retain the statutory retainage for 30 days following the completion of the project, the owner may have to pay the retainage again to perfected claimants and seek reimbursement from the original contractor. If the original contractor is solvent, the owner may experience no ultimate out of pocket loss, aside from the owner's time and aggravation. If the original contractor is not solvent, the owner may have to make a demand on the original contractor's surety, if any, under the performance bond (for the original contractor's breach of contract by not paying for labor or materials) or the payment bond (for not paying for labor or materials).

The owner (or indeed the original contractor) may by a summary motion or proceeding have the court declare the lien invalid or unenforceable. The motion must be verified and state the legal and factual basis for the invalidity of the lien. Property Code § 53.160(a).

The grounds for objecting to the validity of the lien by summary motion are limited. Proper objections include:

- (1) notice of the claim was not furnished to the owner or original contractor as required by Sections 53.056, 53.057, 53.252, or 53.253;
- (2) an affidavit claiming lien failed to comply with Section 53.054, or was not filed as required by Section 53.052;
- (3) notice of the filed affidavit was not furnished to the owner or original contractor as required by Section 53.055;
- (4) the owner complied with the requirements of Section 53.101 and paid the retainage and all other funds owed to the original contractor before: (a) the claimant perfected the lien claim; and (b) the owner received a notice of the claim as required by this chapter;
- (5) all funds subject to the notice of a claim to the owner and the perfection of a claim against the statutory retainage have been deposited in the registry of the court and the owner has no additional liability to the claimant;
- (6) when the lien affidavit was filed on homestead property: (a) no contract was executed or filed as required by Section 53.254; (b) the affidavit claiming a lien failed to contain the notice as required by Section 53.254; or (c) the notice of the

claim failed to include the statement required by Section 53.254; and

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

At the hearing on the motion to invalidate the lien, the burden is on the claimant to prove that then notice of claim and affidavit were furnished to the owner and original contractor as required by this chapter of the Property Code. The burden is on the movant to prove that the lien should be removed for any other ground authorized by Section 53.160.

2. Lender

The owner's lender has no direct liability to a mechanic's lien claimant. However, the lender is concerned that its deed of trust and priority lien position may be behind or subordinated to that of the claimant. The lender may have demanded debt covenants from the owner in the loan documents to safeguard the property from liens. The filing of liens against the property may be an indication that the owner is no longer solvent or is having financial difficulties.

The lender may demand that the owner post or have the original contractor post a bond to indemnify against the lien. See Property Code § 53.171. With a properly issued bond to indemnify against a lien, the mechanic's lien is discharged against the owner's property, and attaches against the bond. *Id.* at § 53.171(c). The bond must:

- (1) describe the property on which the liens are claimed;
- (2) refer to each lien claimed in a manner sufficient to identify it;

(3) be in an amount that is double the amount of the liens referred to in the bond, unless the total amount claimed in the liens exceeds \$40,000, in which case the bond must be in an amount that is the greater of 1 ½ times the amount of the liens or the sum of \$40,000 and the amount of the liens;

(4) be payable to the parties claiming the liens;

(5) be executed by (a) the party filing the bond as principal; and (b) a corporate surety authorized and admitted to do business under Texas law and licensed by Texas to execute the bond as surety;

(6) be conditioned substantially that the principal and sureties will pay to the named obligees or to their assigns the amount that the named obligees would have been entitled to recover if their claims had been proved to be valid and enforceable liens on the property.

See Property Code § 53.172.

After the bond is filed with the county clerk, the county clerk is to issue a notice of the bond to all of the named obligees, with a copy of the bond. *Id.* at § 53.173.

If the owner were to default on its loan obligations to the lender, the lender may foreclose on its deed of trust. If the lender recorded its deed of trust and mortgage before any construction work began on the property, the lender should have a first lien on the property. One way to help ensure a first lien, is for the lender to have the original contractor and owner to execute an affidavit of commencement of construction, attesting to the date that construction began on the property. The lender will insist that the date construction began be after the date that the lender filed its deed of

trust and mortgage. If construction noticeably starts on the property before the lender records its deed of trust and mortgage, any mechanic's lien claimants will have a priority ahead of the lender. The inception of the mechanic's lien is the visible commencement of construction of improvements or visible delivery of materials to the land on which the improvements are to be located, and on which the materials are to be used. *Id.* at § 53.124.

If the lender does have a first lien (no construction started before the lender recorded its deed of trust and mortgage), the lender may seek to foreclose judicially, that is, by filing a suit and obtaining a judgment of lien priority in the lender's favor. Following the judgment, the lender may arrange for a sheriff's sale of the property. The buyer at the sheriff sale (often the lender, itself) will then enjoy the property free and clear of all mechanic's liens.

3. Title Company

The title company is charged with examining the chain of title for the property and pronouncing lien priorities. The owner and lender are most interested in their own respective priorities. The owner will generally require a fee simple ownership interest with no competing claims. The lender will generally require a first lien position to ensure that it may foreclose on the property if there is a default by the owner. The respective interests of the owner and lender are set out by the title company in a title commitment. However, the title company generally will not make judgment calls on lien priorities between lender and mechanic's lien claimants. Often, even with a bond to indemnify against liens, the title company will not make a legal conclusion as to the propriety of the bond. The title company often will require the owner to escrow the amount of the

lien claim in order to remove exceptions to the title commitment.

4. Bonding Company

There are two types of bonding companies which may be involved. The first is the one who issues a bond to indemnify against particular liens. With this sort of bonding obligation, the bonding company usually requires indemnity or collateral from the party requesting the bond, thus reducing or eliminating the bonding company's exposure. A bonding company in this position usually takes no active interest in the outcome of the mechanic's lien claim.

The second type of bonding company has issued a payment bond ensuring that the original contractor has paid for the labor and materials on the project. This surety is interested in the outcome of the mechanic's lien claim, as usually the bonding company will be a named defendant in the foreclosure suit. Often, the bonding company has to incur the cost of defending itself as the original contractor may be insolvent or in bankruptcy.

As the original contractor's surety, this type of bonding company enjoys all of the original contractor's defenses, as well as its own surety defenses. A mechanic's lien claimant in effect has to fight on two fronts. It must first prove that a debt is truly owed, and defeat any defenses or offsets that the original contractor or the surety may have. If there is no debt, there is no valid lien. Then, the claimant must prove that it properly and timely filed its notices and lien affidavit. The surety may defend on any and all of these fronts.

B. Special Issues for Suppliers, Subcontractors, Lenders, and Other Professionals

1. Suppliers

A supplier must show that its materials were incorporated into the construction project at issue. Simply having sold the materials to the original contractor or a subcontractor is not enough if the materials never arrived on the project or were never installed.

A supplier of specially fabricated material must provide notice to the owner by the 15th day of the second month after the month in which the claimant received and accepted the order for the materials. If the claimant did not contract directly with the original contractor, the claimant must give the same notice to the original contractor. The notice must contain (1) a statement that the order has been received and accepted; and (2) the price of the order. The supplier must then provide notice of non-payment under Section 53.056 to the original contractor by the 15th day of the second month (for derivative claimants) and to the owner by the 15th day of the third month (for both derivative claimants and those contracting directly with the original contractor). See Property Code § 53.058.

2. Subcontractors

A mechanic's lien affidavit is required by the 15th day of the fourth month after the month after the day on which the indebtedness to the claimant accrued. Property Code § 53.052. Indebtedness accrues on the last day of the last month in which the labor or materials in question were furnished. *Id.* at § 53.053(c). However, the owner is only required to withhold statutory retainage for 30 days after the work is completed. *Id.* at § 53.101(a). As a result, the claimant may

perfect a lien claim well after the owner has properly released all of the retainage to the original contractor. With no retainage money to be paid to the original contractor, the claimant will enjoy no share of the retainage. If the claimant furnished funds trapping notices, however, the owner is required to withhold money to cover those notices until after the time for filing a lien affidavit has passed. *Id.* at § 53.082.

3. Lenders

A little honored requirement for the release of retainage to the original contractor is the affidavit of completion. See Property Code § 53.106. An affidavit of completion is prima facie evidence of the date that work under the original contract was completed. The purpose of the affidavit of completion is to start running the 30 day window of time for the release of retainage. If the owner does not file an affidavit of completion with the county clerk by the 10th day after the project is complete, then the date of completion is the date that the affidavit is filed. Note, however, that a claim for retainage accrues on the last day of the month in which all work called for by the original contract has been completed, finally settled, or abandoned. *Id.* at § 53.053(e). This means that if the owner never files an affidavit of completion, a claimant's time for filing a lien for retainage never expires. This bomb is then allowed to continue ticking even after ownership of the property changes hands, and a new lender finances the property thinking that it has a first lien.

4. Other Professionals

Architects, engineers, and surveyors who prepare a plan or plat under a written contract with

the owner or the owner's agent, trustee or receiver in connection with the actual or proposed design, construction, or repair of improvements on real property or the location of the boundaries of real property have a lien on the property. Property Code § 53.021(c). The lien must be filed by the 15th day of the fourth month after the day on which the indebtedness accrued. *Id.* at § 53.052(a). The indebtedness accrues on the last day of the last month in which the labor was performed or the materials were furnished. *Id.* at § 53.053(c). However, the inception of the lien of an architect, engineer, or surveyor is the date of recording of the lien affidavit. *Id.* at § 53.124(e). The priority of this lien as compared with other mechanic's liens is determined by the date of recording. Significantly, a lien claimed by an architect, engineer, or surveyor is not valid or enforceable against a grantee or purchaser who acquires an interest in the real property before the time of inception of the lien. *Id.*

C. Bond Issues

1. Perfection of Payment Bond Claims

A claimant may perfect a claim against a payment bond claim in one of two ways. The claimant may provide the original contractor and the owner with all of the notices required under Chapter 53, and file the lien affidavit. The lien will attach to the payment bond, instead of the property, and the owner will have no liability to mechanic's lien claimants. Property Code § 53.201. Alternatively, the claimant may provide the original contractor all of the notices required under Chapter 53, and provide to the payment bond surety, instead of the owner, all notices required to be given to the owner. *Id.* at § 53.206.

2. Statute of Limitations

The statute of limitations for a bond to indemnify against a lien is (a) one year after the date on which the notice of the filing of the bond is served on the claimant or (b) after the date on which the underlying lien claim becomes unenforceable under Section 53.158 (suit must be brought within two years after the date of filing the lien affidavit or within one year after completion of the work under the original contract). See Property Code § 53.175(a). The statute does not specify whether limitations runs after the later of both (a) and (b), or the earlier of both (a) and (b). To be safe, file suit within one year of the serving of the notice of filing of the bond.

The statute of limitations for suit on a payment bond which is recorded with the county clerk is one year after the perfection of the claim. If the bond is not recorded at the time that the lien is filed, the claimant must sue on the bond within two years following perfection of its claim. *Id.* at § 53.208(d).

**FIGURE 1
PROPERTY CODE DEADLINES**

(1) MONTH LABOR PERFORMED OR MATERIALS DELIVERED	(2) LAST DATE FOR EARLY NOTICE TO ORIGINAL/PRIME CONTRACTOR BY CLAIMANT WHO DEALT WITH SUBCONTRACTOR	LAST DATE FOR FUND TRAPPING NOTICE TO OWNER AND ORIGINAL CONTRACTOR OR REGULAR NOTICE TO SURETY ON PROPERTY CODE BOND	(3) LAST DATE FOR FILING LIEN AFFIDAVIT (ASSUMING (1) IS LAST MONTH OF PERFORMANCE OR DELIVERY)
JANUARY	MARCH 15	APRIL 15	MAY 15
FEBRUARY	APRIL 15	MAY 15	JUNE 15
MARCH	MAY 15	JUNE 15	JULY 15
APRIL	JUNE 15	JULY 15	AUGUST 15
MAY	JULY 15	AUGUST 15	SEPTEMBER 15
JUNE	AUGUST 15	SEPTEMBER 15	OCTOBER 15
JULY	SEPTEMBER 15	OCTOBER 15	NOVEMBER 15
AUGUST	OCTOBER 15	NOVEMBER 15	DECEMBER 15
SEPTEMBER	NOVEMBER 15	DECEMBER 15	JANUARY 15
OCTOBER	DECEMBER 15	JANUARY 15	FEBRUARY 15
NOVEMBER	JANUARY 15	FEBRUARY 15	MARCH 15
DECEMBER	FEBRUARY 15	MARCH 15	APRIL 15

- (1) IF NOTICE PERTAINS TO SPECIALLY FABRICATED ITEMS THE DATE OF RECEIPT AND ACCEPTANCE OF THE ORDER CONTROLS NOTICE ON UNDELIVERED SPECIALLY FABRICATED ITEMS.
- (2) CONTRACTUAL RETAINAGE NOTICE TO OWNER AND/OR PRIME CONTRACTOR DUE.
- (3) SUBS AND SUPPLIERS SHOULD ALWAYS REMEMBER TO FILE AFFIDAVIT WITHIN 30 DAYS OF COMPLETION TO TRAP STATUTORY RETAINAGE.

Private Form #1 - NOTICE OF RETAINAGE AGREEMENT

 (1)

CERTIFIED MAIL:
RETURN RECEIPT REQUESTED

Dear Sir:

Our company is pleased to be involved in the construction of your (2) at (3) under an agreement with (4) your (5) . Our part of this project will be to furnish the (6) called for by the plans.

Our agreement provides that a portion of the contract price is to be retained until (7) .

The amount to be retained is (8) .

We are advising you that we have commenced supplying labor or material to your project and of the above terms of our agreement so that you will have the information and notice required by law. If you have any questions, do not hesitate to call us.

Sincerely,
 (9)
 (10)

cc: (11)

* * * * *

- (1) Letter addressed to the owner of the property being improved.
- (2) Indicate type of improvement.
- (3) Address of job.
- (4) Name of firm under whom you are working.
- (5) Status of that firm, such as "general contractor," "roofing subcontractor", etc.
- (6) Describe the labor and/or material that you will perform.
- (7) Insert time for paying retainage.
- (8) Amount or percentage of retainage.
- (9) Your firm name.
- (10) Name and capacity of person signing letter.
- (11) Carbon copy to the original contractor by certified mail unless you have a contract directly with the original contractor.

Private Form #2 - NOTICE OF SPECIALLY FABRICATED ITEM

_____(1)_____

CERTIFIED MAIL:
RETURN RECEIPT REQUESTED

Dear Sir:

Our firm is pleased to be involved in the construction of your (2) at (3) under an agreement with (4) your (5). Our part of this project will be to fabricate and furnish (6) for use as a component part of the construction as called for in the plans. This component will be reasonably unsuitable for use elsewhere. The order for this item has been received and accepted and the price to be billed to our customer is \$ (7).

We are advising you of the foregoing so that you will have the information and notice specified by law.

If you have any questions, please call us.

Yours very truly,

_____(8)_____
_____(9)_____

cc: _____(10)_____

* * * * *

- (1) Letter addressed to the owner of the property being improved.
- (2) Indicate type of improvement.
- (3) The address of the job, with street and city.
- (4) Name of company for whom you work.
- (5) Status of the person under whom you are working, such as "general contractor" or "roofing subcontractor", etc.
- (6) General description of the item being fabricated.
- (7) Contract price for the item being fabricated.
- (8) Name of your company.
- (9) Person signing letter and capacity.
- (10) Carbon copy to original contractor by certified mail unless the order was direct from the original contractor.

Private Form #3 - PRELIMINARY NOTICE TO ORIGINAL CONTRACTOR

____ (1) _____

Re: Job: _____ (2)
Owner: _____ (3)
Location: _____ (4)

Dear Sir:

We have furnished _____ (5) on the above job to your subcontractor, _____ (6). Our books show an unpaid balance due us on this job of \$ _____ (7) through the end of _____ (8).

We are giving you this notice in order to protect our rights under the mechanic's lien laws of Texas.

We wish to cooperate with both you and our customer in any way that would be helpful. Should you desire any additional information, please advise us.

Sincerely,

____ (9)
____ (10)

cc: _____ (11)

* * * * *

- (1) Letter addressed to the original contractor under whom you are working sent certified mail.
- (2) Name of project.
- (3) Owner's name.
- (4) Address of job--street, city and state.
- (5) Indicate generally what has been furnished.
- (6) Your customer.
- (7) Amount due.
- (8) Date of last billing.
- (9) Your firm name.
- (10) Name and capacity of person signing letter.
- (11) Your customer.

Private Form #4 - NOTICE TO OWNER AND ORIGINAL CONTRACTOR

_____(1)_____

CERTIFIED MAIL:
RETURN RECEIPT REQUESTED

Dear Sir:

We have furnished (2) to (3) , (4) on the construction in progress on your property at (5) . We have not been paid the amounts due us for the month of (6) in the amount of \$ (7) as shown by the attached statement which is made a part hereof. Under the mechanic's lien laws of Texas, a subcontractor or supplier of goods or labor is required to notify the owner of all claims which are not paid. Failure to give this notice may cause us to lose our rights under the mechanic's lien laws if the sums are not finally paid.

The law requires that we advise you that if our bill is not paid, you may be personally liable and your property subjected to a lien unless you withhold payments to the contractor for the payment of our statement or unless the bill is otherwise paid or settled.

Demand is hereby made for the payment of our claim from funds withheld by you as owner unless the contractor disputes this claim as required By law.

Should you have any question concerning our claim, please advise us. We will appreciate being advised if there is a dispute as to our claim from the contractor.

Sincerely,

_____(9)_____
_____(10)_____

cc: (11) Certified Mail Return Receipt Requested
 (12) Certified Mail Return Receipt Requested

* * * * *

- (1) Letter addressed to the owner of the property being improved and original contractor.
- (2) Indicate generally what has been furnished.
- (3) Name of the person to whom you furnished goods or labor.
- (4) Indicate status of person to whom you furnish, such as "contractor" or "subcontractor."
- (5) Address of the job--street number, and city.
- (6) Indicate the month or months during which work was done for which payment has not been received.

- (7) The amount due.
- (8) If you have already filed a lien affidavit or are doing so simultaneously insert: "We have elected to file an affidavit claiming a lien on your property and enclose a copy of the affidavit as filed."
- (9) Your company.
- (10) Person signing letter and capacity.
- (11) The general contractor, if not your customer.
- (12) Your customer.

Private Form #5 - DEMAND FOR PAYMENT

_____(1)_____

Certified Mail
Return Receipt Requested

Dear Sir:

We have furnished _____(2)_____ to _____(3)_____, _____(4)_____ on the construction in progress on your property at _____(5)_____. We have not been paid the amounts due us for the month of _____(6)_____ in the amount of \$(7).

Demand is hereby made for the payment of our claim from funds withheld by you as owner.

Should you have any question concerning our claim or this notice, please advise us. We will appreciate being advised if there is a dispute as to our claim from the contractor.

Sincerely,

_____(8)_____
_____(9)_____

cc: _____(10)_____
_____ (11) _____

* * * * *

- (1) Letter addressed to the owner of the property being improved sent by Certified Mail
- (2) Indicate generally what has been furnished.
- (3) Name of the person to whom you furnished goods or labor.
- (4) Indicate status of the person to whom you furnish, such as "contractor or "subcontractor"
- (5) The address of the job, street, number and city.
- (6) Indicate the month during which work was done for which payment has not been received.
- (7) The amount due.
- (8) Your company.
- (9) Person signing letter and capacity.
- (10) Send carbon copy to general contractor.
- (11) Send carbon copy to your customer, if other than the general contractor.

Private Form #6 - AFFIDAVIT CLAIMING LIEN

THE STATE OF TEXAS :
AFFIDAVIT CLAIMING LIEN
COUNTY OF (4) :

BEFORE ME, a notary public in and for the State of Texas, on this day personally appeared the undersigned, who being by me duly sworn, on oath states:

1. My name is (1). I am the (2) of (3) ("Claimant") and am authorized to make this affidavit on its behalf as the sworn statement of its claim.

2. Claimant furnished labor and/or materials for the improvement of the following described land in (4) County, Texas:

(5)

3. The labor and/or material was furnished for such improvement to (6).
(7).

4. (8) is the original contractor for such improvement.

5. (9) is the owner or reputed owner of the land and improvements thereon.

6. The kind of work done and/or material furnished by claimant is (10) and is made up of the items shown on the attached Exhibit "A" which reflects the dates of Performance and/or delivery.

7. The amount unpaid for such furnishing and due and owing to claimant is \$ (11), which is true, correct, and just, with all just and lawful offsets, payments, and credits known to affiant allowed.

8. Claimant's address is (12).

Claimant claims a lien against all the above described land and improvements thereon in the amount shown above pursuant to Chapter 53 of the Texas Property Code, and makes this sworn statement of claim in support thereof.

(3)

By: (1)

Subscribed and sworn to before me by the said (1) this day of , 19
, to certify which witness my hand and seal of office.

Notary Public - State of Texas

THE STATE OF TEXAS :

COUNTY OF :

BEFORE ME, the undersigned authority, on this day personally appeared (1) ,
 (2) of (3) , known to me to be the person and officer whose name is subscribed to the
foregoing instrument, who after being by me duly sworn acknowledged that the statements contained
above are true and correct and that he executed the same for the purposes and consideration therein
expressed, in the capacity therein stated, and as the act and deed of said (13) .

Given under my hand and seal of office this day of , 19 .

Notary Public - State of Texas

Typed or Printed Name of Notary Public

My Commission Expires:

* * * * *

- (1) Name of the person signing the affidavit.
- (2) Position of the affiant with the claimant, such as credit manager, controller, owner, partner, president, etc.
- (3) Name of claimant.
- (4) County in which the land is located.
- (5) Legal description of the land, e.g.:
 - (a) Lot 1, Block 2, Jones Subdivision of the City of Austin, per plat recorded in Volume , Page , Plat Records, Travis County, Texas; or

- (b) The 50 acres covered by the deed from Frederic N. Freeloader to Horace P. Homeowner, dated _____, recorded in Volume _____, Page _____, Deed Records, Travis County, Texas, which is referred to for a more complete description.
- (6) Name of the general contractor or subcontractor for whom work was done or material was furnished. If a subcontractor, add "a subcontractor."
- (7) If the work or material was furnished under a written contract, it is preferable to attach the contract and insert, "The labor and/or material was furnished under a written contract which is attached hereto and made a part hereof."
- (8) Name of original (general) contractor.
- (9) Name of property owner.
- (10) General description of work done or materials supplied.
- (11) Amount due, including retainage.
- (12) Your business address.
- (13) e.g., partnership, corporation, etc.

Private Form #7 - REQUEST FOR INFORMATION FROM OWNER

_____(1)_____, 19____

_____(2)_____

CERTIFIED MAIL:
RETURN RECEIPT REQUESTED

Re: _____(3)_____

We are furnishing labor and/or materials for the above-referenced project. Pursuant to Section 53.159(a) of the Texas Property Code, we request that you provide us with the following information within 10 days after receipt of this request:

- (1) A legal description of the real property upon which the above-referenced project is being constructed.
- (2) Whether a payment bond has been provided to you on this project, and if so, the name and last known address of the surety and a copy of the bond.
- (3) Whether there are any prior recorded liens or security interests on the real property being improved and if so, the name and address of the holder of the lien or security interest.

In the event you fail to furnish the above-requested information, you may be liable for the undersigned's reasonable and necessary costs incurred in procuring the requested information.

Also, we request you furnish our company with a copy of the affidavit of completion, if used, filed with the county clerk for this project. Thank you for your attention to this request.

_____(4)_____

By: _____(5)_____

* * * * *

- (1) Date of request.
- (2) Name and address of owner.
- (3) Project.
- (4) Your Company.
- (5) Officer of your Company.

**PRIVATE FORM #8
REQUEST FOR INFORMATION FROM ORIGINAL CONTRACTOR**

_____(1)_____, 19____

_____(2)_____

CERTIFIED MAIL:
RETURN RECEIPT REQUESTED

RE: _____(3)_____

We have furnished labor and/or materials for the above-referenced project. Pursuant to Section 53.159(b) of the Texas Property Code, we request that you provide us with the following information within 10 days after receipt of this request:

- (1) The name and last known address of the person to whom you furnished labor or materials for the project.
- (2) Whether a payment bond has been provided by or to you on this project, and if so, the name and last known address of the surety(s) and a copy of the bond(s).

In the event you fail to furnish the above-requested information, you may be liable for the undersigned's reasonable and necessary costs incurred in procuring the requested information.

_____(4)_____

By: _____(5)_____

* * * * *

- (1) Date of request.
- (2) Name and address of original contractor.
- (3) Project.
- (4) Your company.
- (5) Officer of your company.

**PRIVATE FORM #9
REQUEST FOR INFORMATION FROM SUBCONTRACTOR**

_____(1)_____, 19____

_____(2)_____

CERTIFIED MAIL:
RETURN RECEIPT REQUESTED

RE: _____(3)_____

The undersigned _____(4)_____ the above-referenced project. Pursuant to Section 53.159(c) of the Texas Property Code, we request that you provide us with the following information within 10 days after receipt of this request:

- (1) The name and last known address of each person from whom you purchased labor or materials for the project, other than those materials which were furnished by you from your own inventory.
- (2) The name and last known address of each person to whom you furnished labor or materials for the construction project.
- (3) Whether a payment bond has been provided by or to you on this project, and if so, the name and last known address of the surety and a copy of the bond.

In the event you fail to furnish the above-requested information, you may be liable for the undersigned's reasonable and necessary costs incurred in procuring the requested information.

_____(5)_____

By: _____(6)_____

* * * * *

- (1) Date of request.
- (2) Name and address of subcontractor.
- (3) Project.
- (4) Fill in as applicable:
(a) is the owner of

(b) is the original contractor on
(c) is the surety which bonded the original contractor for
(d) has furnished work under your subcontract on.

(5) Your company.

(6) Officer of your company.