

**Taming the Trap for the Unwary:
Securing Mechanics' & Materialmen's Liens
In the State of Texas¹**

by

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¹ **IMPORTANT NOTE:** The information and forms included in this paper and presentation are offered as guidance to design professionals who operate in the construction industry in Texas, and to the attorneys who represent any of them. One size can never fit all, when it comes to general guidance and especially forms. Legal practitioners should review each particular project in light of its own merits and circumstances, and claimants should be sure to enlist the services of a legal professional before tailoring any one form or strategy to the given project and/or claim.

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The Power of the Lien for Construction Projects in Texas

The mechanics' and materialmen's lien, as created by the Chapter 53 of the Texas Property Code and the Texas Constitution, creates a very powerful tool for getting the attention of those who own property (and/or withhold payments) on construction projects in this state. The specter of placing a cloud on title to an owner's property, let alone the very act of encumbering property with a lien claim, can have a dramatic effect upon dispute resolution. Chapter 53 of the Property Code also features some important protections for property owners and puts some "bite" into the penalties for those who make improper claims.

Other weapons outside the scope of this presentation include the Texas Prompt Pay Act³ and the Texas Trust Fund statute.⁴ These should also be consulted and used to

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³ See Chapter 28 of the Texas Property Code for the "Private Prompt Pay Act;" see Texas Government Code Chapter 2251 for the "Public Prompt Pay Act."

⁴ See Chapter 162 of the Texas Property Code.

craft a business model that will allow you to (1) protect your (or your clients') rights to payment, and/or (2) defend against improperly filed or groundless liens against your (or your clients') property.

The purpose of this paper is to assist design professional claimants (and their representatives) in understanding and securing lien and fund-trapping rights. The procedures for preserving such rights are often called a “trap for the unwary”—even by those who are used to dealing with such claims—so the goal should be to learn the steps that must be taken and then institute a regular process for keeping track of and enforcing such claims. Setting up such a system may significantly improve the condition of a designer's accounts receivable, and it can also help owners defend against defective lien claims and protect themselves from being kept in the dark about projects.

Liens on public projects – Contracts for \$25,000 or less

It is widely stated that liens categorically cannot be placed on public projects, but rather can only be filed against private property. This is, for the most part, true, but an important exception exists: for public works projects where the original contract amount is \$25,000 or less, Chapter 53, Subchapter J, of the Texas Property Code allows a lien not against the property, but against the funds for the public works project. Some very strict conditions exist for the filing of such liens—including (1) the need to file the lien on or before the fifteenth day of the **second** calendar month after labor or materials have been furnished, and (2) the requirement that the lien be filed before any payment is made by the state to the original contractor.

While public works projects frequently exceed a total project cost of \$25,000, special attention should be paid to this category whenever signing on for such a job. This paper is not designed to cover such claims, but the Texas Property Code sets forth the relevant steps and requirements at § 53.231 *et seq.*

Liens on Leased Property: Is Your Customer an Owner or a Tenant?

Design professionals—whether in direct contractual privity with the owner or otherwise—must go in with eyes wide open when performing work for a tenant, as opposed to an owner. While you should certainly be able to maintain the standard causes of action against the person who contracts with you (e.g., breach of contract, *quantum meruit*, fraud, etc.), your lien rights may be severely limited if your agreement is with one who does not have an ownership interest in the property.

In such a case, your lien rights may be limited to a claim against the leasehold rights of the tenant, which are not usually very substantial and often include only the fixtures at the site. Ask the right questions before entering into such a deal, and consider having the lessee escrow project funds in the event of a later dispute.

Perfecting Your Lien Claim

Know Your Link in the Food Chain and Set Your Alarm Clock

The Texas Property Code allows “substantial compliance” with its requirements, but one thing it will not tolerate is a filing that occurs after a deadline. One of the most crucial aspects of the lien perfection process is the timing of the filings to protect a claimant’s interests.

Deadline for the lien affidavit

Design professional in direct contractual privity with the owner:

For the lien: The deadline is the fifteenth day of the fourth calendar month after indebtedness accrues for non-residential construction.

For residential construction liens: The deadline is the fifteenth day of the third calendar month after indebtedness accrues.

Q: When does “indebtedness accrue” for an original contractor?

A: It accrues on one or the other of the following:

- (1) On the last day of the month in which a written declaration by the original contractor or the owner is received by the other party to the original contract stating that the original contract has been terminated; or
- (2) On the last day of the month in which the original contract has been completed, finally settled, or abandoned.

Design subconsultants and design professionals working for contractors (i.e., anyone without an agreement directly with the owner):

For the lien: The deadline is the fifteenth day of the fourth calendar month after each month when a design professional furnishes labor or materials for non-residential construction.

For residential construction liens: Fifteenth day of the third calendar month after each month when a design professional furnishes labor or materials.

Information required for the affidavit

Section 53.054(a) of the Texas Property Code sets forth the required contents of the lien affidavit as follows:

First, the affidavit must be signed by the person claiming the lien or by another person on the claimant's behalf and must contain substantially:

- (1) a sworn statement of the amount of the claim;
- (2) the name and last known address of the owner or reputed owner;
- (3) a general statement of the kind of work done and materials furnished by the claimant and, for a claimant other than an original contractor, a statement of each month in which the work was done and materials furnished for which payment is requested;
- (4) the name and last known address of the person by whom the claimant was employed or to whom the claimant furnished the materials or labor;
- (5) the name and last known address of the original contractor;
- (6) a description, legally sufficient for identification, of the property sought to be charged with the lien;
- (7) the claimant's name, mailing address, & if different, physical address; and
- (8) for a claimant other than an original contractor, a statement identifying the date each notice of the claim was sent to the owner and the method by which the notice was sent.

Section 53.054 also states that a claimant may attach to the affidavit a copy of any applicable written agreement or contract and a copy of each notice sent to the owner.

Also, for purposes of detail in describing the work or materials made the subject of the lien, the affidavit does not have to set out specific, individual items of work done or material furnished or specially fabricated. Claimants may use abbreviations or symbols that are customary in the trade.

Once the affidavit has been drafted, it must be signed by the claimant (or an authorized representative of the claimant, if it is a business entity) in front of a notary public, who should sign, date, verify the identity of the person signing the affidavit (if necessary), and then stamp it with the notary block or seal.

When filling out your affidavit, be sure to remember:

A sworn statement is required. This means that the affidavit must contain the statement “subscribed and sworn to” in the notary public’s declaration.

Notice of the lien affidavit

Within five days—*five calendar days, not business days*—after the lien affidavit is filed, the claimant must send a copy of the affidavit by registered or certified mail to the owner if the claimant is the original contractor. If the claimant does not have a contract directly with the owner, a copy of the affidavit should be sent to all upstream entities (e.g., a subconsultant should send a copy to the general contractor and the owner).

The best practice is to send the copy of the affidavit by certified mail with a return receipt requested. Staple the green receipt to your enclosure letter, or at least keep a copy of it in your files in case you need to show proof at a later date that you have complied with the statutory requirements.

Requesting information from the owner, contractor, or subcontractor

Sec. 53.159 of the Property Code provides that owners, contractors, and subcontractors must furnish information requested by claimants when needed to perfect lien rights. This provision states that the owner must furnish the following information:

- (1) a description of the real property being improved legally sufficient to identify it;

- (2) whether there is a surety bond and if so, the name and last known address of the surety and a copy of the bond; and
- (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 person having the lien or security interest.

In turn, a contractor must provide the following, upon request:

- (1) the name and last known address of the person to whom the original contractor furnished labor or materials for the construction project; and
- (2) whether the original contractor has furnished or has been furnished a payment bond for any of the work on the construction project and if so, the name and last known address of the surety and a copy of the bond.

A subcontractor must provide the following information, upon request:

- (1) the name and last known address of each person from whom the subcontractor purchased labor or materials for the construction project, other than those materials that were furnished to the project from the subcontractor's inventory;
- (2) the name and last known address of each person to whom the subcontractor furnished labor or materials for the construction project; and
- (3) whether the subcontractor has furnished or has been furnished a payment bond for any of the work on the construction project and if so, the name and last known address of the surety and a copy of the bond.

Likewise, § 53.159(d) provides that a lien claimant must provide “backup documents” supporting the lien claim, upon request. Be ready to provide invoices, billing statements, or other proof of the amount you seek if such a request comes in the door.

The statute, at § 53.159(e), provides that if a request for information comes in from a party who is not in contractual privity with the person providing the information, the responding party may receive up to a \$25.00 reimbursement for the expense of furnishing the answer.

Caution: There is nothing in the statute that excuses you from getting your lien affidavit filed on time if an owner or contractor fails to respond. Deadlines remain the deadlines.

Specially fabricated materials

Sec. 53.058 covers the notice requirements for parties who provide “specially fabricated” items to a construction project. Essentially, additional lien rights are given to those who contract to provide “material fabricated for use as a component of the construction or repair so as to be reasonably unsuitable for use elsewhere.”⁵

To ensure that these rights are preserved, the special materials fabricator should provide the owner (and all links in the construction “food chain” in between) with notice by the fifteenth day of the second month after the month when the order for the specially fabricated materials is received and accepted.

NOTE: If the special materials fabricator provides notice of a retainage agreement (see discussion under “Retainage,” below) containing this type of notice, however, this chore will have been satisfied.

If these deadlines are missed, the ordinary fund-trapping rights still exist under the statutory framework, complete with their own applicable deadlines. These “garden variety” residual rights, however, will probably only cover those materials actually provided to the project.

⁵ See TEX.PROP.CODE § 53.001(12).

Requesting an affidavit of completion

Sec. 53.106(d) allows an owner to file an “affidavit of completion,” which is frequently a document provided by the project’s architect of record. “Completion,” under the Property Code, reads as follows:

“Completion” of an original contract means the actual completion of the work, including any extras or change orders reasonably required or contemplated under the original contract, other than warranty work or replacement or repair of the work performed under the contract.⁶

No penalty is specifically mentioned by the statute for a failure to comply with the notice requirement, but it is a good idea for those interested in retainage and final payment (and that includes practically everyone) to request such a notice. Under a “belt and suspenders” theory, construction entities can keep their ears to the ground, stay in contact with the project architect and/or construction manager, and have this request on file with the owner to keep the best possible track of project and retainage status.

Residential construction projects: Extra steps and shorter deadlines

Subchapter K of Texas Property Code, Chapter 53, § 53.251 *et seq.*, addresses the additional requirements that exist for certain parties to a residential construction project.

They include the following:

Shorter time frames for fund-trapping & affidavit

- Original contractor: Fifteenth day of the third month for filing a lien affidavit.
- Subcontractor & supplier: Fifteenth day of the second month for sending a “fund-trapping” letter, and fifteenth day of the third month for filing a lien affidavit.

⁶ See TEX.PROP.CODE § 53.001(15).

FUND-TRAPPING: A Matter of Special Attention for Design Subconsultants and Anyone Else Not in Direct Contractual Privity with the Owner

The Property Code sets forth a system called a “fund-trapping” scheme, whereby a party who does not have a contract with the owner may alert the owner to past-due payments. If done properly, this can have the effect of “trapping” construction project funds in the hands of the owner.

The fund-trapping mechanism is laid out in Subchapter D of Texas Property Code Chapter 53. Essentially, within a certain time frame after work or materials are delivered to the job, the downstream claimant must send a letter notifying the owner (and the construction “food chain” members in between) of the unpaid balance owed to that claimant. This basically freezes the funds in the hands of the owner and creates individual liability for the owner if it goes ahead and pays the funds out anyway.

A form is included for the purpose of trapping funds in the owner’s hands. Careful attention should be paid to the specifics of each project when drafting.

Remember: A subconsultant or other designer who has a contract with the original contractor has until the FIFTEENTH DAY OF THE THIRD CALENDAR MONTH AFTER LABOR AND/OR MATERIALS ARE SUPPLIED to file its fund-trapping letter. This is calculated for each and every passing month when the party has delivered labor or materials to the job.

For the sub-subconsultant or any other party downstream who does not even have a contract with the original contractor, the deadline is even more severe. These “sub-subs” must file their fund-trapping letter by the FIFTEENTH DAY OF THE SECOND CALENDAR MONTH AFTER LABOR AND/OR MATERIALS ARE SUPPLIED.

Retainage

Subchapter E of Texas Property Code Chapter 53 deals with statutorily required retainage. Essentially, § 53.101 states that ten percent (10%) of the overall contract price for the job (or 10% of the value of the work) must be withheld until thirty days after the project is complete. These funds “secure the payment of artisans and mechanics” who provide labor or materials to the job.

A lien on retained funds is allowed (1) if a claimant sends the (fund-trapping and lien) notices required by Chapter 53 (and described above), and (2) if a claimant files an affidavit claiming the lien not later than the thirtieth day after the project is completed.⁷

If the claimant does not have a contract directly with the owner of the project but does have a contractual agreement that retainage will be withheld from progress payments, the claimant can avoid having to file monthly fund-trapping notices to the owner (and upstream contractor) by sending a notice of a retainage agreement to the owner. This notice of the retainage agreement must be sent to the owner on or before the fifteenth day of the second month following the date with the claimant begins its performance on the job. A form is attached to these materials for this purpose.

No matter what happens, a subconsultant or any lower-tier claimant should keep an eye on the job and be sure to file a lien for the retained funds before thirty days have passed after completion of the work. This thirty-day period is when retained funds must be withheld to satisfy (in whole or in part) any remaining claimants who come to the table.

⁷ See TEX.PROP.CODE § 53.103.

Specific Statutory Rights of Design Professionals

Texas Property Code § 53.021(c) also carves out specific rights and priorities for the claims of design professionals, as opposed to traditional “hammer and nail” contractors and suppliers:

An architect, engineer, or surveyor who prepares a plan or plat under or by virtue of 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, has a lien on the property.

It is important to note that lien rights created under this part of the Property Code bear a lower priority than those filed by contractors and materialmen—specifically, the date when the affidavit is filed, rather than when the work begins (as is the case with contractors, subcontractors, and suppliers).⁸

Special note: As an aside, the revisions to Texas Property Code § 53.021(d) that took place during the 1999 legislative session appear to put landscaping contractors in the same situation as design professionals when it comes to priority of liens. Generally speaking, it is important for design professionals to consult with a legal professional to determine what your rights are on any given project, as well as the priority of a claim, compared with that of the traditional “hammer-and-nail” contractor, subcontractor, and supplier types.

The Constitutional Lien

For original contractors in Texas, there is a lien that Article XVI, § 37 of the Texas Constitution provides for, as follows:

⁸ See TEX.PROP.CODE § 53.124(e).

“Mechanics, artisans and materialmen, of every class, shall have a lien upon the buildings and articles made or repaired by them for the value of their labor done thereon, or materials furnished therefore; and the Legislature shall provide by law for the speedy and efficient enforcement of said liens.”

Notice that the language of this constitutional provision only refers to “buildings” and “articles” when it describes the work for which a lien exists. This language is read restrictively by courts, and it operates to the exclusion of those who perform landscaping work, underground utility lines, etc., even if the contractor is in direct contract with the owner.

Stated differently, the constitutional lien is generally said to apply to “vertical,” rather than “horizontal,” improvements. This has an especially noteworthy effect on the claims of design professionals, who may find their constitutional lien claims invalidated unless they participate in construction-phase activities. Also, remember that those without a contract directly with the owner cannot claim the constitutional lien.

Unavailability of this vehicle is not a “takeout blow,” however, because the statutory lien will frequently exist, as will direct claims against the party with whom the design professional has the agreement.

The constitutional lien is described as being “self-executing.” This means that it exists, and is enforceable, without the filing of any affidavits or notices. This is an advantage if a design professional has, for whatever reason, missed the deadline for filing its lien affidavit. However, if the property is sold to a person who, in good faith, takes possession without notice of the constitutional lien, the design professional will lose the right to enforce this type of claim.

The best way to prevent the loss of the constitutional lien is to file a notice in the property records of the county where the project is located. A suggested form is included in these materials for that purpose.

Calculating the lien amount

The wide variety of contracts and circumstances involved in construction projects (as well as the potential penalties for badly drafted affidavits) means that lien claimants must exercise great caution when they calculate the amount of the claimed lien. For example, one cannot lien for lost profits, but rather only for work performed (which can include the profit component). Creativity is the key—think flexibly when considering—and simply be sure that you may straight-facedly and in good faith stand by your number upon rigorous cross-examination by your opponent.

Penalties

Caution and meticulousness are the watchwords when preparing to file a lien in Texas. The Texas Property Code provides for certain penalties for false and/or incorrect information, as follows:

§ 53.085(d) A person, including a seller, commits an offense if the person intentionally, knowingly, or recklessly makes a false or misleading statement in an affidavit under this section. An offense under this section is a misdemeanor. A person adjudged guilty of an offense under this section shall be punished by a fine not to exceed \$4,000 or confinement in jail for a term not to exceed one year or both a fine and confinement. A person may not receive community supervision for the offense.

§ 53.085(e). A person signing an affidavit under this section is personally liable for any loss or damage resulting from any false or incorrect information in the affidavit. (Emphasis added.)

“Bonding around” lien claims

Texas Property Code § 53.171 *et seq.* provides a mechanism for filing a bond to indemnify against a lien (other than one that is granted in a written contract by the owner). This is what is meant when people talk about “bonding around a lien.”

When a proper bond⁹ is filed to indemnify against a lien and the notice¹⁰ and recording¹¹ requirements, the lien claim itself is literally extinguished, and there is no longer a cloud on title to the property.

While the process for and requirements of filing a lien to indemnify against a bond are outside the scope of this paper, owners and claimants alike should be aware of this option and seek experienced help with it if the need arises. As a special note, however, remember that the statute of limitations for filing to recover against a bond is effectively ONE YEAR after notice of the bond is served.¹² If an owner or contractor bonds around your lien soon after you file it, therefore, you will probably face a dramatically curtailed limitations period during which you may file suit to recover.

Summary proceeding to declare a lien invalid or unenforceable

From time to time, claimants will file a lien affidavit that is unenforceable, perhaps because it was untimely filed, possibly because no further payment is owed, or maybe for still another reason. Section 53.160 of the Property Code provides a

⁹ See TEX.PROP.CODE § 53.172.

¹⁰ See TEX.PROP.CODE § 53.173.

¹¹ See TEX.PROP.CODE § 53.174.

¹² Look to the specific language of TEX.PROP.CODE § 53.175, however, to see that it also refers to the unenforceability date of § 53.158 in calculating the time limits on suing to recover against the bond.

mechanism for obtaining a court proclamation that such a lien is, as a matter of law, invalid or unenforceable.

A prevailing party is entitled to recover its costs and attorneys' fees in such a proceeding. This topic, which is similar to a summary judgment proceeding in an ordinary civil case, is outside the scope of this paper because it is a litigation-phase tool that is almost entirely utilized by lawyers. However, the existence of this process should be remembered, since it is a very useful tool, both for sabre-rattling against an opponent, and as a very real weapon against improperly perfected lien claims.

Foreclosure

Suit must be filed to foreclose on a lien claim within two years from last date when lien could have been filed. The deadline for foreclosing on a constitutional lien appears to be four years, under the residual statute of limitations provided in the Texas Civil Practice & Remedies code. While this topic is also outside the scope of this paper, which intends to focus more on securing a claim, great care must be taken to meet the deadlines and other formal requirements for suing to foreclose on the lien. Consultation with a legal professional before proceeding on this front is strongly recommended.

Releases

Two different forms for lien releases are enclosed with these materials. One is a simple release of a previously filed lien claim, while another is a final waiver of claims, which is a much broader document. Each release or waiver should be drafted so that it is tailored to the specific facts and circumstances at hand.

A word to the wise: take special care to release only what you intend to release.

This may sound obvious, but title companies, owners, and contractors will often put suggested releases in front of claimants who are ready to sign virtually anything to get hold of a check being held about twelve inches away. Courts will uphold broad releases, so read what you are being asked to sign and do not give away the farm just in the name of getting paid. Some authority exists in Texas for the proposition that a lien release obtained in exchange for a bounced check will still remain valid as a release, despite the failure of payment.

Troubleshooting

Remember, know your link in the construction "food chain" and the deadlines and duties that come along with that position. As explained above, the deadlines can vary greatly, depending upon whether or not you have a contract directly with an owner, and also depending upon whether you are involved in a residential project or not.

Additionally, call the County Clerk's office several days in advance of the lien affidavit deadline and ask what the charges, hours, space requirements, etc. are for filing. A lien affidavit can, under some circumstances, literally be rejected for a failure to have the full filing fee, or even for failing to leave enough space for the Clerk's recording information.

If you are upstream from a party who sends a fund-trapping notice letter to the owner, you must remember that § 53.083 of the Property Code requires that you dispute any demands for unpaid balances due. If you have a contract directly with the owner and one of your subconsultants files a fund-trapping notice (which will probably contain a

demand for payment), make sure you dispute the claim. If you fail to do so, the owner may go ahead and pay the claim without consulting you.

Be sure that *both* spouses sign on to any homestead-related or residential contracts and lien agreements, where there is co-ownership. Texas statutory law requires it under some circumstances, as does the case law frequently, to enforce a contract's terms against both spouses.

Read the document that you're signing when you release a lien. Make sure that you're releasing only what you intend to release—not future claims, all claims, etc.

Remember that you can file a lien claim only for work and materials actually supplied - not for lost profits [as recoverable under AIA A201-1997 General Conditions on terminations for convenience]. Check your contract to see what you are entitled to recover if there is a dispute, and be sure that you are comfortable enough with the amount of your lien claim, because chances are good that your calculations will be subjected to withering scrutiny.

Set up a calendaring mechanism inside firm or company; claim must be made for each month in which services are performed or goods provided

Build in extra time to allow for logistical fumbles and for parties who do not want to cooperate with requests for information, and in general, GET STARTED EARLY. Make this a routine part of your billing and collections activities, since the lien and fund-trapping processes are often very effective ways to get someone's attention.

CONCLUSION

Most of all, at the outset of a project, create a plan for making sure that you secure your lien rights—or at least be sure that you have made an informed decision as to how badly you want to preserve those rights to file a lien at a later date. To tailor your lien preparations and create a “system” for retaining your rights, owners and construction outfits alike are encouraged to work through a front-end consultation with a legal professional who is familiar with these mechanisms and requirements. The consultation can be project-specific (e.g., analyzing one’s place in the “food chain” and figuring out the timing of specific notices and filings) and/or focus on the nature of the business that the construction entity performs, particularly in the case of design professionals, who are subject to many different requirements and priorities from traditional “hammer and nail” contractors, subcontractors, and suppliers.

Whatever route you choose in the end, do not fall asleep at the wheel, and you will stand a better chance of retaining lien rights that can put some real “teeth” on your claims for payment. Good luck.

APPENDIX: FORMS

The forms that are included in these documents are intended only as guides for drafting your own versions of them. Every construction project has its own wrinkles and strange relationship webs. Before using these forms for a specific project, take a moment to think things through analytically and consult an experienced legal practitioner to make sure you're covering all of your bases. At the very least, a relatively brief consultation with an attorney who is experienced with this statutory thicket may act as a prophylactic of sorts against big losses that could occur from failing to secure a cloud on a project owner's title.

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