



LIEN ISSUES DURING COVID-19: EARLY IS ON TIME, AND ON TIME MAY BE LATE

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It is apparent COVID-19 is having a massive effect on all aspects of our society, the economy and the law. Numerous businesses and individuals rely on Texas' lien laws to protect their interests. This article addresses practical and legal effects of COVID-19 on perfecting, filing and prosecuting lien claims in Texas in the time of COVID-19 and recommends best practices to ensure claimants can enforce all their lien rights.

The following are the key points regarding liens at this time:

- deadlines to send notice letters and file affidavits of lien in the real property records have not been extended, but may be altered in the future;
- statewide statutes of limitations, including for foreclosure actions, have been tolled until at least June 1;
- county real property records offices are experiencing some delays, although they are typically getting documents file stamped the date they arrive in the office;
- in counties without e-recording, affidavits of lien should be sent early to account for potential delays in delivery and receipt of items;
- follow the adage that early is on time, and on time may be late; and
- take all actions to protect your interests, because the economic downturn may result in many more lien notices and filings than normal.

The Deadlines for Notices and Filings Are Not Extended

The first question is: Will all filing and notice deadlines remain the same? The most likely answer, as of now, is yes. Although the courts and the legislature have the authority to extend deadlines, there is no indication the deadline to serve notices to perfect a lien or to file affidavits of lien in the real property records is extended as a result of COVID-19.

The Texas Supreme Court has the authority to issue orders extending deadlines in disaster situations under Texas Government Code Section 22.0035. To date, the court has issued eight emergency orders related to COVID-19. The First Emergency Order states all courts in Texas may modify or suspend deadlines and procedures, for 30 days after the governor's state of disaster has been lifted.[1] The First Emergency Order expires May 8, unless extended.

Several Texas counties have issued orders continuing, tolling or extending deadlines. However, these orders are likely limited to court filings, not those in real property records, which is where affidavits of lien are filed. We contacted several real property records offices in counties with orders extending deadlines and they indicated their countywide orders did not extend deadlines to file documents in the real property records.

Statutes of Limitations to Foreclose Liens are Probably Tolled

However, the deadline to *foreclose* a lien or bond claim is likely tolled, which would allow additional time to file an applicable lawsuit. The Texas Supreme Court's Eighth Emergency Order, issued April 2, tolls any deadline for the filing or service of any civil case from March 13, until June 1.[2] Because it tolls statutes of limitations, the Eighth Emergency Order should extend the time a claimant has to file suit to foreclose a properly perfected lien by an additional 79 days.[3] Lien deadlines may change further with additional orders from the courts, the governor or the legislature.

Lien Notices and Filings May Be Delayed in Delivery and Processing

The primary deadline for lien filings in Texas remains the 15th of each month.[4] However, with the delays associated with the mail system and reduced staffing at real property records offices, we recommend claimants treat the 12th as the deadline for e-recording lien affidavits or sending pre-lien notices. We recommend claimants treat the deadline for submitting lien affidavits in counties that do not permit e-recording as the 10th to allow additional time for non e-recording counties to receive and process the documents so they can be file stamped by the 15th. This means claimants should begin gathering their material and preparing notices and liens well in advance of these dates so everything can be prepared and out the door to be timely served, filed, noticed or recorded.

Although the deadline for filing most affidavits of lien is the 15th, a claimant should not wait until then to *submit* their affidavit of lien for filing. It must be *file stamped* by the 15th. The question is: Are real property recording offices getting documents file stamped the day they are being received? The answer right now has been yes, in most instances, but you may not receive the file stamped document back for some time. However, COVID-19 has caused some clerk's offices to be understaffed and overwhelmed. In

some instances, the physical offices are closed and clerks are working remotely. These staffing concerns mean if you wait until the last minute, your affidavit of lien may not get timely filed stamped and may not be valid.

A survey of several property clerk offices across Texas has revealed minor delays in e-recording. This may change as we approach the 15th of the month, which is the busy time for lien filings. In particular, with the massive slowdown in the economy, it is reasonable to think April 15th and May 15th will be far busier than usual in terms of filings due to loss of liquidity, work stoppages and other impediments to payment. We therefore recommend you treat the 12th as the actual deadline for e-recording, to account for any backlogs or delays in processing and filing. **In this uncertain time, follow the adage that early is on time, and on time may be late.**

For example, at one major county real property records office permitting e-recording, we found substantial delays when trying to reach someone by phone. In recent calls, we found multiple instances where no one picked up even after 30 minutes of hold time. This suggests if you have problems with filing, you may struggle to get answers. Another county we surveyed, which does not permit e-recording, will file the document when it is received in the office, but has a 3-4 week turnaround to return the file stamped document. Because one of the requirements under the property code is to serve a copy of the affidavit within five days after filing, you should consider sending the as-filed version instead of waiting until the file stamped affidavit of lien is returned to you.[5]

Plan Ahead for Potential Delays in Mailing and Delivery Services

There are two primary issues related to transmission of documents for lien purposes. First, preliminary notice letters and filed affidavits of lien must be *mailed* by a certain date. Second, in those counties that do not permit e-recording, documents must be *received* by clerks in time to be filed by a certain date.

Regarding the first issue, certified mail is recommended for preliminary notice letters or affidavits of lien. The Texas Property Code presumes service on the date of mailing if certified or registered mail is used.[6] The typical method to prove mailing is to get a stamped receipt from the post office the day mailing occurs. However, because people may be reluctant or unable to obtain these stamped receipts in person, you may also have the person mailing the items complete an affidavit stating the date of mailing, or obtain the tracking information to prove mailing from the United States Postal Service (USPS) website.

In addition to the presumption of notice, if a party receives actual written notice the method by which delivery occurred is immaterial.[7] Therefore, during this period, we recommend also sending the preliminary notice letters by email or facsimile. Because many people are working remotely, and may not be checking regular mail, we recommend sending to as many valid email addresses as possible and using electronic read receipts and delivery receipts.

Regarding the second issue, it is important to plan ahead if you need to deliver the affidavit of lien to a real property clerk that does not permit e-recording. For filing in counties without e-recording, the document has to arrive at the property clerk's office before the lien deadline, regardless of when it was

sent. You can still use certified mail, but should also consider FedEx, DHL, UPS or another overnight delivery service that can guarantee delivery times. You can also consider personal delivery or use of a private process server or courier, but keep in mind that if the county clerk's office is physically closed, personal servers may not have access to drop off the document. If there are questions, call or email the real property clerks in advance to determine how they are receiving and processing documents for filing.

You should also consider other questions related to delays. If your office is located in a county with a shelter-in-place or stay-at-home order, are you still operating at full capacity and with access to all your records? Do you need to travel to a county to file that has shelter-in-place restrictions? If you are mailing the affidavit, shipping carriers may have delivery delays. Contact your shipping carrier in advance to determine if delivery times remain the same. The USPS has stated they are experiencing only minor operational impacts from COVID-19, but packages may take longer to deliver as shipping carriers are overwhelmed or prioritizing medical or essential packages.

Take All Steps to Protect Your Interests – And Realize We Are in Uncharted Waters

It is most important in these times to protect your interests. Whereas you may have avoided sending preliminary notices or filing liens in the past because clients ultimately always paid, we are in uncharted territory. Projects are being shut down for logistical and economic reasons. Liquidity for construction projects may dry up. If an owner cannot justify the project as economically viable, they may abandon work and stop paying general contractors, which can trickle down to subcontractors and suppliers. Increased economic hardship means more stalled projects, delayed payments, preliminary notices and lien filings. Because of future uncertainty, many companies may try to withhold payment and remain as liquid as possible so they can pay their own employees.

You cannot assume payments will be made without the leverage provided by timely noticed and perfected liens. Sending preliminary notices and filing liens does not mean you will file a lien foreclosure lawsuit, it simply means you have the option. In this time, it is best to send notices as soon as practicable and take all steps to ensure that if someone is left holding the bag and taking a loss on a project, it is not you or your client.

[1] First Emergency Order Regarding the COVID-19 State of Disaster, No. 20-007, 2020 WL 1239711 (Tex. March 13, 2020).

[2] Eighth Emergency Order Regarding the COVID-19 State of Disaster, No. 20-951 (Tex. April 2, 2020).

[3] Because the Eighth Emergency Order does not specifically address lien foreclosure lawsuits, and this has not yet been tested in the Courts, if you are reaching the deadline to foreclosure a lien, we recommend filing the lawsuit. There is no *prohibition* on filing suits at this time.

[4] There are exceptions to this date, such as when a project has been terminated or completed. In that case, a claimant may have thirty days from that date to file an affidavit of lien.

[5] Tex. Prop. Code. § 53.055.

[6] Tex. Prop. Code § 53.003(c).

[7] Tex. Prop. Code § 53.003(d).

If you have questions or would like to discuss further, please contact [Perrin Fourmy](#).

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