

**WHERE NO ONE HAS GONE BEFORE:**  
**Navigating the Proposed Changes to the Texas Lien Laws**

By: Randall K. Lindley & Kelsey A. Williams,  
Attorneys at Bell Nunnally

Lien laws in Texas are a deeply-rooted part of Texas' legal history; dating nearly as far back as the birth of the state in 1836. The Congress of the Republic of Texas enacted the first mechanic's lien law in 1839, and the Texas Constitution of 1869 created the first constitutional mechanic's lien in Texas. Today, the Texas Property Code sets forth a complicated maze of procedures for asserting and perfecting mechanic's lien claims, but there is a movement for change.

It started in 2013, when a group of construction attorneys began discussing the idea of revising the Texas lien laws. Groups such as the Texas Building Branch of the Associated General Contractors, the Associated Builders and Contractors of Texas, and the Texas Construction Association have appointed several Texas attorneys to a "Working Group" tasked with meeting to evaluate the current lien laws and discuss potential revisions. Over the last three years, the Working Group has been crafting a proposed re-write of Chapter 53 of the Texas Property Code. The latest draft of the proposed changes was distributed in March 2016, and features some substantial modifications to the current scheme for asserting mechanic's liens. Importantly, the proposed lien law revisions are still in their infancy. The Texas Legislature will not be in session again until January 2017, which means the present draft is likely to undergo additional revisions before any bill is sponsored or passed. The Working Group's draft provides insight, though, into what types of changes may be on the table.

The most significant proposed change to the lien laws would be an overhaul of the notice system. Currently, Texas law requires a series of past-due notices and fund trapping notices that must be sent by certified mail to specific parties on or before the 15<sup>th</sup> day of a specific month before a valid lien affidavit may be recorded. The proposed changes would eliminate all of those notice requirements in favor of a "Notice of Furnishing" that all claimants (other than original contractors) would be required to send to the owner and the original contractor. The Notice of Furnishing would include basic information about the claimant, a general description of the labor or materials furnished, and some identifying information about the project. Rather than functioning to trap funds, or stop payment by the owner *after* invoices are past-due, a single Notice of Furnishing is provided at the outset of work, and merely preserves a contractor's right to make a claim.

Another drastic change to the lien law scheme would be the concept of the owner's "Lien Agent". As currently drafted, the owner of a project would have the option to appoint and identify a Lien Agent, who must hold a Certificate of Registration from the Texas Department of Insurance, and must create and maintain a common Internet website for giving and receiving notices and for furnishing information about notices on the project. Should the owner choose to appoint a Lien Agent, all notices, including the Notice of Furnishing, may be delivered to all parties on the project by posting to the website, simplifying the process of gathering addresses and sending letters through certified mail. In addition, owners would be responsible for posting a Notice of Commencement to the website, which would assist all parties involved in the project

in identifying the owner, project information, original contractors, lenders, and the scope of work covered.

There are several proposed revisions to the mechanic's lien affidavit as well. The content of an affidavit would remain largely the same as under the current Property Code, with the exception that the date of sending notice of furnishing would be identified, and the statement of each month in which work was performed is no longer necessary or required. The deadline to file the lien affidavit becomes the fifteenth day of the fourth month (or third month for residential projects) after the work under the original contract has been completed, or the original contract has been terminated. This is a significant revision that may function to extend a subcontractor's lien filing deadline, especially if materials or labor were supplied early in the project.

The Working Group anticipates several advantages to the new notice system, including:

- Consistency with many other states' lien statutes;
- Eliminating several confusing concepts unique to Texas;
- Providing more accessible information for owners, general contractors, subcontractors, and claimants; and
- For claimants, increased ease in perfecting lien claims because notice requirements are reduced to only one Notice of Furnishing, and no more limits on amounts recoverable under a lien because fund-trapping and retainage would be eliminated.

However, due to the infancy of the proposed revisions, there are still many open issues. For example, the new system would cause a major shift for claimants who would be required to post notices when commencing every new project, rather than only creating notices on select projects where invoices have become past-due. Also, owners and general contractors would likely see an increased burden to monitor payments, with owners finding themselves exposed to unlimited liability because fund trapping and retainage caps would no longer place monetary limits on lien claims.

As the revised draft of Chapter 53 stands, the simplified notice provisions appear to favor subcontractors and materialmen requiring only one notice before allowing a claimant to proceed straight to filing a lien. Plus, with the elimination of statutory retainage and fund trapping notices, an owner's liability would be virtually unlimited. However, the new system appears to eliminate the benefits under the current Property Code that allow subcontractors and materialmen to get paid quickly upon the owner's receipt of a fund trapping notice letter. Under the revised scheme, subcontractors may find themselves waiting extremely long periods of time for payment. It appears the revised statute would not prevent owners from continuing to use project funds to pay their general contractors in spite of unpaid subs, or simply waiting until the project is complete to make pro rata distributions to all perfected claimants.

We are continuing to monitor further efforts of the Working Group and their sponsoring organizations. On behalf of the NACM, we welcome your thoughts and comments about the proposed changes and how this potential new world of lien law may impact your business.