

**DALLAS BAR ASSOCIATION
REAL PROPERTY SECTION**

CHANGES IN
TEXAS INDEMNITY AND MECHANICS' LIEN LAW

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Sources of Texas Mechanics' and Materialmens' Liens

In Texas, mechanic's liens are both constitutional and statutory

- ARTICLE 15, § 37 OF THE TEXAS CONSTITUTION

Sec. 37. LIENS OF MECHANICS, ARTISANS, AND MATERIAL MEN. 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 material furnished therefor; and the Legislature shall provide by law for the speedy and efficient enforcement of said liens.

- CHAPTER 53, OF THE TEXAS PROPERTY CODE

Sec. 53.021. PERSONS ENTITLED TO LIEN.

(a) A person has a lien if:

(1) the person labors, specially fabricates material, or furnishes labor or materials for construction or repair in this state of:

(A) a house, building, or improvement; . . . and

(2) the person labors, specially fabricates the material, or furnishes the labor or materials under or by virtue of a contract with the Owner or the Owner's agent, trustee, receiver, contractor, or Subcontractor.

(b) A person who specially fabricates material has a lien even if the material is not delivered. . . .

Sec. 53.022. PROPERTY TO WHICH LIEN EXTENDS.

(a) The lien extends to the house, building, fixtures, or improvements.

Sec. 53.023. PAYMENT SECURED BY LIEN.

The lien secures payment for:

(1) the labor done or material furnished for the construction or repair;

(2) the specially fabricated material, even if the material has not been delivered or incorporated into the construction or repair, less its fair salvage value; or

(3) the preparation of a plan or plat by an architect, engineer, or surveyor in accordance with Section 53.021(c).

Sec. 53.001. DEFINITIONS.

In this chapter: . . .¹

"Labor" means labor used in the direct prosecution of the work.

"Material" means all or part of:

(A) the material, machinery, fixtures, or tools incorporated into the work, consumed in the direct prosecution of the work, or ordered and delivered for incorporation or consumption;

(B) rent at a reasonable rate and actual running repairs at a reasonable cost for construction equipment used or reasonably required and delivered for use in the direct prosecution of the work at the site of the construction or repair; or

(C) power, water, fuel, and lubricants consumed or ordered and delivered for consumption in the direct prosecution of the work.

"Specially fabricated material" means material fabricated for use as a component of the construction or repair so as to be reasonably unsuitable for use elsewhere.

"Subcontractor" means a person who has furnished labor or materials to fulfill an obligation to an Original Contractor or to a Subcontractor to perform all or part of the work required by an original contract.

¹ In this outline General Contractor is the party in direct contract with the Owner, and is an "original contractor" in Sec. 53.001.

What Liens Are and Aren't

Are not an independent right or recovery

Liens secure an underlying debt; are no better than the debt

Purpose is to ensure claimants get paid and to limit Owner liability

In Texas, liens are both (and either) Constitutional and/or statutory

Lien claims and their enforcement are not self executing – unlike deed of trust, liens must be judicially foreclosed

Two Categories of Lien Claimants

General Contractors

Everyone else

- General Contractors have both statutory and Constitutional lien rights
- General Contractors have no notice requirements regarding their Constitutional liens
- Only General Contractors have Constitutional lien rights
- Everyone else only gets a statutory mechanic's lien
- Everyone else has to give notice(s)

Constitutional liens are magical because:

- Do not even have to file, record or give notice of Constitutional liens
- Time periods for filing and perfecting mechanic's lien are not applicable to Constitutional Liens
- Statute of limitations is 4 years (longer)
- Life is easier for General Contractors

Everyone, of any tier, can have a statutory mechanic's lien

- Lien right is not merely derivative of General Contractor's lien
- General Contractor cannot subordinate, release or waive Subcontractors' mechanic's liens

Statutory prohibition against advance waiver of lien

Logic Regarding Statutory Mechanic's Liens

The further away (contractually) the claimant is from the property Owner, the more the claimant has to do and the quicker it has to do it in order to perfect its lien

- | | |
|-----------------------|---|
| General Contractor -- | (i) just file its mechanic's lien by the 15th day of the 4th month following completion of the Project |
| Subcontractor -- | (i) must file its mechanic's lien by the 15th day of the 4th month following completion of its work
(ii) must also give notice to the Owner by the 15th day of the 3rd month(s) of performance |
| Sub-Subcontractor -- | (i) must file its mechanic's lien by the 15th day of the 4th month following completion of its work
(ii) must also give notice to the Owner by the 15th day of the 3rd month(s) of performance
(iii) must also give notice to the General Contractor by the 15th day of the 2nd month(s) of performance |

What Must Notice(s) Contain

There is no formal form

There are specific additional requirements in order to “trap funds” (§ 53.056(d))

In order to “trap funds”, notice must state:

“If the claim remains unpaid, the Owner may be personally liable and the Owner’s property may be subject to a lien unless:

- (1) the Owner withholds payments from the contractor for payment of the claim; or
- (2) the claim is otherwise paid or settled.

In order to “trap funds,” notice must be received by Owner before it has made payment to the contractor. (§ 53.084)

Owner may assert offset rights or backcharges against claims for “trapped funds”

What Must Lien Affidavit Provide

There are 8 requirements under § 53.054

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, and, 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.

Once filed, a copy of the affidavit must be sent by registered or certified mail to the Owner within 5 days.

Subcontractors must also send a copy to the Original Contractor within the same 5-day period.

What Determines Validity Of Lien

Compliance with requirements of § 53.054

Date of filing the mechanic's lien

Date of the last work of the lien claimant

Whether the claimant is a General Contractor, Subcontractor or Sub-subcontractor

Existence of notices and the dates of work

Whether or not the lien claimant has trapped fund

Owner Liability

If Owner conducts itself properly, its liability is limited

Limit of Owner liability is the General Contractor's contract sum

Except for:

- 10% statutory retainage; and
- trapped funds

Statutory Retainage

10% of the contract sum under the Owner's agreement with the General Contractor must be retained by the Owner until 30 days after completion of the work by the General Contractor

If no mechanic's liens have been filed at 30 days after completion of the Project, the Owner can release the statutory 10% retainage to the General Contractor

Trapped Funds

Notice provided to the Owner must have statutory language in order to trap funds

Is like writ of garnishment

Requires Owner to hold the "trapped funds" until mechanic's lien filing deadline passes or mechanic's lien is released

If the Owner complies, its liability is limited; if it ignores, the Owner gets to pay twice

Claimant may include or separately make a demand for payment of funds withheld by Owner (§ 53.083)

Demand must:

- (1) give notice to the Owner that the claim has accrued under Section 53.053 or is past due according to the agreement between the parties
- (2) be sent to the Original Contractor as well

If the General Contractor disputes the claim, it must give notice to the Owner within 30 days

If General Contractor does not give dispute notice, the Owner must pay the claim to the Subcontractor

Notice of Contractual Retainage

Even though subcontract provides for retainage, Subcontractor has to notice retainage like any other unpaid amount

Unless claimant gives notice of retainage agreement under § 53.057

If fail to give notice in either alternative, mechanic's lien is invalid as to those sums

Retainage notice eliminates requirement to periodically notice non-payment of contractual retainage

Must give the Owner notice of contractual retainage not later than the earlier of:

- (1) the 30th day after the date the claimant's agreement providing for retainage is completed, terminated, or abandoned; or
- (2) the 30th day after the date the original contract is terminated or abandoned

If an agreement for contractual retainage is with a Subcontractor, the claimant must also give the notice of contractual retainage to the General Contractor within the same time period

The notice must generally state the existence of a requirement for retainage and contain:

- (1) the name and address of the claimant; and
- (2) if the agreement is with a Subcontractor, the name and address of the Subcontractor

is a change in the statute; previously, the notice was required by the 15th day of the 2nd month following commencement under a contract with retainage

Owner and Contractor Obligations

Owner must furnish within 10 days of a request under § 53.159

- property description
- information regarding bonds
- information regarding prior liens
- date of original

Owner must:

- withhold retainage
- comply with fund trapping
- comply with demand for payment (if not disputed timely)

Original contractor must on request under § 53.159

- provide name and address of project Owner
- inform if it has provided payment bond, and provide copy of bond and name and address of surety
- date of original contract

Release of Lien

Bills paid affidavit can be required as a condition of payment § 53.085

Once paid, must provide release of lien within 10 days of a request

Texas now requires statutory release forms

Releases are conditional and unconditional

Set forth in Subchapter L of Chapter 53

Can also require "good funds" under § 53.283

Notice required on unconditional releases

“Attempted compliance” sufficient until August 2012

Inception and Priority

Inception of lien established by § 53.124

- Construction activity or delivery of materials to the site

Affidavit of Commencement is optional under § 53.124

- Have to file jointly by Owner and General Contractor
- Within 30 days of actual commencement
- Is date of commencement stated in Affidavit

Completion

Affidavit of Completion is optional under § 53.106

- Does not require joinder of General Contractor
- Must state conspicuously that claimant cannot have a lien against retained funds unless it files mechanic’s lien by 40th day after work under original contract is completed
- If Affidavit of Completion is filed after 10th day following the date of completion, the date of completion for statutory purposes is the date the Affidavit of Completion is filed

Contingent Payment - Chapter 56 Texas Business & Commerce Code

“Pay if Paid” still permitted

Statute gives Subcontractors rights against Owner

A person may not waive the statute by contract or otherwise, and any purported waiver of this chapter is void

Pay if paid provision is enforceable until objected to

Once the unpaid indebtedness is paid, the contingent payment clause is reinstated as to work performed or materials furnished after the receipt of the payment

A contingent payment clause may not be enforced if the enforcement would be unconscionable. The party asserting that a contingent payment clause is unconscionable has the burden of proving that the clause is unconscionable

Enforcement of a contingent payment clause is not unconscionable if the contingent payor has exercised diligence in ascertaining and communicating in writing to the contingent payee, the financial viability of the primary obligor and the existence of adequate financial arrangements to pay for the improvements

A contingent payor is considered to have exercised diligence if the contingent payee receives in writing from the contingent payor:

- (1) the name, address, and business telephone number of the primary obligor;
- (2) a description, legally sufficient for identification, of the property on which the improvements are being constructed;
- (3) the name and address of the surety on any payment bond provided under Subchapter I, Chapter 53, Property Code;
- (4) if a loan has been obtained for the construction of improvements:
 - a statement, furnished by the primary obligor and supported by reasonable and credible evidence from all applicable lenders, of the amount of the loan;
 - a summary of the terms of the loan;
 - a statement of whether there is foreseeable default of the primary obligor; and
 - the name, address, and business telephone number of the borrowers and lenders; and
- (5) a statement, furnished by the primary obligor and supported by reasonable and credible evidence from all applicable banks, of the amount, source, and location of funds available to pay the contract amount if there is no loan or the loan is not sufficient

An obligor or a primary obligor may not prohibit a contingent payor from allocating risk by means of a contingent payment clause

Indemnity

Texas continues movement away from and narrowing of indemnity

Old law was “clear and unequivocal” standard

Replaced by “express negligence rule”

Subsequently added “conspicuousness and fair notice” requirement

Now indemnity is restricted by Chapter 151 of Texas Insurance Code

New statute effectively prohibits indemnification for one’s own negligence

Industry, and company, forms may not satisfy Texas law

PROPERTY CODE

TITLE 5. EXEMPT PROPERTY AND LIENS

SUBTITLE B. LIENS

CHAPTER 53. MECHANIC'S, CONTRACTOR'S, OR MATERIALMAN'S LIEN

Sec. 53.057. DERIVATIVE CLAIMANT: NOTICE FOR CONTRACTUAL RETAINAGE CLAIM. (a) A claimant may give notice under this section instead of or in addition to notice under Section 53.056 or 53.252 if the claimant is to labor, furnish labor or materials, or specially fabricate materials, or has labored, furnished labor or materials, or specially fabricated materials, under an agreement with an original contractor or a subcontractor providing for retainage.

(b) The claimant must give the owner or reputed owner notice of contractual retainage not later than the earlier of:

(1) the 30th day after the date the claimant's agreement providing for retainage is completed, terminated, or abandoned; or

(2) the 30th day after the date the original contract is terminated or abandoned.

(b-1) If an agreement for contractual retainage is with a subcontractor, the claimant must also give the notice of contractual retainage to the original contractor within the period prescribed by Subsection (b).

(c) The notice must generally state the existence of a requirement for retainage and contain:

(1) the name and address of the claimant; and

(2) if the agreement is with a subcontractor, the name and address of the subcontractor.

(d) The notice must be sent to the last known business or residence address of the owner or reputed owner or the original contractor, as applicable.

(e) If a claimant gives notice under this section and Section 53.055 or, if the claim relates to a residential construction project, under this section and Section 53.252, the claimant is not required to give any other notice as to the retainage.

(f) A claimant has a lien on, and the owner is personally liable to the claimant for, the retained funds under Subchapter E if the claimant:

(1) gives notice in accordance with this section and:

(A) complies with Subchapter E; or

(B) files an affidavit claiming a lien not later than the earliest of:

(i) the date required for filing an affidavit under Section 53.052;

(ii) the 40th day after the date stated in an affidavit of completion as the date of completion of the work under the original contract, if the owner sent the claimant notice of an affidavit of completion in the time and manner required;

(iii) the 40th day after the date of termination or abandonment of the original contract, if the owner sent the claimant a notice of such termination or abandonment in the time and manner required; or

(iv) the 30th day after the date the owner sent to the claimant to the claimant's address provided in the notice for contractual retainage, as required under Subsection (c), a written notice of demand for the claimant to file the affidavit claiming a lien; and

(2) gives the notice of the filed affidavit as required by Section 53.055.

(g) The written demand under Subsection (f) (1) (B) (iv):

(1) must contain the owner's name and address and a description, legally sufficient for identification, of the real property on which the improvement is located;

(2) must state that the claimant must file the lien affidavit not later than the 30th day after the date the demand is sent; and

(3) is effective only for the amount of contractual retainage earned by the claimant as of the day the demand was sent.

Acts 1983, 68th Leg., p. 3541, ch. 576, Sec. 1, eff. Jan. 1, 1984.
Amended by Acts 1989, 71st Leg., ch. 1138, Sec. 9, eff. Sept. 1, 1989;
Acts 1997, 75th Leg., ch. 526, Sec. 9, eff. Sept. 1, 1997; Acts 1999,
76th Leg., ch. 889, Sec. 3, eff. Sept. 1, 1999.

Sec. 53.106. AFFIDAVIT OF COMPLETION. (a) An owner may file with the county clerk of the county in which the property is located an affidavit of completion. The affidavit must contain:

(1) the name and address of the owner;

(2) the name and address of the original contractor;

(3) a description, legally sufficient for identification, of the real property on which the improvements are located;

(4) a description of the improvements furnished under the original contract;

(5) a statement that the improvements under the original contract have been completed and the date of completion; and

(6) a conspicuous statement that a claimant may not have a lien on retained funds unless the claimant files the affidavit claiming a lien not later than the 40th day after the date the work under the original contract is completed.

(b) A copy of the affidavit must be sent by certified or registered mail to the original contractor not later than the date the affidavit is filed and to each claimant who sends a notice of lien liability to the owner under Section 53.056, 53.057, 53.058, 53.252, or

53.253 not later than the date the affidavit is filed or the 10th day after the date the owner receives the notice of lien liability, whichever is later.

(c) A copy of the affidavit must also be sent to each person who furnishes labor or materials for the property and who furnishes the owner with a written request for the copy. The owner must furnish the copy to the person not later than the date the affidavit is filed or the 10th day after the date the request is received, whichever is later.

(d) Except as provided by this subsection, an affidavit filed under this section on or before the 10th day after the date of completion of the improvements is prima facie evidence of the date the work under the original contract is completed for purposes of this subchapter and Section 53.057. If the affidavit is filed after the 10th day after the date of completion, the date of completion for purposes of this subchapter and Section 53.057 is the date the affidavit is filed. This subsection does not apply to a person to whom the affidavit was not sent as required by this section.

(e) Repealed by Acts 1999, 76th Leg., ch. 889, Sec. 12, eff. Sept. 1, 1999.

Added by Acts 1989, 71st Leg., ch. 1138, Sec. 18, eff. Sept. 1, 1989.
Amended by Acts 1997, 75th Leg., ch. 526, Sec. 14, eff. Sept. 1, 1997;
Acts 1999, 76th Leg., ch. 889, Sec. 12, eff. Sept. 1, 1999.

SUBCHAPTER L. WAIVER AND RELEASE OF LIEN OR PAYMENT BOND CLAIM

Sec. 53.281. WAIVER AND RELEASE OF LIEN OR PAYMENT BOND CLAIM.

(a) Any waiver and release of a lien or payment bond claim under this chapter is unenforceable unless a waiver and release is executed and delivered in accordance with this subchapter.

(b) A waiver and release is effective to release the owner, the owner's property, the contractor, and the surety on a payment bond from claims and liens only if:

(1) the waiver and release substantially complies with one of the forms prescribed by Section 53.284;

(2) the waiver and release is signed by the claimant or the claimant's authorized agent and notarized; and

(3) in the case of a conditional release, evidence of payment to the claimant exists.

Sec. 53.282. CONDITIONS FOR WAIVER, RELEASE, OR IMPAIRMENT OF LIEN OR PAYMENT BOND CLAIM. (a) A statement purporting to waive, release, or otherwise adversely affect a lien or payment bond claim is not enforceable and does not create an estoppel or impairment of a lien or payment bond claim unless:

(1) the statement is in writing and substantially complies with a form prescribed by Section 53.284;

(2) the claimant has actually received payment in good and sufficient funds in full for the lien or payment bond claim; or

(3) the statement is:

(A) in a written original contract or subcontract for the construction, remodel, or repair of a single-family house, townhouse, or duplex or for land development related to a single-family house, townhouse, or duplex; and

(B) made before labor or materials are provided under the original contract or subcontract.

(b) The filing of a lien rendered unenforceable by a lien waiver under Subsection (a)(3) does not violate Section 12.002, Civil Practice and Remedies Code, unless:

(1) an owner or original contractor sends a written explanation of the basis for nonpayment, evidence of the contractual waiver of lien rights, and a notice of request for release of the lien to the claimant at the claimant's address stated in the lien affidavit; and

(2) the lien claimant does not release the filed lien affidavit on or before the 14th day after the date the owner or the original contractor sends the items required by Subdivision (1).

(c) Subsection (a)(3) does not apply to a person who supplies only material, and not labor, for the construction, remodel, or repair of a

single-family house, townhouse, or duplex or for land development related to a single-family house, townhouse, or duplex.

Sec. 53.283. UNCONDITIONAL WAIVER AND RELEASE: PAYMENT REQUIRED. A person may not require a claimant or potential claimant to execute an unconditional waiver and release for a progress payment or final payment amount unless the claimant or potential claimant received payment in that amount in good and sufficient funds.

Sec. 53.284. FORMS FOR WAIVER AND RELEASE OF LIEN OR PAYMENT BOND CLAIM. (a) A waiver and release given by a claimant or potential claimant is unenforceable unless it substantially complies with the applicable form described by Subsections (b)-(e).

(b) If a claimant or potential claimant is required to execute a waiver and release in exchange for or to induce the payment of a progress payment and is not paid in exchange for the waiver and release or if a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release must read:

"CONDITIONAL WAIVER AND RELEASE ON PROGRESS PAYMENT

"Project _____

"Job No. _____

"On receipt by the signer of this document of a check from _____ (maker of check) in the sum of \$_____ payable to _____ (payee or payees of check) and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position that the signer has on the property of _____ (owner) located at _____ (location) to the following extent: _____ (job description).

"This release covers a progress payment for all labor, services, equipment, or materials furnished to the property or to _____ (person with whom signer contracted) as indicated in

the attached statement(s) or progress payment request(s), except for unpaid retention, pending modifications and changes, or other items furnished.

"Before any recipient of this document relies on this document, the recipient should verify evidence of payment to the signer.

"The signer warrants that the signer has already paid or will use the funds received from this progress payment to promptly pay in full all of the signer's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above referenced project in regard to the attached statement(s) or progress payment request(s).

"Date _____
" _____ (Company name)
"By _____ (Signature)
" _____ (Title)"

(c) If a claimant or potential claimant is required to execute an unconditional waiver and release to prove the receipt of good and sufficient funds for a progress payment and the claimant or potential claimant asserts in the waiver and release that the claimant or potential claimant has been paid the progress payment, the waiver and release must:

(1) contain a notice at the top of the document, printed in bold type at least as large as the largest type used in the document, but not smaller than 10-point type, that reads:

"NOTICE:

"This document waives rights unconditionally and states that you have been paid for giving up those rights. It is prohibited for a person to require you to sign this document if you have not been paid the payment amount set forth below. If you have not been paid, use a conditional release form."; and

(2) below the notice, read:

"UNCONDITIONAL WAIVER AND RELEASE ON PROGRESS PAYMENT

"Project _____

"Job No. _____

"The signer of this document has been paid and has received a progress payment in the sum of \$_____ for all labor, services, equipment, or materials furnished to the property or to _____ (person with whom signer contracted) on the property of _____ (owner) located at _____ (location) to the following extent: _____ (job description). The signer therefore waives and releases any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position that the signer has on the above referenced project to the following extent:

"This release covers a progress payment for all labor, services, equipment, or materials furnished to the property or to _____ (person with whom signer contracted) as indicated in the attached statement(s) or progress payment request(s), except for unpaid retention, pending modifications and changes, or other items furnished.

"The signer warrants that the signer has already paid or will use the funds received from this progress payment to promptly pay in full all of the signer's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above referenced project in regard to the attached statement(s) or progress payment request(s).

"Date _____
" _____ (Company name)
"By _____ (Signature)
" _____ (Title)"

(d) If a claimant or potential claimant is required to execute a waiver and release in exchange for or to induce the payment of a final payment and is not paid in good and sufficient funds in exchange for the waiver and release or if a single payee check or joint payee check is

given in exchange for the waiver and release, the waiver and release must read:

"CONDITIONAL WAIVER AND RELEASE ON FINAL PAYMENT

"Project _____

"Job No. _____

"On receipt by the signer of this document of a check from _____ (maker of check) in the sum of \$ _____ payable to _____ (payee or payees of check) and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position that the signer has on the property of _____ (owner) located at _____ (location) to the following extent: _____ (job description).

"This release covers the final payment to the signer for all labor, services, equipment, or materials furnished to the property or to _____ (person with whom signer contracted).

"Before any recipient of this document relies on this document, the recipient should verify evidence of payment to the signer.

"The signer warrants that the signer has already paid or will use the funds received from this final payment to promptly pay in full all of the signer's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above referenced project up to the date of this waiver and release.

"Date _____

" _____ (Company name)

"By _____ (Signature)

" _____ (Title)"

(e) If a claimant or potential claimant is required to execute an unconditional waiver and release to prove the receipt of good and sufficient funds for a final payment and the claimant or potential

claimant asserts in the waiver and release that the claimant or potential claimant has been paid the final payment, the waiver and release must:

(1) contain a notice at the top of the document, printed in bold type at least as large as the largest type used in the document, but not smaller than 10-point type, that reads:

"NOTICE:

"This document waives rights unconditionally and states that you have been paid for giving up those rights. It is prohibited for a person to require you to sign this document if you have not been paid the payment amount set forth below. If you have not been paid, use a conditional release form."; and

(2) below the notice, read:

"UNCONDITIONAL WAIVER AND RELEASE ON FINAL PAYMENT

"Project _____

"Job No. _____

"The signer of this document has been paid in full for all labor, services, equipment, or materials furnished to the property or to _____ (person with whom signer contracted) on the property of _____ (owner) located at _____ (location) to the following extent: _____ (job description). The signer therefore waives and releases any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position.

"The signer warrants that the signer has already paid or will use the funds received from this final payment to promptly pay in full all of the signer's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above referenced project up to the date of this waiver and release.

"Date _____

" _____ (Company name)

"By _____ (Signature)

" _____ (Title)"

Sec. 53.285. ATTEMPTED COMPLIANCE. (a) A waiver or release shall be construed to comply with this subchapter and is enforceable in the same manner as a waiver and release under this subchapter if the waiver or release:

(1) is furnished in attempted compliance with this subchapter; or

(2) evidences by its terms intent to comply with this subchapter.

(b) Any provision in any waiver or release furnished in attempted compliance with this subchapter that expands or restricts the rights or liabilities provided under this subchapter shall be disregarded and the provisions of this subchapter shall be read into that waiver or release.

(c) This section expires August 31, 2012.

Sec. 53.286. PUBLIC POLICY. Notwithstanding any other law and except as provided by Section 53.282, any contract, agreement, or understanding purporting to waive the right to file or enforce any lien or claim created under this chapter is void as against public policy.

Sec. 53.287. CERTAIN AGREEMENTS EXEMPT. This subchapter does not apply to a written agreement to subordinate, release, waive, or satisfy all or part of a lien or bond claim in:

(1) an accord and satisfaction of an identified dispute;

(2) an agreement concerning an action pending in any court or arbitration proceeding; or

(3) an agreement that is executed after an affidavit claiming the lien has been filed or the bond claim has been made.

BUSINESS AND COMMERCE CODE

TITLE 4. BUSINESS OPPORTUNITIES AND AGREEMENTS

CHAPTER 56. AGREEMENT FOR PAYMENT OF CONSTRUCTION SUBCONTRACTOR

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 56.001. DEFINITIONS. In this chapter:

(1) "Contingent payee" means a party to a contract with a contingent payment clause, other than an architect or engineer, whose receipt of payment is conditioned on the contingent payor's receipt of payment from another person.

(2) "Contingent payment clause" means a provision in a contract for construction management, or for the construction of improvements to real property or the furnishing of materials for the construction, that provides that the contingent payor's receipt of payment from another is a condition precedent to the obligation of the contingent payor to make payment to the contingent payee for work performed or materials furnished.

(3) "Contingent payor" means a party to a contract with a contingent payment clause that conditions payment by the party on the receipt of payment from another person.

(4) "Improvement" includes new construction, remodeling, or repair.

(5) "Obligor" means the person obligated to make payment to the contingent payor for an improvement.

(6) "Primary obligor" means the owner of the real property to be improved or repaired under the contract, or the contracting authority if the contract is for a public project. A primary obligor may be an obligor.

Added by Acts 2009, 81st Leg., R.S., Ch. 87, Sec. 4.001(a), eff. September 1, 2009.

Sec. 56.002. INAPPLICABILITY OF CHAPTER TO CERTAIN CONTRACTS. This chapter does not apply to a contract that is solely for:

- (1) design services;
- (2) the construction or maintenance of a road, highway, street, bridge, utility, water supply project, water plant, wastewater plant, water and wastewater distribution or conveyance facility, wharf, dock, airport runway or taxiway, drainage project, or related type of project associated with civil engineering construction; or
- (3) improvements to or the construction of a structure that is a:
 - (A) detached single-family residence;
 - (B) duplex;
 - (C) triplex; or
 - (D) quadruplex.

Added by Acts 2009, 81st Leg., R.S., Ch. 87, Sec. 4.001(a), eff. September 1, 2009.

Sec. 56.003. EFFECT OF CHAPTER ON TIMING OF PAYMENT PROVISIONS. This chapter does not affect a provision that affects the timing of a payment in a contract for construction management or for the construction of improvements to real property if the payment is to be made within a reasonable period.

Added by Acts 2009, 81st Leg., R.S., Ch. 87, Sec. 4.001(a), eff. September 1, 2009.

Sec. 56.004. WAIVER OF CHAPTER PROHIBITED. A person may not waive this chapter by contract or other means. A purported waiver of this chapter is void.

Added by Acts 2009, 81st Leg., R.S., Ch. 87, Sec. 4.001(a), eff. September 1, 2009.

SUBCHAPTER B. CONTINGENT PAYMENT CLAUSE

Sec. 56.051. ENFORCEMENT OF CLAUSE PROHIBITED TO EXTENT CERTAIN CONTRACTUAL OBLIGATIONS NOT MET. A contingent payor or its surety may not enforce a contingent payment clause to the extent that the obligor's nonpayment to the contingent payor is the result of the contractual obligations of the contingent payor not being met, unless the nonpayment is the result of the contingent payee's failure to meet the contingent payee's contractual requirements.

Added by Acts 2009, 81st Leg., R.S., Ch. 87, Sec. 4.001(a), eff. September 1, 2009.

Sec. 56.052. ENFORCEMENT OF CLAUSE PROHIBITED FOLLOWING NOTICE FROM CONTINGENT PAYEE. (a) Except as provided by Subsection (d), a contingent payor or its surety may not enforce a contingent payment clause as to work performed or materials delivered after the contingent payor receives written notice from the contingent payee objecting to the further enforceability of the contingent payment clause as provided by this chapter and the notice becomes effective as provided by Subsection (b). The contingent payee may send written notice only after the 45th day after the date the contingent payee submits a written request for

payment to the contingent payor that is in a form substantially in accordance with the contingent payee's contract requirements for the contents of a regular progress payment request or an invoice.

(b) For purposes of Subsection (a), the written notice becomes effective on the latest of:

(1) the 10th day after the date the contingent payor receives the notice;

(2) the eighth day after the date interest begins to accrue against the obligor under:

(A) Section 28.004, Property Code, under a contract for a private project governed by Chapter 28, Property Code; or

(B) 31 U.S.C. Section 3903(a)(6), under a contract for a public project governed by 40 U.S.C. Section 3131; or

(3) the 11th day after the date interest begins to accrue against the obligor under Section 2251.025, Government Code, under a contract for a public project governed by Chapter 2251, Government Code.

(c) A notice given by a contingent payee under Subsection (a) does not prevent enforcement of a contingent payment clause if:

(1) the obligor has a dispute under Chapter 28, Property Code, Chapter 2251, Government Code, or 31 U.S.C. Chapter 39 as a result of the contingent payee's failure to meet the contingent payee's contractual requirements; and

(2) the contingent payor gives notice in writing to the contingent payee that the written notice given under Subsection (a) does not prevent enforcement of the contingent payment clause under this subsection and the contingent payee receives the notice under this subdivision not later than the later of:

(A) the fifth day before the date the written notice from the contingent payee under Subsection (a) becomes effective under Subsection (b); or

(B) the fifth day after the date the contingent payor receives the written notice from the contingent payee under Subsection (a).

(d) A written notice given by a contingent payee under Subsection (a) does not prevent the enforcement of a contingent payment clause to the extent that the funds are not collectible as a result of a primary obligor's successful assertion of a defense of sovereign immunity, if the contingent payor has exhausted all of its rights and remedies under its contract with the primary obligor and under Chapter 2251, Government Code. This subsection does not:

(1) create or validate a defense of sovereign immunity;
or

(2) extend to a primary obligor a defense or right that did not exist before September 1, 2007.

(e) On receipt of payment by the contingent payee of the unpaid indebtedness giving rise to the written notice provided by the contingent payee under Subsection (a), the contingent payment clause is reinstated as to work performed or materials furnished after the receipt of the payment, subject to the provisions of this chapter.

Added by Acts 2009, 81st Leg., R.S., Ch. 87, Sec. 4.001(a), eff. September 1, 2009.

Sec. 56.053. ENFORCEMENT OF CLAUSE PROHIBITED IF EXISTENCE OF SHAM RELATIONSHIP. A contingent payor or its surety may not enforce a contingent payment clause if the contingent payor is in

a sham relationship with the obligor, as described by the sham relationships in Section 53.026, Property Code.

Added by Acts 2009, 81st Leg., R.S., Ch. 87, Sec. 4.001(a), eff. September 1, 2009.

Sec. 56.054. ENFORCEMENT OF CLAUSE PROHIBITED IF UNCONSCIONABLE. (a) A contingent payor or its surety may not enforce a contingent payment clause if the enforcement would be unconscionable. The party asserting that a contingent payment clause is unconscionable has the burden of proving that the clause is unconscionable.

(b) The enforcement of a contingent payment clause is not unconscionable if the contingent payor:

(1) proves that the contingent payor has exercised diligence in ascertaining and communicating in writing to the contingent payee, before the contract in which the contingent payment clause has been asserted becomes enforceable against the contingent payee, the financial viability of the primary obligor and the existence of adequate financial arrangements to pay for the improvements; and

(2) has done the following:

(A) made reasonable efforts to collect the amount owed to the contingent payor; or

(B) made or offered to make, at a reasonable time, an assignment by the contingent payor to the contingent payee of a cause of action against the obligor for the amounts owed to the contingent payee by the contingent payor and offered reasonable cooperation to the contingent payee's collection efforts, if the assigned cause of action is not subject to defenses caused by the contingent payor's action or failure to act.

(c) A cause of action brought on an assignment made under Subsection (b)(2)(B) is enforceable by a contingent payee against an obligor or a primary obligor.

(d) A contingent payor is considered to have exercised diligence for purposes of Subsection (b)(1) under a contract for a private project governed by Chapter 53, Property Code, if the contingent payee receives in writing from the contingent payor:

(1) the name, address, and business telephone number of the primary obligor;

(2) a description, legally sufficient for identification, of the property on which the improvements are being constructed;

(3) the name and address of the surety on any payment bond provided under Subchapter I, Chapter 53, Property Code, to which any notice of claim should be sent;

(4) if a loan has been obtained for the construction of improvements:

(A) a statement, furnished by the primary obligor and supported by reasonable and credible evidence from all applicable lenders, of the amount of the loan;

(B) a summary of the terms of the loan;

(C) a statement of whether there is foreseeable default of the primary obligor; and

(D) the name, address, and business telephone number of the borrowers and lenders; and

(5) a statement, furnished by the primary obligor and supported by reasonable and credible evidence from all applicable banks or other depository institutions, of the amount, source, and location of funds available to pay the balance of the contract amount if there is no loan or the loan is not sufficient to pay for all of the construction of the improvements.

(e) A contingent payor is considered to have exercised diligence for purposes of Subsection (b)(1) under a contract for a public project governed by Chapter 2253, Government Code, if the contingent payee receives in writing from the contingent payor:

(1) the name, address, and primary business telephone number of the primary obligor;

(2) the name and address of the surety on the payment bond provided to the primary obligor to which any notice of claim should be sent; and

(3) a statement from the primary obligor that funds are available and have been authorized for the full contract amount for the construction of the improvements.

(f) A contingent payor is considered to have exercised diligence for purposes of Subsection (b)(1) under a contract for a public project governed by 40 U.S.C. Section 3131 if the contingent payee receives in writing from the contingent payor:

(1) the name, address, and primary business telephone number of the primary obligor;

(2) the name and address of the surety on the payment bond provided to the primary obligor; and

(3) the name of the contracting officer, if known at the time of the execution of the contract.

(g) A primary obligor shall furnish the information described by Subsection (d) or (e), as applicable, to the contingent payor not later than the 30th day after the date the primary obligor receives a written request for the information. If the primary obligor fails to provide the information under the written request, the contingent payor, the contingent payee, and their sureties are relieved of the obligation to initiate or continue performance of the construction contracts of the contingent payor and contingent payee.

Added by Acts 2009, 81st Leg., R.S., Ch. 87, Sec. 4.001(a), eff. September 1, 2009.

Sec. 56.055. USE OF CLAUSE TO INVALIDATE ENFORCEABILITY OR PERFECTION OF MECHANIC'S LIEN PROHIBITED. A contingent payment clause may not be used as a basis for invalidation of the enforceability or perfection of a mechanic's lien under Chapter 53, Property Code.

Added by Acts 2009, 81st Leg., R.S., Ch. 87, Sec. 4.001(a), eff. September 1, 2009.

Sec. 56.056. ASSERTION OF CLAUSE AS AFFIRMATIVE DEFENSE. The assertion of a contingent payment clause is an affirmative defense to a civil action for payment under a contract.

Added by Acts 2009, 81st Leg., R.S., Ch. 87, Sec. 4.001(a), eff. September 1, 2009.

Sec. 56.057. ALLOCATION OF RISK PERMITTED. An obligor or a primary obligor may not prohibit a contingent payor from allocating risk by means of a contingent payment clause.

Added by Acts 2009, 81st Leg., R.S., Ch. 87, Sec. 4.001(a), eff. September 1, 2009.

AN ACT

relating to the operation and regulation of certain consolidated insurance programs.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Title 2, Insurance Code, is amended by adding Subtitle C to read as follows:

SUBTITLE C. PROGRAMS AFFECTING MULTIPLE LINES OF INSURANCE

CHAPTER 151. CONSOLIDATED INSURANCE PROGRAMS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 151.001. DEFINITIONS. In this chapter:

(1) "Consolidated insurance program" means a program under which a principal provides general liability insurance coverage, workers' compensation insurance coverage, or both that are incorporated into an insurance program for a single construction project or multiple construction projects.

(2) "Construction project" means construction, remodeling, maintenance, or repair of improvements to real property. The term includes the immediate construction location and areas incidental and necessary to the work as defined in the construction contract documents. A construction project under this chapter does not include a single family house, townhouse, duplex, or land development directly related thereto.

(3) "Contractor" means any person who has entered into a construction contract or a professional services contract and is enrolled in the consolidated insurance program.

(4) "Claim" includes a loss or liability for a claim, damage, expense, or governmentally imposed fine, penalty, administrative action, or other action.

(5) "Construction contract" means a contract, subcontract, or agreement, or a performance bond assuring the performance of any of the foregoing, entered into or made by an owner, architect, engineer, contractor, construction manager, subcontractor, supplier, or material or equipment lessor for the design, construction, alteration, renovation, remodeling, repair, or maintenance of, or for the furnishing of material or equipment for, a building, structure, appurtenance, or other improvement to or on public or private real property, including moving, demolition, and excavation connected with the real property. The term includes an agreement to which an architect, engineer, or contractor and an owner's lender are parties regarding an assignment of the construction contract or other modifications thereto.

(6) "Indemnitor" means a party to a construction contract that is required to provide indemnification or additional insured status to another party to the construction contract or to a third party.

(7) "Insurer" has the meaning assigned by Section 560.001.

(8) "Principal" means the person who procures the insurance policy under a consolidated insurance program.

Sec. 151.002. RULES. The commissioner shall adopt rules as necessary to implement and enforce Subchapter B.

[Sections 151.003-151.050 reserved for expansion]

SUBCHAPTER B. GENERAL REQUIREMENTS

Sec. 151.051. DURATION OF GENERAL LIABILITY COVERAGE. A consolidated insurance program that provides general liability insurance coverage must provide completed operations insurance coverage for a policy period of not less than three years.

[Sections 151.052-151.100 reserved for expansion]

SUBCHAPTER C. REQUIREMENTS RELATED TO INDEMNIFICATION

Sec. 151.101. APPLICABILITY. (a) This subchapter applies to a construction contract for a construction project for which an indemnitor is provided or procures insurance subject to:

- (1) this chapter; or
- (2) Title 10.

(b) Subsection (a) applies regardless of whether the insurance is provided or procured before or after execution of the contract.

Sec. 151.102. AGREEMENT VOID AND UNENFORCEABLE. Except as provided by Section 151.103, a provision in a construction contract, or in an agreement collateral to or affecting a construction contract, is void and unenforceable as against public policy to the extent that it requires an indemnitor to indemnify, hold harmless, or defend a party, including a third party, against a claim caused by the negligence or fault, the breach or violation of a statute, ordinance, governmental regulation, standard, or rule, or the breach of contract of the indemnitee, its agent or employee, or any third party under the control or supervision of the indemnitee, other than the indemnitor or its agent, employee, or subcontractor of any tier.

Sec. 151.103. EXCEPTION FOR EMPLOYEE CLAIM. Section 151.102 does not apply to a provision in a construction contract that requires a person to indemnify, hold harmless, or defend another party to the construction contract or a third party against a claim for the bodily injury or death of an employee of the indemnitor, its agent, or its subcontractor of any tier.

Sec. 151.104. UNENFORCEABLE ADDITIONAL INSURANCE PROVISION. (a) Except as provided by Subsection (b), a provision in a construction contract that requires the purchase of additional insured coverage, or any coverage endorsement, or provision within

an insurance policy providing additional insured coverage, is void and unenforceable to the extent that it requires or provides coverage the scope of which is prohibited under this subchapter for an agreement to indemnify, hold harmless, or defend.

(b) This section does not apply to a provision in an insurance policy, or an endorsement to an insurance policy, issued under a consolidated insurance program to the extent that the provision or endorsement lists, adds, or deletes named insureds to the policy.

Sec. 151.105. EXCLUSIONS. This subchapter does not affect:

(1) an insurance policy, including a policy issued under an owner-controlled or owner-sponsored consolidated insurance program or a contractor-controlled or contractor-sponsored consolidated insurance program, except as provided by Section 151.104;

(2) a cause of action for breach of contract or warranty that exists independently of an indemnity obligation, including an indemnity obligation in a construction contract under a construction project for which insurance is provided under a consolidated insurance program;

(3) indemnity provisions contained in loan and financing documents, other than construction contracts to which the contractor and owner's lender are parties as provided under Section 151.001(5);

(4) general agreements of indemnity required by sureties as a condition of execution of bonds for construction contracts;

(5) the benefits and protections under the workers' compensation laws of this state;

(6) the benefits or protections under the governmental immunity laws of this state;

(7) agreements subject to Chapter 127, Civil Practice and Remedies Code;

(8) a license agreement between a railroad company and a person that permits the person to enter the railroad company's property as an accommodation to the person for work under a construction contract that does not primarily benefit the railroad company;

(9) an indemnity provision pertaining to a claim based upon copyright infringement;

(10) an indemnity provision in a construction contract, or in an agreement collateral to or affecting a construction contract, pertaining to:

(A) a single family house, townhouse, duplex, or land development directly related thereto; or

(B) a public works project of a municipality; or

(11) a joint defense agreement entered into after a claim is made.

[Sections 151.106-151.150 reserved for expansion]

SUBCHAPTER D. NONWAIVER

Sec. 151.151. NONWAIVER. A provision of this chapter may not be waived by contract or otherwise.

SECTION 2. Section 2252.902, Government Code, is repealed.

SECTION 3. (a) Chapter 151, Insurance Code, as added by this Act, applies only to a new or renewed consolidated insurance program for a construction project that begins on or after January 1, 2012. A consolidated insurance program for a construction project that begins before January 1, 2012, is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

(b) The changes in law made by this Act apply only to an original construction contract with an owner of an improvement or

contemplated improvement that is entered into on or after the effective date of this Act. If an original construction contract with an owner of an improvement or contemplated improvement is entered into on or after the effective date of this Act, the changes in law made by this Act apply to a related subcontract, purchase order contract, personal property lease agreement, and insurance policy. If an original construction contract with an owner of an improvement or contemplated improvement is entered into before the effective date of this Act, that original construction contract and a related subcontract, purchase order contract, personal property lease agreement, and insurance policy are governed by the law in effect immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 4. This Act takes effect January 1, 2012.



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EDUCATION

JD, Southern Methodist University, 1981
BEc, Southern Methodist University, 1977

BAR ADMISSIONS

Texas

Mike's practice focuses on construction law and commercial and industrial real estate development.

Mike is an Adjunct Professor at Southern Methodist University School of Law in Dallas, Texas. He is also on the teaching faculty of the Design Build Institute of America and on the panel of Arbitrators and Mediators for the American Arbitration Association.

Mike has been a speaker at numerous programs concerning construction law, including the Practising Law Institute's Construction Contracts Seminars, the Texas Bar Advanced Real Estate Program, the ABA/Joint Program on Bankruptcy in the Construction Industry, Southern Methodist School of Law's Continuing Legal Education Program, CLE International, Design-Build Institute of America, Lorman Education Services and the State Bar of Texas Annual Construction Law Conference.

Relevant Experience

- Representation of public and private owners, developers, lenders and contractors in construction transactions, documentation and dispute resolution proceedings, as well as project acquisition, financing and development activities.
- Transactional aspects include multi-family, office building and shopping center projects, corporate headquarters projects, hospitals, health care and senior living facilities, hotels, resorts and golf courses, manufacturing, industrial, co-generation, highway and rail projects.
- Representations involving both professional and collegiate sports arenas, as well as the representation of mass transit authorities.
- Focuses on commercial, residential and retail mixed use facilities and on manufacturing and industrial plant and facility construction and expansion projects.
- Representations of nationally recognized firms in food processing plants and distribution centers, tire manufacturing plants and a wide variety of other production facility projects.
- Representations in dispute proceedings, involving arbitrations, mediations and other alternative dispute resolution proceedings for owners, developers, educational institutions, hospitals and construction joint ventures.
- Representations in the health care industry, including construction and development of new hospitals and medical office buildings, expansions of existing campuses, and construction of senior living and assisted care facilities.

Memberships

- Member, American Bar Association
- Member, Dallas Bar Fellows
- Member, Dallas Bar Association
- Member, College of the State Bar of Texas

Publications

- Author, Design Build Contracting Claims, *Aspen Publishing*, 1999-2002
- Author, Construction Law Update, *Aspen Publishing*, 1995-2007
- Author, State-by-State Guide to Architect, Engineer, and Contractor Licensing, *Aspen Law & Business*, 1995-2011
- Author, Risk Allocation Through Indemnity Obligations, *South Carolina Law Review*, Vol. 40, No. 4, 1995
- Author, Fifty State-by-State Construction Lien and Bond Law, *Wiley Law Publication*, 1992-2011
- Author, *Southern Methodist University Law Review: Annual Survey -- Construction Law*, 1991-1999
- Author, Construction Subcontracting: A Legal Guide for Industry Professionals, *Wiley Law Publication*, 1991
- Author, Proving and Pricing Construction Claims, *Wiley Law Publication*, 1990
- Author, Construction Failures, *Wiley Law Publication*, 1989

Awards & Recognition

- Selected for inclusion by *Chambers* Directory as one of the nation's leading attorneys in construction law in the United States, 2004-2011
- Selected for inclusion in *The Best Lawyers in America*, 2005-2011
- Named a "Texas Super Lawyer" by *Texas Monthly*, 2005-2011