



Lovein Ribman PC



Texas Board Certified Construction Attorneys

(888) 368-2483

www.loveinribman.com

TEXAS LIEN LAW SUMMARY **Including the 2022 Lien Law Amendments and Modifications**

The Texas Board of Legal Specialization has certified approximately 100 plus Texas lawyers as Board Certified in Construction Law. Lovein Ribman's construction law department is overseen by two of those Board-Certified attorneys. Our construction law attorneys counsel and represent commercial and residential property owners, architects, engineers, developers, sureties, Original Contractors, subcontractors, and suppliers with every type of legal issue encountered on commercial, industrial, residential and public construction projects. Our construction attorneys have been tried and tested, and are experienced in all aspects of construction law, to include enforcing payment through the mechanics lien and bond claim process; removing invalid mechanic's liens; lien foreclosure actions; defending and/or prosecuting design and construction defect claims; delay damage claims; and with drafting, reviewing, and modifying all types of residential and commercial contracts.

CAN I FILE A LIEN ON A PUBLIC PROJECT?

NO.

The first step in protecting your unpaid invoices is to determine whether the Property is owned by a Public Entity, a privately held company, or an individual. The process that you will follow to enforce your claim is different depending upon the answer to this question. You cannot file a Lien against a Property owned by a Public Entity, like the state, a county, municipality, or a city. Some examples of government owned Properties include public schools, libraries, highways, parks, and government buildings. As a substitute to a Lien, the State of Texas requires the Original Contractor to purchase a Payment Bond from a reputable Surety (insurance company) wherein the prime contract (the contract between the Public Entity and the Original Contractor) is over specific sum (generally between \$25,000.00 - \$50,000.00). If you provided labor/material to a publicly owned Project and have not been paid, then your first step is to make a claim against the Payment Bond. If you need to file a Payment Bond Claim, please contact **Lovein Ribman at (888) 368-2483 (www.loveinribman.com)** for additional information and to have one of our construction lawyers prepare and serve a Payment Bond Claim for you.

On all other Projects, those that are owned by private individuals or private business entities, you can file a Lien against the Property to secure payment of the debt. Some examples of privately owned Properties include private homes, apartment complexes, office buildings, shopping centers, restaurants and leased commercial properties.

HOW DO I ENFORCE PAYMENT ON A PRIVATELY OWNED PROJECT?

There are at least six potential legal methods that you can use to enforce payment on a privately owned Project: (1) send a Notice of Claim Payment Demand Letter to the Property Owner, Original Contractor, and the contractor who hired you; (2) file a Lien Affidavit against the Property; (3) serve the Property Owner, Original Contractor, and contractor who hired you with a Notice of Lien Filing Payment Demand Cover Letter; (4) send a Pre-Foreclosure Payment Demand Letter; (5) send a Payment Demand Letter to the debtor only; and/or (6) file a Lawsuit to foreclose on the Lien and/or for breach of contract. Each one of these methods can be used independently or in conjunction with one another. Read below to learn more.

SERVE A COURTESY NOTICE OF CLAIM PAYMENT DEMAND LETTER: If you were hired by the Property Owner, or the Property Owner's agent, then you are **not required** to serve any preliminary Notices before filing a Lien. However, if you believe that filing a Lien may negatively affect your business relationship or if you believe that sending one last stern Notice may prompt payment, then you should consider sending a Courtesy Notice of Claim Payment Demand Letter before filing a Lien.

SERVE A MANDATORY NOTICE OF CLAIM PAYMENT DEMAND LETTER: If you were **not** hired by the Property Owner or the Owner's Agent, then you must serve a "Notice of Claim" on the Property Owner and the Original Contractor before filing a Lien. When properly prepared and timely served, the Property Owner is **required** to withhold from the Original Contractor the amount you claim is owed (referred to as "trapped funds") upon receipt of a Notice of Claim. If the Property Owner pays the Original Contractor after receiving the Notice, then the Property Owner may be personally liable for the debt and made to pay twice. Additionally, when the Notice of Claim is prepared and served as a strong Payment Demand Letter, it can be a very effective tool to enforcing payment without even filing a Lien. Keep in mind, you can always serve a Notice of Claim without later filing a Lien. To learn more about the Notice of Claim requirements, **contact Lovein Ribman at (888) 368-2483 (www.loveinribman.com)**.

FILE A LIEN AGAINST THE PROPERTY: Almost everyone who provides labor, materials and/or equipment to a Property has the right to file a Lien against the Property if they have not been timely paid and have properly completed all statutory and/or constitutional requirements. A Lien is a powerful tool that can be used to potentially secure payment of the debt and gain leverage in negotiating a settlement. To learn more about the Lien, see the "What is a Lien?" question herein.

SERVE A NOTICE OF LIEN FILING PAYMENT DEMAND COVER LETTER: After you file the Lien, you must serve it on the Property Owner and the Original Contractor within five business

days of filing. This is one of the best opportunities to inform the Property Owner, the Original Contractor, and all other interested parties that a Lien has been filed and the legal action you intend to take if the debt is not paid.

SEND A PRE-FORECLOSURE PAYMENT DEMAND LETTER: If you have still not been paid after filing and serving the Lien, you may need to file a Lawsuit to foreclose on the Lien. However, before you do so, you should consider sending one last stern Payment Demand Letter to all parties who will be affected by the Lawsuit.

SERVE A PAYMENT DEMAND LETTER: If you failed to timely serve any of the required Notices or file a Lien, then your remaining two options are to serve a strong Payment Demand Letter to the debtor who hired you and/or file a Lawsuit. Before filing a Lawsuit, you should consider sending a strong Payment Demand Letter to the company/individual who hired you before incurring the cost of litigation.

FILE A LAWSUIT: If your deadline has passed to file a Lien, then other than serving a Payment Demand Letter, your remaining option is to file a Lawsuit. Additionally, if you have filed a Lien and have still not been paid, then your next step is to file a Lawsuit to foreclose on the Lien prior to the statutory and/or constitutional deadline. **Contact Lovein Ribman at (888) 368-2483 (www.loveinribman.com)** to learn more about having a construction lawyer prepare and file a Lawsuit to foreclose for you.

WHAT IS A LIEN?

A Lien is one of the most powerful legal tools that an Original Contractor, Subcontractor, Architect, Engineer, Material Supplier, Landscaper or Laborer has to secure payment for the unpaid labor/material/equipment it provided to a privately owned (as opposed to state or federally owned) Property. In Texas, a Lien is referred to as a “Mechanic’s Lien,” “Construction Lien”, “Mechanic’s, Contractor’s, or Materialman’s Lien,” or just simply a “Lien.” When properly filed with the County Clerk’s Office in the county where the Property is located, the Lien creates an encumbrance (or a “cloud”) on the Property’s title, thereby giving notice to Lenders and potential purchasers that someone (referred to as the “**Claimant**”) claims a debt is owed to it for labor/material/equipment provided to the Property. Lenders typically will not close out a construction loan, provide permanent financing, or refinance a Property that has a Lien filed against it. As such, Property Owners (especially on new construction) will need to resolve the Lien prior to completion of the Project or before the Property is refinanced or sold. It has become the practice, as opposed to the exception, for all categories of Original Contractors, Subcontractors, Architects, Engineers, Material Suppliers, Landscapers and Laborers to routinely serve and file all necessary Lien documents as a means to protect their unpaid invoices.

WHAT ARE THE BENEFITS TO FILING A LIEN?

A Lien creates a new and additional source to recover payment of the debt. For example, in the event of nonpayment, your first line of recovery would typically be a breach of contract claim

against the party who hired you. However, if you *timely* and *properly* file a Lien against the Property, then you will have the following *additional* rights and protections: (1) a Lawsuit to foreclose on the Lien and *possibly* force a sale of the Property; (2) a Lien against any funds held by the Property Owner and due to the Original Contractor; (3) the possibility of being paid directly by the Property Owner if the Original Contractor does not dispute the amount owed; and (4) if the Property Owner pays the Original Contractor after receiving a *timely* Notice of Claim (with “fund trapping” language), then the potential right to force the Property Owner to pay twice for your work. The “Lien Process” is also an excellent way to gain leverage in negotiating a resolution of the debt. Moreover, if you file a Lawsuit and prevail on foreclosing the Lien, then you *may* be entitled to recover all reasonable attorneys’ fees and costs.

HOW DO I USE THE LIEN FILING PROCESS TO ENFORCE PAYMENT?

Typically, you engage the “Lien Filing Process” as a means to gain leverage to resolve the dispute, as opposed to actually foreclosing on the property. As such, each step of the process can be viewed independently and as an attempt to obtain payment without having to take the next step. With that said, it is important that each Lien document is: (1) *timely* sent; (2) has the right look and appearance; (3) has the strongest possible content; and (4) is served and/or filed at the optimal time.

WHAT LAWS CONTROL THE FILING OF A LIEN?

TEXAS PROPERTY CODE SECTIONS 53.001 through 53.176 contain the general provisions for filing a Lien against a privately owned Property in Texas and SECTIONS 53.251 through 53.260 set forth special requirements for filing a Lien against a “residential” Property in Texas. These statutes are strictly enforced by the courts. If you fail to *timely* serve any of the required Notices or fail to *timely* record and serve your Lien, you have likely waived your right to enforce payment by way of the Lien process.

In addition to a statutory Lien, the TEXAS CONSTITUTION, ARTICLE XVI, SECTION 37, provides certain Original Contractors (those who have a direct contract with the Property Owner or the Owner’s Agent) with a second basis for a Lien, known as a “constitutional Lien.” Unlike a statutory Lien (which must be filed within a short time period from completion of the work), a constitutional Lien can *potentially* be filed up to **four years** from the completion of the entire Project.

HOW LONG SHOULD I WAIT BEFORE I BEGIN THE LIEN PROCESS ON A PROJECT?

You should begin the Lien Process the moment you start a new Project by gathering the essential Project information needed to later serve a Notice of Claim or file a Lien in the event of non-payment. One of the most common mistakes made is to assume that you will be paid for your work. The better approach is to assume that you will not be paid and to make it a practice in

your business to *timely* serve all Notices and file your Lien Affidavit well before your deadlines. Remember, a Notice of Claim does not need to be a threatening demand for payment, but instead can also be drafted in a non-adversarial manner that simply advises the Property Owner and the Original Contractor that the Notice is simply being sent to preserve your Lien rights in the event you are not paid.

WHO HAS THE RIGHT TO FILE A LIEN?

Any Original Contractor, Subcontractor, Laborer, Material Supplier, Architect, Engineer, Landscaper or Surveyor, who has provided labor, material, equipment, plans, plats, or surveys to a Property for the construction or repair of a house, building, or a structure, may file a Lien against the Property.

WHAT ARE THE NECESSARY STEPS FOR FILING A LIEN?

Below are the **bare minimum steps** that must be completed in order to perfect a Lien. The deadlines and documents that you will use to complete these steps vary depending upon whether the Property is commercial, residential, or a homestead.

When Hired by the Property Owner

Step One: Prepare and file the Lien Affidavit with the County Clerk's Office in the county where the Property is located within the statutory deadline.

Step Two: Serve the Lien Affidavit on the Property Owner within no later than five business days from filing.

Step Three: File a Lawsuit to foreclose on the Lien if you have not been paid within the statutory deadline, or waive your right to further enforce the Lien.

When Hired by the Original Contractor or Any Tier Subcontractor or Supplier

Step One: Serve the Property Owner and the Original Contractor with a Notice of Claim within the statutory deadline.

Step Two: Prepare and file the Lien Affidavit with the County Clerk's Office in the county where the Property is located within the statutory deadline.

Step Three: Serve the Lien Affidavit on the Property Owner and Original Contractor within no later than five business days from filing.

Step Four: File a Lawsuit to foreclose on the Lien if you have not been paid within the statutory deadline, or waive your right to further enforce the Lien.

Again, the above steps represent the bare minimum that you need to do to perfect a Lien. Read on to learn how to maximize the probability of being paid through each step.

ARE THE REQUIREMENTS AND DEADLINES DIFFERENT FOR FILING A LIEN ON A “COMMERCIAL” PROPERTY VERSUS A “RESIDENTIAL” PROPERTY?

YES. The Notice and Lien filing requirements and deadlines are different for residential and commercial properties.

As such, the first step is to determine whether you supplied labor and/or material to a “residential” Property or a “commercial” Property as defined under the TEXAS PROPERTY CODE. If the Property is not “residential,” then it is “commercial” by default.

A “**residential Property**” is a single-family house, a duplex, a triplex, a quadruplex, or a unit in a multi-unit structure (like a condo) that is used for residential purposes **and** that is:

- (1) **owned** by one or more adult persons (not an entity); **and**
- (2) used or intended to be used as a dwelling **by one of the Owners**.

Therefore, if the Owner is a company (like a builder), then the Property is likely commercial and not residential for Lien purposes. In contrast, if the **Owner** lives in or intends to live in the house, then the Property is likely considered residential for Lien purposes.

EXAMPLE: Here are some basic examples to consider: your next-door neighbor’s house, if rented, would not be a residential Property since the Owner does not live in the house and since it is being used to generate income. A spec house or a house in a large-scale development would not be residential if it has not yet been sold and occupied by its Owner. An apartment complex is not a residential Property if the units are rented. Therefore, just because something looks like a “residence” does not mean that it is a residential Property for Lien purposes.

PRACTICE POINTER: The Notice of Claim and Lien filing deadlines are shorter for residential Properties than they are for commercial Properties. Additionally, there are special requirements which must be followed if the Property is a residential *homestead* Property. Therefore, it is always better for the Claimant if the Property is considered “commercial” rather than “residential.” If unsure, you

should consider following the residential deadlines/requirements in that they are more restrictive.

ARE THE REQUIREMENTS AND DEADLINES FOR SERVING AND FILING LIEN DOCUMENTS DIFFERENT IF YOU WERE HIRED BY THE PROPERTY OWNER, ORIGINAL CONTRACTOR, OR A SUBCONTRACTOR?

YES.

The requirements and deadlines for serving Notices and filing the Lien Affidavit are different depending upon who hired you. Therefore, the second step in analyzing your Lien rights is to confirm who hired you.

If you were hired by the Property Owner, you are an “Original Contractor” even if you only supplied materials. Keep in mind that if you were hired by the Owner’s Authorized Agent, then you have been hired by the Property Owner. An example of a Property Owner’s Agent might be an apartment management company who is authorized to retain Contractors to perform work at the Project.

If you were hired by the Original Contractor, then you are a First-Tier Subcontractor/Supplier.

If you were hired by a Subcontractor of any level, then you are considered a Second-Tier Subcontractor/Supplier for Lien purposes. Prior to the 2022 lien law amendments, Second-Tier Subcontractors/Suppliers were required to serve an additional Notice by no later than the 15th day of the second month from providing the unpaid labor/materials. However, the 2022 amendments have repealed this requirement and now all tiers of Subcontractors/Suppliers are only required to serve the Third Month Notice prior to filing the Lien.

ARE THE REQUIREMENTS AND DEADLINES FOR SERVING AND FILING LIEN DOCUMENTS DIFFERENT FOR “UNPAID PROGRESS PAYMENTS” VERSUS “WITHHELD CONTRACTUAL RETAINAGE”?

YES

The 2022 lien amendments re-define “retainage” as “an amount representing part of a contract payment that is not required to be paid to the claimant within the month following the month in which labor is performed, material is furnished, or specially fabricated material is delivered.” In other words, “retainage” is the amount an Original Contractor or Subcontractor can withhold from its Subcontractor or Supplier from a progress payment as allowed by the subcontract. Note, “retainage” or “contractual retainage” is **not** the same as “statutory retainage”, of which the 2022 lien amendments now refer to as “reserved funds”. Reserved funds are the 10% a Property

Owner is required to withhold from an Original Contractor's progress payment until 30 days from completion of the Project.

Step One—Serve Notice of Contractual Retainage: If you were not hired by the Property Owner, or the Property Owner's Authorized Agent, then you **must** notify the Property Owner in writing that your contract allows the contractor who hired you to withhold retainage from your progress payments. If your contract is with a Subcontractor, then you must serve the Original Contractor with the Notice as well. The Notice **must** be served within the **earlier of:** (1) the 30th day from when you complete, terminate, or abandon your contract; or (2) before the 30th day after the contract between the Property Owner and the Original Contractor is completed, terminated, or abandoned. This simple Notice requirement can easily be incorporated into the standard Notice of Claim for unpaid progress payments or sent independently.

POINTER: The 2022 lien amendments modified the deadline to serve all Notices and file the Lien Affidavit if the deadline falls on a weekend or legal holiday. Now you have until the next business day to serve a Notice or to file a Lien Affidavit if the deadline falls on the weekend or a legal holiday.

Step Two—File the Lien Affidavit: A claim solely for withheld contractual retainage **does not** accrue until the contract between the Property Owner and the Original Contractor is completed, settled, terminated, or abandoned. Once that has occurred and if you have timely served the required Notice, then under the 2022 lien amendments, you have until the **15th day of the third month** (for both residential and commercial Projects) to timely file a Lien Affidavit for unpaid retainage. As such, if you provide labor/material at the outset of a large-scale Project, it is likely that your deadline to file a pure retainage Lien may not arise until well after you have completed your work.

Example: Assume that in March you installed and completed the foundation on a *commercial* Project and that the entire Project was not completed until December of that same year. You would then have until March 15th of the next year to *timely* file the retainage Lien. (See below for a Warning.)

Warning: Generally speaking, a Property Owner is permitted to release *final payment* (typically withheld *statutory* retainage) to the Original Contractor within 30 days after completion of the entire Project. If a Property Owner timely receives Notice of Contractual Retainage (as discussed above) it should not release the statutory retainage to the Original Contractor until after the deadline to file a Lien for contractual retainage has passed. However, Property Owners do not always know or follow the law. Therefore, best practice is to **always file your Lien Affidavit for withheld contractual retainage within no later than 30 days from completion of the Project as opposed to waiting until your deadline.**

CAN I FILE A LIEN IF THE WORK WAS PERFORMED FOR A COMMERCIAL TENANT?

YES. However, the Lien will only extend to the “leasehold interest” held by the tenant as opposed to the real Property itself. A leasehold interest is the interest that a tenant has to use the Property by and through the lease agreement. This is typically not the type of “interest” that you would want to foreclose on through a Lien. However, there are two major benefits of a leasehold interest Lien.

First, the lease agreement between the tenant and the landlord should include a provision which expressly prohibits the tenant from allowing a Lien to be filed against the Property or against the “leasehold interest.” Consequently, by filing the Lien, you may put the tenant in default of the lease. Second, as an incentive to obtain a tenant or keep a pre-existing tenant, landlords will commonly agree to pay for some of the tenant improvements. the landlord will not release the TI money until the construction is complete and the tenant has obtained a Lien waiver from the Original Contractor representing that all subcontractors/suppliers have been paid in full. By filing a Lien, you will likely prevent the release of the TI money until your Lien is resolved.

The process for filing a Lien against the leasehold interest is exactly the same as filing a Lien against the real Property, with the only two differences being that the tenant becomes the “Property Owner” (since he owns the leasehold interest) and the Property description should state that the Lien is being recorded against “the leasehold interest owned by [tenant’s name] for real Property located at [address and legal description].” All other requirements are the same.

CAN I FILE A LIEN EVEN IF I DO NOT HAVE A WRITTEN CONTRACT?

Prior to the 2022 lien amendments, Architects, Engineers, Surveyors and Landscapers did not have lien rights unless their work was performed pursuant to a **written** contract. For **commercial** projects, the 2022 lien amendments have removed the requirement that the contract be in “writing”. As such, as long as the work was performed pursuant to *either* a written or verbal agreement, then all categories of Contractors, Subcontractors, Laborers, Landscapers and Professionals have the right to file a lien if all other requirements have been satisfied.

Homestead Properties: In order to have a right to file a Lien against a residential *homestead* Property, the work needs to have been performed under or by virtue of a **written** contract (signed by both spouses, a married couple). For more details see section entitled “Are there Special Requirements for Filing a Lien Against a Residential Homestead Property?” below.

ARE THERE SPECIAL REQUIREMENTS FOR FILING A STATUTORY LIEN AGAINST A RESIDENTIAL HOMESTEAD PROPERTY?

YES. To have Lien rights on a residential homestead Property, the Original Contractor must: (1) have a written contract signed by the Property Owner (if they are a married couple, then **both**

must sign the contract); (2) before the work begins; and (3) the contract must be filed with the County Clerk. See TEXAS PROPERTY CODE Section 53.254 for more details.

PRACTICE POINTER: If you are a Subcontractor or a Material Supplier who provided labor/materials to a residential homestead Property by virtue of a verbal contract or a purchase order, you still have a right to file a Lien if you properly/timely serve the Notice of Claim and if the Original Contractor has satisfied the above requirements.

NOTICE OF CLAIM REQUIREMENTS

WHAT IS A NOTICE OF CLAIM (A.K.A. “PRE-LIEN NOTICE”)?

If you were not hired by the Property Owner, or the Property Owner’s Agent, then **before** you can file a Lien, you **must** provide the Property Owner and the Original Contractor with *written* notice of your claim. In Texas, this Notice was commonly referred to as a “Pre-Lien Notice,” “Preliminary Notice,” or an “Intent to File a Lien.” However, the 2022 lien amendments now refer to the Notice as a “Notice of Claim”. The Notice must be served (not filed with the County Clerk’s Office) on the Property Owner and Original Contractor within the statutory deadline from when the labor/materials/equipment were provided to the Property. Specific statutory language (required by the TEXAS PROPERTY CODE) must be included in the Notice for it to be valid and to require the Property Owner to withhold construction funds from the Original Contractor. Failure to serve the Notice by the statutory deadline (even by one day) will result in a waiver of the right to later file a Lien against the Property.

INSIDE TIP NO. 1: Every time you prepare/serve a document in regard to your claim, (like a Notice of Claim), consider using it as an opportunity to demand payment. Remember, you only have a limited number of opportunities to demand payment and you need to make the most out of all of them. Keep in mind, you are not required to file a Lien simply because you served a Notice of Claim.

INSIDE TIP NO. 2: For strategic reasons, Original Contractors might consider sending a courtesy Pre-Lien Payment Demand Letter to the Property Owner, the Lender, and anyone else who may be affected by the filing of a Lien, before actually filing the Lien if you believe it will work to get you paid without having to file the Lien.

WHAT IS THE DEADLINE TO SERVE A NOTICE OF CLAIM (A.K.A. “PRE-LIEN NOTICE”) ON A “COMMERCIAL” PROPERTY?

ORIGINAL CONTRACTORS/ORIGINAL CONTRACTORS (those hired by the Property Owner or the Property Owner’s Agent): If you were hired by the Property Owner or the Property Owner’s Agent, then you are **not** required to serve or file any Notices before filing your Lien. You can go straight to filing a Lien against the Property. However, you might consider sending a strong Payment Demand Letter before filing a Lien if you think it will resolve the payment dispute.

ALL OTHERS (those not hired by the Property Owner): **The 2022 lien amendments removed the Second Month Notice requirement for anyone not hired by the Original Contractor. Now, all Claimants not hired by the Property Owner are required to serve the Property Owner and the Original Contractor with a Notice of Claim by no later than the 15th day of the**

NOTICE OF CLAIM REQUIREMENTS

third month, for EACH AND EVERY MONTH that they provide labor or material to the Project and have not been paid.

EXAMPLE: If you provided labor/material in January and February and were not paid, then for the work done in January you must serve a Notice of Claim **by no later** than April 15; for the work done in February, you must serve the Notice of Claim **by no later** than May 15. In other words, you have to notify the Property Owner and Original Contractor EACH AND EVERY MONTH payment has not been made.

INSIDE TIP: In the above example, you could serve just one Notice (combining both months) as long as the Notice is sent before April 15th (which would be the 15th of the third month for the work performed in January). Keep in mind, you can serve the Notice as early as the first month following the month that you provided the labor/materials. For example, if you provided the labor/materials in March, you can serve the Pre-Lien Notice on April 1.

PRACTICE POINTER: To calculate the Notice deadline, do not look to the date of your invoice or the date payment is due under your contract—both are irrelevant. Your sole concern in calculating the deadline from the month that the labor/material were provided to the Property.

WARNING: A Property Owner is allowed to release *final payment* (typically withheld statutory retainage) to the Original Contractor within 30 days after completion of the entire Project. Once it has been released, you can no longer require the Property Owner to withhold it or place a Lien against it. As such, if possible, always serve the Notice (regardless of your final deadline) **before** the Property Owner releases final payment to the Original Contractor.

WHAT IS THE DEADLINE TO SERVE A NOTICE OF CLAIM (A.K. A. “PRE-LIEN NOTICE”) ON A “RESIDENTIAL” PROPERTY?

ORIGINAL CONTRACTOR/ORIGINAL CONTRACTOR (those hired by the Owner or Owner’s Agent): If you were hired by the Property Owner or the Owner’s Agent, then you are **not** required to serve or file any Notices before filing your Lien. You can move straight to filing a Lien. However, you might consider sending a strong Payment Demand Letter before filing a Lien if you think it will resolve the payment dispute.

ALL OTHER CLAIMANTS: If you were **not** hired by the Property Owner or the Property Owner’s Agent, then you **must** serve the Property Owner and the Original Contractor with a Notice of Claim by no later than the **15th day of the second month**, for EACH AND EVERY MONTH that you provide labor or material to the Property and have not been paid.

NOTICE OF CLAIM REQUIREMENTS

EXAMPLE: If you provide labor/materials in January and February and were not paid, then for the work done in January, you must serve a Notice **by no later** than March 15; for the work done in February, you must serve the Notice **by no later** than April 15. In other words, you have to notify the Property Owner **EACH AND EVERY MONTH** payment has not been made.

INSIDE TIP: In the above example, you could serve just one Notice (combining both months) as long as the Notice is sent before March 15th (which would be the 15th of the second month for the work performed in January). Keep in mind you can always serve a Notice early, just don't serve it late.

WARNING: A Property Owner is allowed to release *final payment* (typically withheld statutory retainage) to the Original Contractor within 30 days after completion of the entire Project. Once it has been released, you can no longer require the Property Owner to withhold it or place a Lien against it. As such, if possible, always serve the Notice (regardless of your final deadline) **before** the Property Owner releases final payment to the Original Contractor. On residential *homestead* Properties, the Property Owner is not liable to a Subcontractor or Material Supplier for any amount paid to the Original Contractor (including the withheld 10% retainage) before receiving a Notice of Claim. Again, consider serving the Notice as soon as you expect a payment dispute and before the Property Owner releases final payment to the Original Contractor.

HOW DO I SERVE THE NOTICE OF CLAIM?

The Notice may be served by any one of the following methods:

Personal Service: You may serve the Notice of Claim (“Pre-Lien Notice”) by personal delivery to the person entitled to receive the Notice. If you chose to personally serve the Notice, you should consider using an independent process server who can confirm under oath that the Notice was timely and properly served.

By Any Traceable Form of Delivery: Such as Fed Ex, or any other third-party private carrier service who can confirm proof of receipt.

Certified Mail Return Receipt Requested: You may serve the Notice by certified mail, with return receipt requested. This is the preferred and least expensive method of service. When served by this method, the Notice is deemed served on the date post marked even if the addressee does not accept or receive the Notice (as long as you can prove the Notice was actually sent to the addressee's last known address).

PRACTICE POINTER: As an exception to the service rules, if a Notice is **actually received** by the person who is entitled to receive it, the method used to serve the

NOTICE OF CLAIM REQUIREMENTS

Notice is immaterial. In other words, if you failed to properly serve the Notice by one of the required service methods, but can prove it was actually received within the deadline, you should be able to establish that the Notice requirement was satisfied.

NEW RULE: Pursuant to the 2022 lien amendments, if the deadline falls on a weekend or legal holiday, then the date is now extended to the next business day.

HOW DO I USE THE NOTICE OF CLAIM TO COMPEL THE PROPERTY OWNER TO PAY MY CLAIM DIRECTLY?

A Property Owner is required by statute (TEXAS PROPERTY CODE SECTION 53.101) to retain 10% of the overall Prime Contract amount from the Original Contractor for up to thirty days from completion of the entire Project (referred to as “statutory retainage”). Statutory retainage is intended to be a source of funds that unpaid Subcontractors can look to for payment. However, it typically is not enough to satisfy all unpaid claims. As such, to require the Property Owner to withhold the “entire amount of your claim” from the Original Contractor (referred to as “trapped funds”), you must include certain statutory language in the Pre-Lien Notice. The trapped funds create an entirely new source of funds in which to satisfy your claim. Upon receipt of a *properly* prepared Notice of Claim, the Property Owner must retain the trapped funds until either: (1) the time for filing the Lien has passed; or (2) if a Lien was timely filed, until the lien claim has been satisfied or released.

WHAT IF I FAILED TO SERVE THE NOTICE OF CLAIM?

Anyone who was not hired directly by the Property Owner or the Property Owner’s Agent **must** notify the Property Owner and Original Contractor in writing of the unpaid amount before filing a Lien. However, if you failed to serve the Notice, you may still have the right to file a Lien if you can demonstrate that the Original Contractor was actually the “Purported Original Contractor” under a Sham Contract. Pursuant to the 2022 lien amendments, a "Purported Original Contractor" means an original contractor who can effectively control the owner or is effectively controlled by the owner through common ownership of voting stock or ownership interests, interlocking directorships, common management, or otherwise, or who was engaged by the owner for the construction or repair of improvements without a good faith intention of the parties that the purported original contractor was to perform under the contract. Under these circumstances, a person who labors or furnishes labor or materials under a direct contractual relationship with a Purported Original Contractor is considered to be an Original Contractor for purposes of perfecting a mechanic's lien, and is not required to serve a Notice of Claim prior to recording the Lien Affidavit.

NOTICE OF CLAIM REQUIREMENTS

LIEN FILING REQUIREMENTS AND FORECLOSURE

WHAT INFORMATION MUST BE INCLUDED IN THE LIEN AFFIDAVIT?

After you have served a Notice of Claim, then the next step in the Lien Process is to file the Lien Affidavit with the County Clerk's Office in the county where the Property is located prior to your Lien filing deadline. The TEXAS PROPERTY CODE requires the following specific categories of information to be stated in the Lien Affidavit in order for the Lien to be valid:

Identification of the Claimant: The one who is owed money is referred to as the "Claimant." If the Claimant is a registered entity, then the full legal name of the business should be stated. You will also need to identify the person who will sign the Affidavit on behalf of the entity and that person's title with the company. If the Claimant is a d/b/a, then the person who is using the d/b/a needs to be identified, along with the d/b/a name. If the Claimant is an individual, then simply state that person's full name. In addition to the above, the Affidavit must include: (1) the mailing and business address for the Claimant; and (2) the county of which the person who signs the Affidavit is a resident.

Identification of the Owner or Reputed Owner: The Lien Affidavit must include the name and address of the Property Owner or the person or entity reasonably thought to be the Property Owner, otherwise known as the "reputed" Owner.

A Description of the Work Performed and Materials Furnished: All Claimants must include a description of the work or the materials furnished to the Project. Everyone but an Original Contractor must also state the month(s) in which the work or materials were provided to the Project. Depending upon the information contained in your invoice, you may be able to satisfy this requirement by simply attaching the invoice(s). However, note that the County Clerk's Office will generally charge an extra \$4.00 for every page filed with the Lien Affidavit. Therefore, sometimes it is cheaper and safer, to just describe the work and identify the months the work was performed in the Lien Affidavit itself as opposed to relying on attached invoices. The TEXAS PROPERTY CODE also permits use of common industry abbreviations to describe the work or materials; however, it is better practice to use complete words/sentences so as to avoid any confusion or miscommunication.

Identification of the Person Who Hired the Claimant: This requirement is satisfied by including the name and last known address of the person or company who hired you.

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Identification of the Original Contractor: Include the name and last known address of the Project Original Contractor.

A Description of the Property: The Affidavit must contain a legally sufficient description of the Property. The description must be detailed enough for the tract of land to be identified with reasonable certainty. A lot-and-block description of the Property is preferred, but if not available, it may be sufficient to describe the Property by cross streets and/or a common name.

The Amount of the Claim: The Lien Affidavit must state the amount claimed owed. Some examples of items that should not be included in calculating the Lien amount are: (1) anticipated profits; (2) prejudgment interest; (3) returned materials not incorporated into the Project (if not specially fabricated); (4) Lien costs; or (5) attorneys' fees. Although attorneys' fees and costs are potentially recoverable under TEXAS PROPERTY CODE SECTION 53.156, the amount incurred for these items cannot be included in the Lien Affidavit.

Pursuant to TEXAS PROPERTY CODE SECTION 53.024, the amount of a subcontractor's Lien may not exceed: (1) an amount equal to the proportion of the total subcontract price that the sum of the labor performed, materials furnished, materials specially fabricated, reasonable overhead costs incurred, and proportionate profit margin bears to the total subcontract price, **minus** (2) the sum of previous payments received by the Claimant on the subcontract.

Identification of Statutory Notices: All Claimants, other than Original Contractors must state the date on which each Notice of Claim was sent to the Property Owner and Original Contractor, and identify the method by which the Notices were sent.

The Affidavit Must be Sworn Under Oath: This is accomplished by concluding the Affidavit with what's known as a jurat, whereby the affiant affirms or swears under oath that the contents of the Affidavit are true. The jurat is made before a notary. Failure to use a jurat in the Affidavit will render it invalid and unenforceable.

After you have filed the Lien Affidavit, the next step is to serve the Lien Affidavit on the Property Owner and Original Contractor (if applicable). See "Am I Required to Notify the Property Owner or the Original Contractor That I File a Lien?" herein.

WHAT IS THE DEADLINE FOR FILING A LIEN ON A COMMERCIAL PROPERTY?

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WHEN HIRED BY THE PROPERTY OWNER: At the very latest, the Lien Affidavit must be filed with the County Clerk's Office in the county where the Property is located by no later than the **15th day of the fourth calendar month** from when the contract is terminated in writing, has been completed, finally settled, or abandoned.

EXAMPLE: Assume that you completed your contract in January, then your Lien Affidavit must be filed by no later than May 15. Alternatively, assume that the Property Owner terminated your contract *in writing* in January, then your Lien Affidavit would still need to be filed by no later than May 15.

EXCEPTION FOR CONSTITUTIONAL LIEN: If you were hired by the Property Owner or the Property Owner's Agent, then you may also have a right to file a constitutional Lien against the Property if your work affected the structure. The type of work typically not covered by a constitutional Lien might include: (1) landscaping that does not affect the structure; (2) supplying or installing plant materials; (3) irrigation; (4) underground wells; (5) demolition; and/or (6) fencing. Unlike a statutory Lien, a constitutional Lien can potentially be filed within up to four years after providing labor or material to the Property or before the Property is sold to a purchaser who is not aware of the debt. A constitutional Lien is easily asserted by a simple paragraph in the statutory Lien Affidavit or by way of its own independent Lien Affidavit.

WHEN NOT HIRED BY THE PROPERTY OWNER: For Subcontractors/Material Suppliers, the deadline to file a Lien depends upon whether the unpaid amount is a "progress payment" or withheld "contractual retainage".

If you were hired by the Original Contractor, a Subcontractor, or a Material Supplier, then at the **very latest**, your deadline to file a Lien Affidavit for ***unpaid progress payments*** (or anything other than withheld contractual retainage), is by **no later than the 15th day of the fourth month** from when **you last** provide labor or materials to the Project, excluding warranty work.

EXAMPLE: Assume that you completed your work in January and that the contractor who hired you **did not** withhold contractual retainage. Under that scenario, your deadline to file a Lien Affidavit for the unpaid contract balance would be by **no later** than the 15th day of May. However, to ensure that your Lien attaches to the 10% statutory retainage being withheld by the Property Owner from the Original Contractor, make sure you file the Lien Affidavit by no later than 30 days from completion of the entire Project even if the 15th of the fourth month comes after this date. (See below.)

If your claim is ***purely for unpaid withheld contractual retainage***, then at the **very latest**, your deadline to file the Lien Affidavit is by **no later than the 15th day of the third month** (as

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modified by the 2022 lien amendments) from when the contract between the Property Owner and the Original Contractor has been completed, finally settled, terminated, or abandoned.

EXAMPLE: Assume that you completed your work in January and the contractor who hired you **did** withhold contractual retainage from your progress payments (typically 5% to 10%). Further assume that the contract between the Property Owner and the Original Contractor was not completed until March. If your claim is **purely** for the unpaid withheld retainage, then your deadline to file the Lien Affidavit would be by no later than June 15. However, to ensure that your Lien attaches to the 10% statutory retainage being withheld by the Property Owner from the Original Contractor, make sure you file the Lien Affidavit by no later than 30 days from completion of the entire Project, even if the 15th of the third month comes after this date. (See below.)

Notwithstanding the above deadlines, to ensure that your Lien attaches to the 10% statutory retainage being withheld by the Property Owner from the Original Contractor, you **must** file your Lien Affidavit within no later than 30 days from completion, abandonment, or termination of the prime contract (the contract between the Property Owner and the Original Contractor), regardless of the above-referenced deadlines.

EXAMPLE: Assume that your deadline to file a Lien is the 15th day of March. Further assume the contract between the Property Owner and the Original Contractor was completed on January 10. Under this scenario, although you would have until April 15th to file a retainage Lien and May 15th to file a final progress payment Lien, you would want to ensure that the Lien was filed by no later than February 10 (30 days from completion of the Project).

WHAT IS THE DEADLINE FOR FILING A LIEN ON A RESIDENTIAL PROPERTY?

WHEN HIRED BY THE PROPERTY OWNER: At the very latest, the Lien Affidavit must be filed with the County Clerk's Office in the county where the Property is located by no later than the **15th day of the third month** from when the contract is terminated in writing, has been completed, finally settled, or abandoned.

EXAMPLE: Assume that you completed your contract in January, then your Lien Affidavit must be filed by no later than April 15. Alternatively, assume that the Property Owner terminated your contract *in writing* in January, then your Lien Affidavit would still need to be filed by no later than April 15.

EXCEPTION FOR CONSTITUTIONAL LIEN: If you were hired by the Property Owner or the Property Owner's Agent, then you may also have a right to file a constitutional Lien against the Property if your work affected the structure. The

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type of work typically not covered by a constitutional Lien might include: (1) landscaping that does not affect the structure; (2) supplying or installing plant materials; (3) irrigation; (4) underground wells; (5) demolition; and/or (6) fencing. Unlike a statutory Lien, a constitutional Lien can be potentially filed within up to four years after providing labor or materials to the Property or before the Property is sold to a purchaser who is not aware of the debt. A constitutional Lien is easily asserted by a simple paragraph in the statutory Lien Affidavit or by way of its own independent Lien Affidavit.

WHEN NOT HIRED BY THE PROPERTY OWNER: If you were hired by the Original Contractor, a Subcontractor, or a Material Supplier, then at the **very latest**, your deadline to file a Lien Affidavit for contractual retainage and/or ***unpaid progress payments*** is by **no later than the 15th day of the third month** from when **you last** provide labor or material to the Project, excluding warranty work.

EXAMPLE: Assume that you completed your work in January, your deadline to file a Lien Affidavit would be by **no later** than the 15th day of April. However, to ensure that your Lien attaches to the 10% statutory retainage being withheld by the Property Owner from the Original Contractor, make sure you file the Lien Affidavit by no later than 30 days from completion of the entire Project even if the 15th day of the third month comes after this date. (See below.)

AM I REQUIRED TO NOTIFY THE PROPERTY OWNER OR THE ORIGINAL CONTRACTOR AFTER I FILE A LIEN?

YES.

The Lien Affidavit **must** be served on the Property Owner by personal service, certified mail, or registered mail by no later than the 5th business day after it has been filed with the County Clerk's Office. If you are a Subcontractor or Material Supplier not hired by the Property Owner, then you **must** also serve the Lien Affidavit on the Original Contractor.

INSIDE TIP NO. 1: To take full advantage of the Lien filing, you should consider serving the Lien as an enclosure to a strong Payment Demand Cover Letter advising the Property Owner, the Original Contractor, and anyone else who might be affected by the filing of the Lien or a Lawsuit to foreclose on the Lien. Remember, you only have a limited number of opportunities to demand payment; service of the Lien can be one of the best opportunities that you will have to resolve the Claim before filing a Lawsuit to foreclosure.

INSIDE TIP NO. 2: If you serve the Lien, or any other Lien document by certified mail, you can go to www.USPS.com, click on the "track and confirm" option,

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enter the certified mail number in the box and the tracking information will appear; such as when the document was delivered and who signed for it.

HOW IS THE LIEN REMOVED AFTER THE DEBT IS PAID?

Removing the Lien is simple! After you have been paid or resolved the debt, just file a Release of Lien with the County Clerk's Office where you filed the Lien. Once the release is accepted and recorded by the Clerk, the Lien is forever removed.

PRACTICE POINTER: If you fail to release the Lien after you have been paid and within 10 days of receiving a written demand to do so, the Property Owner has the right to file a Lawsuit to request the Court to release the Lien. In the event the Court grants the request, the Property Owner will be entitled to recover attorneys' fees and costs incurred in making the request.

WHAT IS THE DEADLINE TO FILE A LAWSUIT TO FORECLOSE ON THE LIEN?

COMMERCIAL & RESIDENTIAL PROPERTIES: Pursuant to the 2022 lien amendments, a lawsuit to foreclose the Lien must be brought not later than the first anniversary from the last day a Claimant had the right to file the Lien Affidavit, unless the Claimant enters into a written agreement with the present Property Owner (recorded with the county clerk's office) to extend the deadline up until the second anniversary from the last date the Lien could be filed.

INSIDE TIP: Remember, each step of the Lien Process is a *new* and different opportunity to enforce payment. If you have not received the desired response to your Lien, the next step is to file a Lawsuit. If the money is owed, typically the mere filing and serving of the Lawsuit can be enough to prompt payment. Even at this stage, you may not be filing the Lawsuit to actually see it through to a judge or jury, but instead using it as another step in the process to enforce payment now. To learn more about having a construction lawyer file the Lawsuit for you, please **contact Lovein Ribman at (888) 368-2483 (www.loveinribman.com)**

OTHER REMEDIES TO ENFORCEMENT

WHAT IS A PAYMENT DEMAND LETTER?

A Payment Demand Letter is an informal request for payment sent to the debtor and all other parties who may be affected by the recording of a Lien or a Lawsuit to foreclose (the Lender, Property Owner, Original Contractor, and/or Subcontractors). It is **not** a prerequisite to serving a Notice of Claim, filing a Lien, serving Notice of the Lien Filing, or filing a Lawsuit. However, it is an extremely effective tool to enforce payment and should be considered at every step of the Lien process; failure to take advantage of the Payment Demand Letter may very well increase the amount of time it takes to get paid and result in having to take additional unnecessary steps to enforce payment.

To be effective, you should consider incorporating a Payment Demand into every step of the Lien Filing Process. If applicable, a strong Payment Demand should include at least the following allegations: (1) that the contract has been breached by nonpayment; (2) that the PROMPT PAYMENT ACT has been or will be violated if the Contractor and/or Subcontractor received your progress payment and fails to remit the payment to you within the statutory deadline; (3) that if the PROMPT PAYMENT ACT has been violated, then notice that interest is accruing on the unpaid amount at eighteen percent (18%) a year; (4) a calculation and demand for the accrued interest; (5) if suspected, an allegation that payments have been wrongfully withheld or diverted from the Project in violation of the Trust Fund Statute; (6) a presentment for future attorneys' fees in the event an attorney is later obtained to enforce payment; (7) a representation that a Lien or a Lawsuit to foreclose on the Lien will be filed if payment is not immediately made; and (8) that if a Lawsuit is filed to collect the debt, that you will sue the Property Owner and the contractor who hired you to seek an award for the principal amount owed, accrued interest, attorneys' fees, costs, and punitive damages (if applicable).

Finally, a Payment Demand Letter can be sent by anyone before or after filing a Lien or a Lawsuit if you believe doing so will resolve the dispute without having to take the aforementioned formal steps to enforce payment.

INSIDE TIP NO. 1: Since a Payment Demand Letter is not a prerequisite to filing a Lien or a Lawsuit, it can be sent at any step in the collection process and as many times as you deem necessary; however, do not send a Payment Demand Letter without following through with the threats made in the previous letter, or you will lose credibility and the demand will become less effective. Also, if you set a deadline for a response to your demand, be sure to set a date that allows you sufficient time to prepare, record, and serve either the Lien or file a Lawsuit before the applicable deadline.

OTHER REMEDIES TO ENFORCEMENT

WHAT IS THE TRUST FUND STATUTE AND HOW CAN IT BE USED TO ENFORCE PAYMENT?

TEXAS PROPERTY CODE SECTION 162, (referred to as the “Trust Fund Statute”) is another powerful tool that you have in your arsenal (independent from a Lien) to enforce payment for unpaid labor/materials provided to a construction Project.

In summary, an Owner, Original Contractor or Subcontractor violates the statute when it intentionally, knowingly, or with the intent to defraud, retains, uses, disburses, or diverts *trust funds* without first fully paying all obligations incurred or owed for labor or materials furnished to the Project. The statute imposes both civil and criminal liability on any individual who violates it.

EXAMPLE: When an Original Contractor and/or a Subcontractor receives a progress payment and uses the money received to pay non-Project debts, such as those incurred on an unrelated Project, then that Contractor has likely violated the Trust Fund Statute.

In the civil context, the officers, directors and agents of a Property Owner, Original Contractor, or Subcontractor are deemed “trustees” of construction funds received for the benefit of another. If the trustee violates the Trust Fund Statute, he or she becomes *personally liable* to the Contractor and can be individually sued in civil court and criminally prosecuted by the state.

In regard to criminal liability, a trustee who intentionally or knowingly misapplies trust funds amounting to \$500 or more, commits a Class A misdemeanor. A trustee who misapplies trust funds amounting to \$500 or more with an “intent to defraud” commits a felony of the third degree.

There are three primary ways to use the Trust Fund Statute: (1) as an educational threat in your Notice of Claim or Notice of Lien Filing; (2) through a Payment Demand Letter; or (3) by Filing a Lawsuit and alleging a violation of the Trust Fund Statute.

INSIDE TIP: Since the statute imposes *personal* liability against those individuals who violate it, you can name those persons in the Lawsuit as individual defendants; of which you may not otherwise be allowed to do on a simple breach of contract claim. Most business owners and employees think that they are shielded by the entity; however, if an officer, Owner, or employee violates the statute, then they can be sued individually.

WHAT IS THE PROMPT PAYMENT ACT AND HOW CAN IT ASSIST ME IN RECOVERING INTEREST?

OTHER REMEDIES TO ENFORCEMENT

When a Property Owner receives a timely and allowed written payment request from an Original Contractor, then the Property Owner **must** pay the amount owed to the Original Contractor by the ***thirty-fifth (35th) day*** after the Owner receives the request; failure to do so is a violation of the Prompt Payment Act, unless there is a reasonable basis to dispute the amount owed. Even if there is a dispute, the Property Owner cannot withhold more than 100% of the disputed amount on commercial Projects and 110% of the disputed amount on residential Projects.

When an Original Contractor receives payment from a Property Owner, the Original Contractor **must** pay each of its Subcontractors that portion of the Property Owner's payment attributable to the Subcontractors' work performed under its contract with the Contractor within ***seven (7) days*** of receiving the payment from the Owner; failure to do so is a violation of the Act, unless there is a reasonable basis to dispute the amount owed. Even if there is a dispute, the Original Contractor cannot withhold more than 100% of the disputed amount on commercial Projects and 110% of the disputed amount on residential Projects.

When a Subcontractor receives payment from a Contractor, the Subcontractor **must** pay each of its Subcontractors and Suppliers the portion of the Contractor's payment attributable to its Subcontractors and Suppliers for work performed under its contract with them within ***seven (7) days*** of receiving the payment from the Contractor; failure to do so is a violation of the Act, unless there is a reasonable basis to dispute the amount owed. Even if there is a dispute, the Subcontractor cannot withhold more than 100% of the disputed amount on commercial Projects and 110% of the disputed amount on residential Projects.

Any unpaid amount that is required to be paid pursuant to the Act begins to accrue interest the day after the date that payment becomes due at 1 ½ percent each month (or 18% a year).

INSIDE TIP: Claimants should consider including potential or actual violations of the Prompt Payment Act in the Notice of Claim, Notice of Lien Filing, and/or a Payment Demand Letter.