



1998

## Construction Law

Robert L. Meyers III

Michael F. Albers

Follow this and additional works at: <https://scholar.smu.edu/smulr>

---

### Recommended Citation

Robert L. Meyers & Michael F. Albers, *Construction Law*, 51 SMU L. REV. 805 (1998)  
<https://scholar.smu.edu/smulr/vol51/iss4/8>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# CONSTRUCTION LAW

*Robert L. Meyers, III\**

*Michael F. Albers\*\**

## TABLE OF CONTENTS

I. MECHANICS' LIENS .....	806
II. NO DAMAGES FOR DELAY .....	807
III. PROJECT SAFETY.....	808
IV. FEDERAL ARBITRATION ACT .....	808
V. DELAY DAMAGES .....	810
VI. STATUTES OF REPOSE .....	811
VII. TEXAS DEPARTMENT OF TRANSPORTATION ADMINISTRATIVE AWARDS .....	811
VIII. TEXAS PROPERTY CODE .....	812

The stated purpose of the *Southern Methodist University Law Review's Annual Survey of Texas Law* is to provide Texas practitioners with a “thoughtful, critical, analysis and synthesis of important cases and statutes in the major fields of Texas jurisprudence.”<sup>1</sup> This Article is aimed at achieving that goal in the area of construction law, and, to that end, discusses some of the more important—and hopefully interesting—cases and statutes presented during the course of the Survey period.

---

\* Robert L. Meyers, III received both his undergraduate (B.A. 1958) and his law degree (LLB 1960) from Southern Methodist University. He is a partner in the Dallas office of Jones, Day, Reavis & Pogue and has concentrated his practice on construction documentation, litigation, and arbitration for over thirty years.

\*\* Michael F. Albers received both his undergraduate (B.A., cum laude, 1976) and his law degree (J.D. 1981) from Southern Methodist University. He is a partner in the Dallas office of Jones, Day, Reavis & Pogue and concentrates his practice in the areas of construction law, construction documentation, and commercial real estate development. He has written for and participated in the presentation of various programs concerning construction law, including Practising Law Institute's Construction Contracts Seminars, the Texas Bar Advanced Real Estate Program, and the ABA/Joint Program on bankruptcy in the Construction Industry. Mr. Albers is a contributing author to the following books published by John Wiley & Sons: *CONSTRUCTION FAILURES* (1989), *PROVING AND PRICING CONSTRUCTION CLAIMS* (1990) and *FIFTY STATE CONSTRUCTION LIEN AND BOND LAW* (1992).

1. Annual Survey of Texas Law, Policies, Procedures, and Guidelines, *SMU Law Review Association* (quoting former SMU Law School Dean Charles O. Galvin) (on file with the *SMU Law Review Association*).

## I. MECHANICS' LIENS

The Houston Court of Appeals confirmed and clarified certain issues regarding rights and remedies in connection with the enforcement of mechanics' liens in *Hadnot v. WENCO Distributors*.<sup>2</sup> The *Hadnot* case affirmed a trial court judgment in favor of the subcontractor claimants against the owner for a money judgment, as well as foreclosure of their timely filed mechanics' lien claims.<sup>3</sup> In analyzing the claims and the defenses raised, the court clarified the law with respect to the sources of funds available to subcontractors and suppliers who have not been paid. The court, citing *First National Bank v. Sledge*,<sup>4</sup> identified two distinct sources of funds to which derivative claimants (i.e., subcontractors and suppliers) may look to recover from the owner.<sup>5</sup> The first of these is the "statutory retainage fund."<sup>6</sup> The second is the "trapped funds."<sup>7</sup> The statutory retainage fund represents ten percent of the contract price to the owner, and must be retained during performance of the work and for thirty days after the work is complete.<sup>8</sup> In order to have a lien against the statutory retainage fund, the claimant must (1) send notices required by the applicable provisions of the Texas Property Code and (2) file an affidavit of lien not later than thirty days after the work is complete.<sup>9</sup> The court held that in the event that the owner fails to comply with the amount and duration of the statute's ten percent retainage requirement, a claimant satisfying its obligations under section 53.103 has a lien "at least to the extent of the amount that should have been retained from the original contract under which they are claiming."<sup>10</sup> The court held that where the owner does not retain the ten percent, the thirty day period for filing the affidavit of lien is inapplicable, and the owner becomes personally liable to the claimant.<sup>11</sup>

The trapped funds represent amounts otherwise payable to the original (general) contractor by the owner which a claimant can "trap" in the owner's hands by giving the owner notice of non-payment.<sup>12</sup> The court affirmed the personal liability of the owner and that of its property to derivative claimants if and to the extent that the owner pays "any money to the general contractor after receiving notice from the claimants."<sup>13</sup>

At issue in *Hadnot* was the interpretation of the requirement under

---

2. 961 S.W.2d 232 (Tex. App.—Houston [1st Dist.] April 10, 1997, no writ).

3. See *id.* at \*1.

4. 653 S.W.2d 283 (Tex. 1983).

5. See *Hadnot*, 961 S.W.2d at 234.

6. See TEX. PROP. CODE ANN. §§ 53.101-53.106 (Vernon 1995).

7. See TEX. PROP. CODE ANN. §§ 53.081-53.085 (Vernon 1995 & Supp. 1998). It should be noted that although the court refers to such sums as "trapped retainage," such is not limited to statutory retainage. See *Hadnot*, 961 S.W.2d at 235.

8. See TEX. PROP. CODE ANN. § 53.101 (Vernon 1995).

9. See *id.* § 53.103.

10. *Hadnot*, 961 S.W.2d at 234.

11. See *id.* at 235.

12. See TEX. PROP. CODE ANN. § 53.081 (Vernon 1995).

13. *Hadnot*, 961 S.W.2d at 235; see TEX. PROP. CODE ANN. § 53.084 (Vernon 1995 & Supp. 1998).

section 53.084 that "the claim has been reduced to final judgment."<sup>14</sup> The court rejected the owner's contention that the subcontractors and suppliers must first obtain a final judgment against the general contractor to support their lien claims.<sup>15</sup> The lien claims have their basis in the mechanics' lien statute, and the validity of the amounts due was established at trial.<sup>16</sup> The court held that the language at issue relates to the establishment and foreclosure of the lien, which may occur only upon the judgment of a court and not through self-enforcement as in the case of deeds of trust.<sup>17</sup> The property in question in this case was the homestead of the Hadnots, but that was not a factor in the court's determination inasmuch as the Hadnots had entered into a mechanics' lien contract for the construction of their home.

## II. NO DAMAGES FOR DELAY

In *Green International, Inc. v. Solis*,<sup>18</sup> the Texas Supreme Court upheld the enforceability of a no-damage-for-delay clause in a construction subcontract. The contractual provision at issue in *Green* provided: "Contractor [Green] . . . shall not be liable to the Subcontractor [Solis] for delay to Subcontractor's work by the act, neglect or default of the Owner, Contractor, action of workmen or others, or any cause beyond Contractor's control."<sup>19</sup> First, the Court acknowledged that Texas recognizes four exceptions to the enforcement of no-damage-for-delay clauses: (1) delays not intended or contemplated to be within the provision; (2) those resulting from fraud, misrepresentation, or bad faith; (3) delays of such unreasonable duration as to permit abandoning the contract; and (4) those not within the specifically enumerated delays to which the clause applies.<sup>20</sup> Second, the Court rejected the appellate court's conclusion that an additional exception, active interference, applied.<sup>21</sup>

Third, and perhaps most importantly, the Court rejected the subcontractor's argument that the no-damage-for-delay clause should be subject to the conspicuousness requirement applicable to indemnity provisions.<sup>22</sup> The Court noted that its prior decision in *Dresser Industries, Inc. v. Page Petroleum, Inc.*<sup>23</sup> was "explicitly limited to releases and indemnity clauses in which one party exculpates itself from its own future negligence."<sup>24</sup> The Court distinguished *Dresser* as a case concerned with shifting tort and negligence damages, whereas no-damage-for-delay clauses shift eco-

---

14. *Id.* § 53.084(b).

15. *See Hadnot*, 961 S.W.2d at 236.

16. *See id.*

17. *See id.*; TEX. PROP. CODE ANN. § 53.154 (Vernon 1995).

18. 951 S.W.2d 384, 388 (Tex. 1997).

19. *Id.* at 387.

20. *See id.* (citing *City of Houston v. R.F. Ball Constr. Co.*, 570 S.W.2d 75 (Tex. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.)).

21. *See id.* at 388.

22. *See id.* at 387.

23. 853 S.W.2d 505 (Tex. 1993).

24. *Green*, 951 S.W.2d at 387.

conomic damages resulting from a breach of contract.<sup>25</sup> Practitioners, whether seeking to avoid or enforce the application of a no-damage-for-delay clause, should carefully read the Court's opinion on these issues.

The Court also extended the no-damage-for-delay clause bar to consequential damages such as, in this case, damage to credit reputation.<sup>26</sup> Also of note is the Court's determination that the mere signing of interim lien releases does not act as a bar to a claim for extra contractual work, as has been held in some other jurisdictions.<sup>27</sup> The Court's reasoning is apparently based upon the conclusion that the releases were not fully operative until the ten percent retainage had been paid, i.e., the lien releases were in exchange for one hundred percent payment, not ninety percent, and because certain change orders had been executed following the execution of lien releases.<sup>28</sup> This reasoning is somewhat questionable, but the result obviously tries to do justice in recognition of the economic realities related to progress payments.

### III. PROJECT SAFETY

The Eastland Court of Appeals addressed the issue of responsibility for project safety in the case of *Graham v. Freese & Nichols, Inc.*<sup>29</sup> In this case, the employee of a general contractor sued the engineering firm that, by contract, had designed the project and had on site contract administration responsibility. Suit was for work site injury sustained by the general contractor's employee. The court reasoned that responsibility for job site safety could arise by contract or by conduct.<sup>30</sup> The court held that the engineering firm had no contractual duty for job site safety, that job site safety was the contractual duty of the general contractor, and that the engineer exercised no control over the premises.<sup>31</sup>

### IV. FEDERAL ARBITRATION ACT

During the past year, both the San Antonio Court of Appeals and the Houston Court of Appeals have had an opportunity to discuss the Federal Arbitration Act<sup>32</sup> and related issues as they apply to construction disputes. The Houston court issued an opinion in *Hou-Scape, Inc. v. Lloyd*.<sup>33</sup> In this case, a subcontractor was seeking confirmation of the arbitration award it obtained against the general contractor. The general contractor in turn was seeking to have the award vacated and sought a mandamus to compel the trial court to order arbitration of not only the contract in which the arbitration provision was contained, but related tort

---

25. *See id.*

26. *See id.* at 388.

27. *See id.* at 389.

28. *See id.*

29. 927 S.W.2d 294 (Tex. App.—Eastland 1996, writ denied).

30. *See id.* at 296.

31. *See id.*

32. 9 U.S.C. §§ 2-14, 201-207 (1994).

33. 945 S.W.2d 202 (Tex. App.—Houston [1st Dist.] 1997, no writ).

claims as well. The Houston court held, among other things, that the request for confirmation was not ripe because of the pending motion to vacate the same award.<sup>34</sup> In addition, the court held that the subcontractor's verified motion alleging that the goods it provided pursuant to the contract were in interstate commerce and the payment and performance bonds it had obtained, which were issued in the State of New York, were sufficient to support application of the Federal Arbitration Act.<sup>35</sup> The court cited a number of cases in support of this holding, not including, unfortunately, one of the leading cases on this issue: *Blanks v. Midstate Constructors, Inc.*<sup>36</sup> Having found the Federal Arbitration Act applicable, the court determined that federal law controls whether or not the ancillary counterclaims were arbitrable, and that the applicable standard is that arbitration "should not be denied unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."<sup>37</sup> Further, the court held that in determining this issue, the facts alleged, as opposed to the causes of action asserted, were to be reviewed.<sup>38</sup> The court determined that the tort counterclaims actually arose out of the alleged failure of the subcontractor to fulfill its contractual obligations, and therefore, they were arbitrable.<sup>39</sup> Interestingly, the tort claims in question included violation of the DTPA,<sup>40</sup> fraudulent inducement, defamation, and tortious interference.

In *Hardin Construction Group, Inc. v. Strictly Painting, Inc.*,<sup>41</sup> the San Antonio Court of Appeals considered a case wherein the subcontractor sued the contractor on estoppel, fraud, quantum meruit, and lien claims. The general contractor sought to compel arbitration, but the trial court denied its motion. The contractor filed both an interlocutory appeal under the Texas Arbitration Act<sup>42</sup> and a motion seeking mandamus to direct the trial court to order arbitration. The court held that the Federal Arbitration Act applied because both the general contractor and the subcontractor were based in Georgia, the construction project was in Texas, the subcontractor retained the services of Texas and Alabama subcontractors, employees were hired in Georgia for the Texas project, and supplies were purchased by a subcontractor in Texas.<sup>43</sup> The court held that these facts were sufficient to cause the contract containing the arbitration clause to be "relat[ed] to interstate commerce."<sup>44</sup>

Having determined this threshold issue, the court then held that the interlocutory appeal was inappropriate because the Federal Arbitration

---

34. See *id.* at 204.

35. See *id.* at 205.

36. 610 S.W.2d 220 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.).

37. *Hou-Scape*, 945 S.W.2d at 205.

38. See *id.*

39. See *id.*

40. See TEX. BUS. & COM. CODE ANN. § 17.01 (Vernon 1987 & Supp. 1998).

41. 945 S.W.2d 308 (Tex. App.—San Antonio 1997, app. for mand. filed).

42. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.001-171.098 (Vernon 1997).

43. See *Hardin*, 945 S.W.2d at 311.

44. *Id.*

Act, rather than the Texas Arbitration Act, applied, and the court sustained the request for mandamus applying the abuse of discretion test.<sup>45</sup>

## V. DELAY DAMAGES

In *Chilton Insurance Company v. Pate & Pate Enterprises, Inc.*,<sup>46</sup> the San Antonio Court of Appeals dealt with an array of construction issues, but the principal issues involved a claim for extended home office overhead by reason of delay and, secondarily, issues of judicial admissions, the nature of McGregor Act<sup>47</sup> claims, and the doctrine of quantum meruit as applied to construction disputes.

With respect to home office overhead as an element of delay damage, the court seemed to recognize the validity of overhead claims related to delay arising out of the breach of a construction contract. The court analyzed such claims as being extended home office overhead and unabsorbed home office overhead.<sup>48</sup> Extended home office overhead was defined as the additional cost for the period of extension of job completion, while unabsorbed home office overhead was home office overhead not deferred by the cash flow generated by the construction contract revenue stream in a timely manner.<sup>49</sup> It is not clear which of these types of home office overhead the court considered, but apparently the court accepted both as valid forms of damage. The court also recognized the use of the "Eichleay Formula,"<sup>50</sup> which is a formula often used in cases before the United States Contract Board of Appeals for calculating extended home office overhead costs. However, an evidentiary quirk effectively barred recovery for the subcontractor claimant in this case. The court held that while the conclusory testimony of the contractor's president, as to the fact that some additional overhead was incurred, was sufficient in general, it was not sufficient to tie those damages to the surety inasmuch as these delays could not be attributed or allocated to delays occurring after the surety took over performance obligations.<sup>51</sup> The court did not reach the issue of whether the surety would nevertheless be responsible for the obligations of its principal in that regard.

In addition, the court confirmed that the McGregor Act does not create an independent cause of action but is simply a statutory means of enforcing other claims.<sup>52</sup>

With respect to the quantum meruit claims, the court confirmed the general rule that quantum meruit cannot be asserted or sustained if there is a contract covering the same performance requirements.<sup>53</sup> The court,

---

45. *See id.*

46. 930 S.W.2d 877 (Tex. App.—San Antonio 1996, no writ).

47. *See* TEX. GOV'T CODE ANN. §§ 2253.001-2253.079 (Vernon 1997).

48. *See Chilton*, 930 S.W.2d at 892.

49. *See id.*

50. *See Eichleay Corp.*, ASBCA No. 5183, 60-2 BCA ¶ 2688 (1960).

51. *See Chilton*, 930 S.W.2d at 893.

52. *See id.* at 886.

53. *See id.* at 889.

moreover, confirmed the exception available in construction contracts where the owner or general contractor has received the benefit of the performance by the contractor or subcontractor and quantum meruit theory is allowed to prevent unjust enrichment.<sup>54</sup>

## VI. STATUTES OF REPOSE

The Corpus Christi Court of Appeals recently addressed certain issues relating to the ten year statute of repose applicable to claims of those who furnish construction or repair of improvements to real property.<sup>55</sup> In *Gordon v. Western Steel Co.*,<sup>56</sup> the court reconfirmed that the ten-year period commences upon substantial completion of the improvement, irrespective of the date on which the damage or injury complained of is discovered.<sup>57</sup> The court also concluded, in a more finely tuned analysis, that with respect to subcontractors, the ten-year period of repose began to run on the date when their portion of the improvement was substantially complete.<sup>58</sup> This point is of particular interest to subcontractor trades, which normally finish early in the construction process. Addressing the sufficiency of summary judgment evidence, the court determined that uncontradicted evidence presented by subcontractors, in the form of affidavits and verified receipts for payment of work demonstrating that the particular subcontractor's work had been in fact substantially completed more than ten years prior to the filing of the action, was sufficient to support summary judgment.<sup>59</sup>

## VII. TEXAS DEPARTMENT OF TRANSPORTATION ADMINISTRATIVE AWARDS

In *Texas Department of Transportation v. T. Brown Constructors, Inc.*,<sup>60</sup> the Austin Court of Appeals reviewed an administrative award made by the Texas Department of Transportation (DOT), presumably pursuant to the internal review and "arbitration" provisions governing claims against the Texas DOT. In this case, the Texas DOT awarded the contractor \$56,295 on its various claims, after which the contractor filed suit to set aside this award and to recover the \$3 million it had sought. The district court in Austin set aside the administrative award as grossly inadequate, and instead substituted a judgment in the amount of \$3,318,001.33. The procedural record is a bit confusing inasmuch as the Texas DOT failed to appeal the district court judgment but subsequently filed a bill of review seeking to set it aside. After moving through various procedural matters, the court of appeals concluded that the trial court had jurisdiction to re-

---

54. *See id.*

55. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.008, 16.009 (Vernon 1986 & Supp. 1998).

56. 950 S.W.2d 743 (Tex. App.—Corpus Christi 1997, writ denied).

57. *See id.* at 746.

58. *See id.*

59. *See id.* at 749.

60. 947 S.W.2d 655 (Tex. App.—Austin 1997, pet. denied).



view and set aside administrative awards that in the court's view were inadequate and to direct that the administrative agency award an appropriate amount.<sup>61</sup> However, the court held that the district court lacked jurisdiction to determine on its own the appropriate amount of the award.<sup>62</sup> The reasoning was that the Legislature specifically granted to the Texas DOT and agencies with similar procedures the authority and discretion to determine the appropriate amount to award with respect to claims.<sup>63</sup> The result of this opinion, though probably correct on the law, creates a practical problem. The claimant contractor in *Brown* could go back to the Texas DOT and receive another award, theoretically, in the amount of \$100,000, file suit to set that award aside, have the trial court once again set aside the award, and go back again to the Texas DOT until such time as the Texas DOT should arrive at an award that is either satisfactory to the contractor or close enough to the court's idea of the appropriate award to pass muster. This could in theory take an infinite number of trips to the Texas DOT and to the district court, back and forth, but presumably this is one of the practical problems that can arise when applying the separation of powers doctrine to bolster the discretionary authority of administrative agencies. Hopefully, such a procedural nightmare can be avoided by the application of the "cooler heads" doctrine following a singular and somewhat mutually frustrating trip to the courthouse.

### VIII. TEXAS PROPERTY CODE

The Survey period also witnessed material changes to the Texas mechanics' and materialmen's lien statutes.<sup>64</sup> This Article does not discuss the subsequent changes to Texas law regarding Texas home equity loans, which occurred after the Survey period, or their potential effects on homestead and mechanics' and materialmen's lien statutes.

A detailed discussion of Texas lien law could easily be the subject of an article dedicated exclusively to that topic. For the present purposes, this Article will focus on the two major additions to chapter 53 of the Texas Property Code: (1) removal and revival of liens, and (2) residential construction projects.

Section 17 of chapter 53 has been substantially expanded by the addition of the three new sections dealing with "Summary Motion to Remove Invalid or Unenforceable Lien," "Bond Requirements After Order to Remove," and "Revival of Removed Lien."<sup>65</sup> Section 53.160 provides that in a suit to foreclose a lien, a party objecting to the validity or enforceability of the lien may now file a verified motion to remove the lien

---

61. *See id.* at 658.

62. *See id.* at 659.

63. *See id.*

64. *See* TEX. PROP. CODE ANN. §§ 53.160-53.162, 53.251-53.260 (Vernon 1995 & Supp. 1998).

65. *See* TEX. PROP. CODE ANN. §§ 53.160, 53.161, 53.162 (Vernon Supp. 1998).

or claim.<sup>66</sup> The grounds for objecting to the lien's validity are specifically limited to situations where (1) the claimant fails to furnish statutory notices required to the owner or original contractor; (2) the lien affidavit fails to comply with the statutorily required elements or was not properly filed; (3) the claimant fails to furnish notice of the filed lien affidavit to the owner or original contractor; (4) the owner has complied with all retainage requirements and paid all funds to the original contractor before the claimant perfects its lien and before the owner receives notice of the claim; (5) the owner has deposited the sums claimed with the court; or (6) the claimant has executed a valid waiver or release.<sup>67</sup> In those instances where the property is the homestead, the fact that the contract was not signed or filed as required by statute, or that either the lien or the notice of claim did not contain its requisite statutory notice, are also accepted grounds for objection.<sup>68</sup>

The lien claimant has the burden to prove that he furnished notice of the claim and the lien affidavit to the owner and original contractor; the party objecting to the lien has the burden of proof as to any other grounds for removal.<sup>69</sup> No interlocutory appeal of the court's order is permitted,<sup>70</sup> nor is the court's order admissible as evidence in the trial of the case.<sup>71</sup>

Removal of the lien may be stayed if the claimant posts bond, cash, or security in an amount, determined by the court, sufficient to cover the movant's estimated costs and attorneys' fees in proceeding to determine the lien's validity within thirty days after the order is entered.<sup>72</sup> Absent the foregoing stay, the owner may file the order with a certificate of the court clerk stating that no bond was filed and no order of stay was entered.<sup>73</sup> The lien is removed and extinguished as to a creditor or subsequent purchaser who obtains an interest in the property after the filing of the order and the clerk's certificate with the county clerk.<sup>74</sup> The removal of the lien does not, however, constitute a release of the owner's liability, if any, to the claimant.<sup>75</sup> Additionally, if the claimant obtains a final judgment in the case which establishes the validity of the lien and ordering its foreclosure, the claimant may file the judgment, and the lien is then revived.<sup>76</sup> The lien, even though "revived," is void as to a creditor or subsequent purchaser who obtained an interest in the property after the order of removal and the clerk's certificate were filed with the county clerk, but

---

66. *See id.* § 53.160.

67. *See id.* § 53.160(b)(1)-(5), (7).

68. *See id.* § 53.160(b)(6). These statutory requirements are hereinafter discussed in connection with "Residential Construction Projects."

69. *See id.* § 53.160(d).

70. *See id.* § 53.160(e).

71. *See id.* § 53.160(f).

72. *See id.* § 53.161.

73. *See id.*

74. *See id.* § 53.161(g).

75. *See id.*

76. *See id.* § 53.162.

before the final judgment reviving the lien was so filed.<sup>77</sup>

The procedures under sections 53.160-162 offer a means of more expeditiously addressing lien claims and may prove dispositive in those instances where the lien is clearly invalid or spurious. While it also offers a procedural mechanism for clearing title and protecting lenders and purchasers, it is not the simplified means of fully resolving the owner's dispute with lien claimants that one might assume.

Subchapter K—"Residential Construction Projects"<sup>78</sup>—has also been added to the Texas Property Code, and while nominally a mechanics' and materialmen's statute, it has the overtone of a consumer protection act. Sections 53.251 to 53.253 set forth the statutory notice procedures applicable to perfecting a lien claim and to trapping funds on residential construction projects, which are similar and in many instances identical to those applicable to non-residential projects.<sup>79</sup> Section 53.254 contains special requirements when the residential construction project is Texas homestead property.<sup>80</sup> The inclusion of these provisions in section 53.254 does not represent a revision in Texas lien or homestead law; rather, section 53.254 is a recodification of former section 53.059 (which was repealed when section 53.254 was added). Sections 53.255 to 53.259 have been added to chapter 53 of the Property Code to establish and clarify to owners, lenders, and potential lien claimants the disclosures that must be made to the owner in connection with residential construction projects.<sup>81</sup> Section 53.255 contains the specific requirements of the disclosure statement that the original contractor is required to give to the owner prior to the owner's signing a residential construction contract.<sup>82</sup> The required disclosure statement is a detailed twelve paragraph construction primer for the uninitiated and unwary, an explanation of do(s) and don't(s) ranging from "GET IT IN WRITING" to "SOME CLAIMS MAY NOT BE VALID,"<sup>83</sup> all of which, despite complaints about the provisions' length and excessive discussion of items non-laymen will consider obvious, would be helpful and useful if parties were more likely to utilize it. The section, however, provides that the failure to comply with its requirements does not invalidate a mechanics' lien, contract lien, or deed of

---

77. *See id.* § 53.162(c).

78. *See id.* §§ 53.251-53.260. As used in the statute, "residence" is "a single-family house, duplex, triplex, or quadruplex or a unit in a multiunit structure used for residential purposes that is: (A) owned by one or more adult persons; and (B) used or intended to be used as a dwelling by one of the owners." TEX. PROP. CODE ANN. § 53.001(8) (Vernon Supp. 1998). "Residential construction project" is "a project for the construction or repair of a new or existing residence, including improvements appurtenant to the residence. . . ." *Id.* § 53.001(10).

79. One important difference is the requirement under section 53.052(b) that the lien on residential construction be filed by the fifteenth day of the third calendar month after indebtedness accrues, instead of the customary fourth month. Another is that suits to foreclose must be brought under section 53.158(b) within one year after lien filing rather than the customary two years. *See id.* §§ 53.052(b), 53.158.

80. *See id.* § 53.254.

81. *See id.* §§ 53.255-53.259.

82. *See* TEX. PROP. CODE ANN. § 53.255(b) (Vernon Supp. 1998).

83. *Id.*

trust.<sup>84</sup> Section 53.256 requires attachment of a list of project subcontractors and suppliers to the foregoing disclosure statement and the updating of the list within fifteen days after the addition or removal of a subcontractor or supplier.<sup>85</sup> As with the disclosure statement itself, failure to comply does not invalidate any liens.<sup>86</sup>

The "Residential Construction Projects" provisions also require the lender, where the owner is borrowing residential construction financing, to provide to the owner all loan closing documents not later than one day before closing, and to provide the aforementioned disclosure statement before closing (or at closing for good cause and with the owner's written consent).<sup>87</sup> Here again, lack of compliance does not invalidate liens or deeds of trust.<sup>88</sup> Section 53.258 further requires that the original contractor, and the lender if there is third-party financing, furnish the owner with signed statements of construction billings, expenses, and disbursements, and that the lender do so prior to disbursing funds to the original contractor.<sup>89</sup> While failure to comply with these requirements does not invalidate liens or deeds of trust, the act of intentionally, knowingly, or recklessly providing false or misleading information is a misdemeanor punishable by a fine of up to \$4,000 and a jail term of up to one year.<sup>90</sup> Delivery to the owner by the original contractor of an affidavit of all bills paid is made a condition of final payment in residential construction projects.<sup>91</sup> The seller of residential construction that is intended by the purchaser to be its residence is required to provide the purchaser with a similar affidavit.<sup>92</sup> The same misdemeanor penalties previously referenced apply here as well, and the affiant is personally liable for any loss or damage resulting from any "false or incorrect information in the affidavit."<sup>93</sup>

---

84. *See id.* § 53.255(c).

85. *See id.* § 53.256(a).

86. *See id.* § 53.256(c).

87. *See id.* § 53.257.

88. *See id.* § 53.257(c).

89. *See id.* § 53.258.

90. *See id.* § 53.258(f).

91. *See id.* § 53.259(a).

92. *See id.* § 53.259(b).

93. *Id.* § 53.259(d) (The provision does not require that the false or incorrect information be furnished intentionally, knowingly, or recklessly for the personal liability to apply).

