

**SUBJECT:** Creating commercial real estate broker's liens

**COMMITTEE:** Business and Industry— favorable, without amendment

**VOTE:** 6 ayes — Brimer, Dukes, Elkins, Janek, Solomons, Woolley  
2 nays — Rhodes, Giddings  
1 present, not voting — Corte

**SENATE VOTE:** On final passage, April 24 — 29-1 (Harris)

**WITNESSES:** (*On House companion bill, HB 1650*)  
For — Don Canady, Foundation Appraiser's Coalition of Texas; David Mintz, Texas Apartment Association; Ronald Walker, John Stone and John Nichols, Texas Association of Realtors; Greg McDonald, North Texas Commercial Association of Realtors; Richard Harris, Houston Association of Realtors; James Hochman, CB Commercial Real Estate Group; Jack Wolfe  
Against — None

**BACKGROUND :** Texas law allows liens on real and personal property, including judgment liens; mechanic's, contractor's and materialman's liens; landlord's liens; hospital liens; railroad laborer's liens; farm, factory and store worker's liens; self-service storage facility liens; newspaper employee's liens; and motor vehicle mortgagee's liens. All such liens have varying terms, notice provisions and requirements for enforcement.

**DIGEST:** SB 573 would allow commercial real estate brokers to attach a lien on the commercial portion of property subject to a real estate transaction in which the broker's services were used.  
  
Such liens could only attach to commercial property, not a homestead, single-family residence, duplexes, triplexes or fourplexes, or any unimproved property zoned for such uses or restricted under covenant. Brokers allowed to attach such liens would only include licensed real estate brokers and licensed real estate appraisers.

SB 573 would allow a broker entitled to a commission under a commission agreement to have a lien on the property in the amount specified by the commission agreement. Liens would only be available to the broker named in the commission agreement. A broker could not waive the right to a lien or release of a lien before the commission was satisfied. A broker's lien would attach to the interest in commercial real estate owned by the person obligated to pay the lien on the date that notice of the lien was recorded.

A change in the use of commercial property subject to a broker's lien would not affect a properly filed and noticed lien unless, within 180 days of the date on which the commission was due, the property was zoned for single-family residences or became subject to a restrictive covenant requiring the property to be used for a single-family residence and such zoning or covenant was valid for at least two years after the date the commission was due.

**Recording and notice.** In order to attach a lien, a broker would have to record a notice of a lien after the commission agreement was signed and before the conveyance of the commercial real estate. If the lien was based on a lease transaction, the notice of the lien would have to be recorded before the 91st day after the event for which the commission became payable occurred and before the date that the person who was obligated to pay the commission recorded the future conveyance of the interest claimed in the lien. Notice of the lien would have to be filed with the county clerk of the county in which the commercial real estate was located. The county clerk would be required to file, index and cross-index the lien in the same manner as other liens on real property.

The notice filed with the clerk would have to contain:

- a sworn statement of the claim, including the amount or formula used to determine the amount and the date when the commission was due;
- the name and license number of the broker;
- the name of the owner and other persons obligated to pay the commission;
- a legally sufficient description of the property subject to the lien;

- a description of the interest in commercial property; and
- a copy of the commission agreement.

The broker recording a lien with a county clerk would have to mail a copy of the notice by certified or registered mail to the owner of the property and the prospective purchaser within one day of filing of notice with the county clerk.

**Priority and subordination.** Any lien recorded before a broker's lien would have priority over the broker's lien. If the deed, lease, or instrument transferring interest was recorded before the broker's lien, the broker's lien would not be valid or enforceable against a grantee, purchaser, leasee or transferee of an interest in real property. A mechanic's lien recorded before a broker's lien that dated back before the date of recording of the broker's lien would have priority over the broker's lien.

A broker's lien would be considered subordinate to a recorded purchase-money first lien authorized by the purchaser for the sale of commercial real estate or a recorded refinanced first lien authorized by the owner if the purchaser or owner executed and recorded a memorandum evidencing ratification of the broker's lien and the purchaser's or owner's agreement to assume payment of the lien and sent the broker, by certified mail, a copy of the recorded memorandum. A broker's lien would be subordinate to a lien for extension of credit if the extension of credit was made exclusively for the purpose of repairing or renovating the commercial real estate, completing the construction, or providing improvements requested by a tenant.

**Enforcement of a lien.** A broker holding a properly recorded and noticed lien could bring suit to foreclose on such a lien in any district court for the county in which the real estate was located. A broker would have to bring such a suit within two years of the date on which the lien was recorded. If the lien was based on a commission for a future interest, the suit would have to be brought within two years of the date the commission was due. A broker would be allowed to bring suit to collect a commission within 10 years of the date the lien was recorded or within 10 years of the date the broker recorded a subsequent notice of the lien as renewal of entitlement to the lien. The party prevailing in a suit to foreclose a lien would be entitled to court costs, reasonable attorney's fees, and interest.

**Release of a lien.** A lien would have to be released within five days of payment of the commission or within 10 days of the occurrence of a condition that would preclude the broker from compensation.

**Escrow account for disputed amounts.** If a broker's lien would prevent the closing of a sale, lease or mortgage, the person obligated to pay the lien would be required to establish an escrow account sufficient to satisfy the lien and other related costs. The establishment of an escrow account would extinguish a lien. A party could not refuse to close a transaction because of the existence of a broker's lien for which an escrow account had been established, provided the broker executed and delivered a release of the lien for the amount of the lien. The escrow account would remain until the rights of the parties claiming the amount in escrow were determined in a written agreement by the parties, by a court, or by an alternative dispute resolution process agreed to by the parties, the lien became unenforceable, or the funds were interpleaded into a court with jurisdiction over the claim.

SB 573 would take effect September 1, 1997 and apply only to commission agreements entered into on or after that date.

**SUPPORTERS  
SAY:**

A lien is a method of enforcing a contract for services performed. For example, a contractor making improvements to a home is entitled to a lien on the home because, if the homeowner refused to pay for the improvements, there would be no way for the contractor to unimprove the home. Other liens allowed under Texas law follow the same general principle. The services of a commercial real estate broker should be included among the services subject to a lien because when such services are performed and a transaction is completed, there is no way for the broker to undo the transaction to force payment of the broker's commission.

SB 573 would apply general property lien provisions to broker's liens but limit the application of such liens to specific circumstances. The bill would also ensure that the property to which a lien was established would not be encumbered in such a way that it could not be transferred because of the lien. In order to allow the lien to remain in force but also allow the property to be transferred, the obligor on the lien could create an escrow account clearing title while still retaining the ability to dispute payment for the services rendered.

Liens are not designed to encumber property but to simply require payment for services rendered. Such payment should be taken care of by the person obligated to pay for the services, but if that person failed to pay, the establishment of a lien is the only way, in these circumstances, that a broker could force that person to pay for services rendered.

This legislation would make it very clear that it would only apply to commercial real estate transactions, not residential transactions. The homestead requirements for such liens to attach would require a constitutional amendment and, therefore a vote of the people. Additionally, commercial transactions are often quite different because, unlike in residential transactions, most commercial real estate brokers are paid not up front, but over time, especially when brokering commercial real estate leases.

**OPPONENTS  
SAY:**

SB 573 would create yet another encumbrance on property. Liens on real property cloud property titles until they are fully cleared, and they present unnecessary paperwork for both property owners and persons seeking the lien. Persons seeking to enforce liens are not without recourse if an obligor refuses to pay; they can sue for such payment on the agreement establishing such services. Liens, however, create a number of traps that can be used to force an obligor into paying an amount no matter whether services were rendered satisfactorily because otherwise the property could not be transferred or could be foreclosed upon.

While a residential real estate broker or agent cannot now attach a lien for the broker's commission on residential property, this legislation could be a step in that direction. With the potential easing of restrictions on home equity lending, residential real estate broker's liens could be the next step.