

SUBJECT: Permitting corrections of minor errors or omissions on mechanics' liens

COMMITTEE: Business and Industry — committee substitute recommended

VOTE: 7 ayes — Deshotel, Elkins, Gattis, Keffer, Orr, Quintanilla, S. Turner

0 nays

4 absent — Christian, England, Giddings, S. Miller

WITNESSES: For — Misti Beanland, Texas Construction Association; Rufus Duncan, Higginbotham Bros. & Co.; Meagan Jones, McCoy's Building Supply and Lumbermen's Association of Texas; Charles Pool, Main Street Lumber Company and Lumber Association of Texas, Luanne Woodruff, Foxworth-Galbraith Lumber; (*Registered, but did not testify*: June Deadrick, Center Point Energy; Barbara Douglas, Lumbermen's Association of Texas; Jon Fisher, Associated Builders and Contractors of Texas; Harold Freeman, Texas Construction Association; Kathy Grant, Texas Society of Architects)

Against — None

BACKGROUND: In 1997, the 75th Legislature enacted HB 1185 by Hightower to create criminal penalties for filing fraudulent court documents. The bill amended Civil Practice and Remedies Code to add sec. 12 that defined the offense of filing a fraudulent court record or a fraudulent lien or claim against real or personal property or an interest in real or personal property.

Civil Practice and Remedies Code, sec. 12.002 establishes liability for filing a fraudulent lien or claim against real or person property as:

- the greater of \$10,000 or the actual damages caused by the violation;
- court costs;
- reasonable attorney's fees; and
- exemplary damages in an amount determined by the court.

Property Code, ch. 53 allows for the filing of a mechanic's, contractor's or materialman's lien against real property to secure an uncollected payment

for work or materials furnished for construction or development of the property.

DIGEST: CSHB 669 would amend Civil Practice and Remedies Code, sec. 12.002 to exempt a person filing a lien under Property Code, ch. 53 from liability for the penalties of filing a fraudulent lien provided that:

- the lien claim was reasonable and the filed lien was determined to be invalid only because of a technical error or omission in the document or other record being made, presented or used; or
- the lien claim was reasonable and the filed lien was determined to be substantially valid, in whole or in part.

The change would apply to liens filed on or after the bill's September 1, 2009, effective date.

SUPPORTERS  
SAY:

CSHB 669 would reassert a well-established right held by contractors and building supply companies to file liens against property to secure unpaid debts under the Property Code. A simple dispute on payment for labor and goods has been elevated into the Code of Civil Practices and Remedies Code section on fraudulent liens. The potential liability of \$10,000, plus exemplary damages, is overkill. Faced with a claim that a lien is fraudulent, the contractor or supply may not pursue collection of a legitimate debt.

CSHB 669 would allow for the correction of minor typographical errors or other omissions. Most liens are filed using computer templates, and typically office managers and other staffs file information such as addresses and legal descriptions on dozens of documents to meet the strict deadlines for filing liens under Property Code, ch. 53. Attorneys have argued — and courts have agreed — that misspelling a name or transposing the lot and block numbers of a legal description of a property can render a lien “fraudulent.” In many cases, those preparing liens have little education beyond high school or some vocational training, and lawyers and others with professional educations pore over their documents to find little mistakes that would make the liens essentially invalid. Mere errors are not the same as deliberate fraud.

The bill would not prevent legal claims that a lien is fraudulent, but it would shift the burden of proof away from the person filing the lien. An attorney would not be able to scare away a lien merely by sending a letter

threatening to invoke \$10,000 penalties. For the most part, disputes over percentage of completion or the actual cost of materials and labor involve business to business litigation. The determination of what would constitute a minor error or would be fraud should be decided in the legal system.

Lumberyards operate on a very slim margin, and the prices of their commodities have dropped during the slump in building. These small businesses should not risk exposure to hefty civil penalties or forego collections of debts because a lawyer responds that the lien is potentially fraudulent because of a small mistake. Particularly in West Texas, lumberyards sell supplies to plumbers, electricians and other craftsmen, and they should not have additional exposure to bankruptcy or other losses because of non-payment by other vendors and contractors.

OPPONENTS  
SAY:

CSHB 669 would not necessarily end the mismatch between lawyers and office managers in battles over filing liens. The debtor could still threaten to tie up the claimed debt in litigation and hope that the contractor or supplier does not pursue collection of the small amount owed.

OTHER  
OPPONENTS  
SAY:

CSHB 669 should adopt a simpler standard that would exempt any lien not made with an intention to defraud.

NOTES:

Rep. Solomons is expected to offer a floor amendment that would provide that a person claiming a lien under Property Code, ch. 53 would not be liable for penalties under Civil Practice and Remedies Code, sec. 12.002 unless the use of the document or other record to assure the claim is done with intent to defraud.

The original bill would have exempted from Civil Practice and Remedies Code, sec. 12.002 liability for filing a fraudulent lien if:

- the claimant or claimant's representative believed in good faith that the document was valid; or
- the lien was invalid only because of a technical error or omission in the document or other record being made, presented, or used.