

## **BILL ANALYSIS**

Senate Research Center

H.B. 740  
By: Solomons (Harris)  
Jurisprudence  
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Engrossed

### **DIGEST**

In 1994, the Committee on Business and Industry (committee) was charged with studying lien laws and construction contracts. The committee concluded that there were some changes that could be made in the current law which would give owners of real property added protections from certain liens without hampering the construction industry. This bill would implement the committee's recommendations relating to mechanics', contractors', and materialmen's liens in regard to owners of real property.

### **PURPOSE**

As proposed, H.B. 740 implements the recommendations of the Committee on Business and Industry relating to mechanics', contractors', and materialmen's liens in regard to owners of real property.

### **RULEMAKING AUTHORITY**

This bill does not grant any additional rulemaking authority to a state officer, institution, or agency.

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Section 41.001(b), Property Code, to authorize encumbrances to be fixed on homestead property for, among other items, work and material used in constructing improvements on the property if contracted for in writing as provided by Sections 53.254(a), (b), and (c); rather than Sections 53.059(a), (b), and (c).

SECTION 2. Amends Section 53.001, Property Code, to define "residence," "residential construction contract," and "residential construction project." Makes conforming changes.

SECTION 3. Amends Section 53.003(a), Property Code, to provide that this section applies to notices required by Subchapter K, among other subchapters.

SECTION 4. Amends Section 53.026(a), Property Code, to provide that a person who labors, specially fabricates materials, or furnishes labor or materials under a direct contractual relationship with another person is considered to be in direct contractual relationship with the owner and has a lien as an original contractor, if, among other options, the owner contracted with the other person for the construction or repair of a house, building, or improvements and that other person can effectively control the owner through ownership of voting stock, interlocking directorships, or otherwise. Makes conforming changes.

SECTION 5. Amends Section 53.052, Property Code, to require a person claiming a lien arising from a residential construction project to file an affidavit with the county clerk of the county in which the property is located no later than the 15th day of the third calendar month after the day on which the indebtedness accrues. Makes conforming changes.

SECTION 6. Amends Sections 53.054(a) and (b), Property Code, to require a certain affidavit to be signed by the person claiming the lien or by another person on the claimant's behalf and to contain substantially, a sworn statement of the amount of the claim; the name and last known address of the owner or reputed owner; a general statement of the kind of work done and materials furnished by the claimant and, for a claimant other than an original contractor, a statement of each month in which the

work was done and material furnished for which payment is requested; the name and last known address of the person by whom the claimant was employed or to whom the claimant furnished the materials or labor; the name and last known address of the original contractor; the claimant's name, mailing address, and if different, physical, rather than business, address; and for a claimant other than an original contractor, a statement identifying the date each notice of the claim was sent to the owner and the method by which the notice was sent, among other items. Authorizes the claimant to attach to the affidavit a copy of each notice sent to the owner, among other items.

SECTION 7. Amends Section 53.055(a), to require a person who files an affidavit to send a copy of the affidavit by registered or certified mail to the owner or reputed owner at the owner's last known business or residence address not later than one business day after the date the affidavit is filed with the county clerk. Deletes existing Subdivisions (a)(1) and (2).

SECTION 8. Amends Section 53.056(a), Property Code, to require a claimant other than an original contractor, except as provided by Subchapter K, to give the notice prescribed by this section for the lien to be valid.

SECTION 9. Amends Section 53.057(a), Property Code, to make conforming changes.

SECTION 10. Amends Section 53.058(a), Property Code, to make conforming changes.

SECTION 11. Amends Sections 53.081(a), (b), and (d), Property Code, to authorize an owner, if the owner receives notice under Section 53.252 or 53.253, among other sections, to withhold from payments to the original contractor an amount necessary to pay the claim for which he receives notice. Authorizes an owner, if notice is sent in a form that substantially complies with Section 53.252, among other sections, to withhold the funds immediately on receipt of the notice. Authorizes an owner, if notice is sent as provided by Section 53.252(b), to withhold funds immediately on receipt of the notice sent as required by Section 53.252.

SECTION 12. Amends Section 53.084(b), Property Code, to make a conforming change.

SECTION 13. Amends Section 53.085, Property Code, as follows:

Sec. 53.085. AFFIDAVIT REQUIRED. (a) Requires a person, in the event that the person has not paid each of the person's subcontractors, laborers, or materialmen in full, to state in the affidavit the amount owed and the name and, if known, the address and telephone number of each subcontractor, laborer, or materialman to whom a payment is owed. Makes nonsubstantive changes.

(b) Requires the seller of any real property, upon request by the purchaser or the purchaser's agent prior to closing of the purchase of the real property, provide to the purchaser, or the purchaser's agent, a written affidavit stating that the seller has paid each of the seller's contractors, laborers, or materialmen in full for all labor and material provided to the seller through the date specified in the affidavit for any construction of improvements on the real property and that the seller is not indebted to any person, firm, or corporation by reason of any such construction through the date specified in the affidavit. Requires the seller, in the event that the seller has not paid each of the seller's contractors, laborers, or materialmen in full for labor and material provided through the date specified in the affidavit, to state in the affidavit the amount owed and the name and, if known, the address and telephone number of each contractor, laborer, or materialman to whom the payment is owed. Makes nonsubstantive changes.

(c) Authorizes the affidavit to include certain information.

(d) Provides that a person commits a misdemeanor, rather than a Class A misdemeanor, if the person intentionally, knowingly, or recklessly makes a false or misleading statement in an affidavit under this section. Requires a person adjudged guilty of an offense under this section to be punished by a fine not to exceed \$4,000 or confinement in jail for a term not to exceed one year or both a fine and confinement. Prohibits a person from receiving

community supervision for the offense.

(e) Provides that a person signing an affidavit under this section is personally liable for any loss or damage resulting from any false or incorrect information in the affidavit.

SECTION 14. Amends Sections 53.106(b), (c), and (d), Property Code, to require a copy of the affidavit to be sent by certified or registered mail to the original contractor no later than the date the affidavit is filed and to each claimant who sends a notice of lien liability to the owner under Section 53.252 or 53.253, among other sections, no later than the date the affidavit is filed or the 10th day after the date the owner receives a notice of lien liability, whichever is later. Provides that Subsection (d) does not apply to a person to whom the affidavit was not sent as required by this section. Makes conforming changes.

SECTION 15. Amends Section 53.157, Property Code, to authorize a mechanic's lien or affidavit claiming a mechanic's lien filed under Section 53.052 to be discharged of record by filing the bond and notice, rather than the bond, notice, and return, in compliance with Subchapter H; or by recording a certificate copy of the order removing the lien under Section 53.160 and a certificate from the clerk of the court that states that no bond or deposit as described by Section 53.161 was filed by the claimant within 30 days after the date the order was entered; among other options.

SECTION 16. Amends Section 53.158, Property Code, to require suit, for a claim arising from a residential construction project, to be brought to foreclose the lien no later than the first anniversary of the date the lien affidavit is filed under Section 53.052. Makes conforming changes.

SECTION 17. Amends Chapter 53G, Property Code, by adding Sections 53.160, 53.161, and 53.162, as follows:

Sec. 53.160. SUMMARY MOTION TO REMOVE INVALID OR UNENFORCEABLE LIEN. (a) Authorizes a party objecting to the validity or enforceability of the claim or lien, in a suit brought to foreclose a lien or to declare a claim or lien invalid or unenforceable, to file a motion to remove the claim or lien. Requires the motion to be verified and state the legal and factual basis for objecting to the validity or enforceability of the claim or lien. Authorizes the motion to be accompanied by supporting affidavits.

(b) Sets forth the limited grounds for objecting to the validity or enforceability of the claim or lien for purposes of the motion.

(c) Provides that the claimant is not required to file a response. Requires the claimant and any other party that has appeared in the proceeding to be notified by at least 21 days before the date of the hearing on the motion. Prohibits a motion from being heard before the 21st day after the date the claimant answers or appears in the proceeding.

(d) Sets forth the burden of proof at the hearing on the motion in regard to certain matters.

(e) Requires the court to promptly determine a motion to remove a claim or lien under this section. Requires the court, if the court determines that the movant is not entitled to remove the lien, to enter an order denying a motion. Requires the court, if the court determines that the movant is entitled to remove the lien, to enter an order removing the lien claimed in the lien affidavit. Prohibits a party to the proceeding from filing an interlocutory appeal from the court's order.

(f) Authorizes admissible evidence offered at the hearing to be admitted in the trial of the case. Provides that the court's order under Subsection (e) is not admissible as evidence in determining the validity and enforceability of the claim or lien.

Sec. 53.161. BOND REQUIREMENTS AFTER ORDER TO REMOVE. (a) Requires the court, in an order removing a lien, to set the amount of security that the claimant may provide in order to stay the removal of the claim or lien. Requires the sum to be an amount that the

court determines is a reasonable estimate of the cost and attorney's fees the movant is likely to incur in the proceeding to determine the validity or enforceability of the lien. Prohibits the sum from exceeding the amount of the lien claim.

(b) Requires the court to stay the order removing the lien if the claimant files a bond or a deposit in lieu of a bond in the amount set in the order with the clerk of the court by a certain date unless the court orders a later date for filing the bond or the deposit in lieu of a bond. Provides that if the court fails to set the amount of the security required, the amount required is the amount of the lien claim.

(c) Sets forth the requirements for the bond.

(d) Authorizes the claimant, in lieu of filing a bond, to deposit in the amount set by the court for the surety bond certain items.

(e) Requires a deposit made under Subsection (d) to be conditioned in the same manner as a surety bond. Provides that any interest accrued on the deposit amount is a part of the deposit.

(f) Authorizes the owner to file certain documents if the claimant fails to file the bond or the deposit in lieu of the bond in compliance with this section.

(g) Provides that the claim or lien is removed and extinguished as to a creditor or subsequent purchaser for valuable consideration who obtains an interest in the property after the certified copy of the order and certificate of the clerk of the court are filed with the county clerk. Provides that the removal of the lien does not constitute a release of the liability of the owner, if any, to the claimant.

Sec. 53.162. REVIVAL OF REMOVED LIEN. Authorizes the claimant, if an order removing the lien is not stayed as provided by Section 53.161 and the claimant later obtains a final judgment in the suit establishing the validity and ordering the foreclosure of the lien, to file a certified copy of the final judgment with the county clerk. Provides that the filed judgment revives the lien, and the claimant may foreclose the lien. Provides that a lien revived under this section is void as to a creditor or subsequent purchaser for valuable consideration who obtained an interest in the property under certain conditions.

SECTION 18. Amends Section 53.171, Property Code, by adding Subsection (c), to provide that a mechanic's lien claim against an owner's property is discharged after a bond that complies with Section 53.172 is filed; the notice of the bond is issued as provided by Section 53.173; and the bond and the notice are recorded as provided by Section 53.174.

SECTION 19. Amends Sections 53.173(c) and (d), Property Code, to require, rather than authorize, the notice to be served on each obligee by mailing a copy of the notice and the bond, rather than having a copy delivered, to the obligee by certified U.S. mail, return receipt requested, addressed to the claimant at the address stated in the lien affidavit for the obligee, rather than by any means authorized for the service of an original petition under the Texas Rules of Civil Procedure. Provides that if the claimant's lien affidavit does not state the claimant's address, the notice is not required to be mailed to the claimant. Deletes existing Subsection (d).

SECTION 20. Amends Section 53.174, Property Code, to require the county clerk to record the bond, the notice, and a certificate of mailing, rather than the return, in the real property records. Makes conforming changes.

SECTION 21. Amends Section 53.175(b), Property Code, to authorize each named obligee or assignee of an obligee to maintain a separate suit on the bond in any court of jurisdiction in the county in which the real property is located.

SECTION 22. Amends Section 53.201(a), Property Code, to authorize an original contractor who has a written contract with the owner to furnish at any time a bond for the benefit of claimants.

SECTION 23. Amends Chapter 53, Property Code, by adding Subchapter K, as follows:

SUBCHAPTER K. RESIDENTIAL CONSTRUCTION PROJECTS

Sec. 53.251. PROCEDURES FOR RESIDENTIAL CONSTRUCTION PROJECTS. Provides that this chapter applies only to residential construction projects. Requires a person to comply with this subchapter in addition to the other applicable provisions of this chapter to perfect a lien that arises from a claim resulting from a residential construction project.

Sec. 53.252. DERIVATIVE CLAIMANT: NOTICE TO OWNER OR ORIGINAL CONTRACTOR. Requires a claimant other than an original contractor to give the notice prescribed by this section for the lien to be valid. Requires the notice, if the property that is the subject of the lien is a homestead, to also comply with Section 53.254. Requires the claimant to give to the owner or reputed owner and the original contractor written notice of the unpaid balance. Requires the claimant to give the notice by a certain date. Requires the notice, to authorize the owner to withhold funds under Subchapter D, to state that if the claim remains unpaid, the owner may be personally liable and the owner's property may be subjected to a lien unless the owner withholds payments from the contractor for payment of the claim; or the claim is otherwise paid or settled. Requires the notice to be sent by registered or certified mail and to be addressed to the owner or reputed owner and the original contractor, as applicable, at the person's last known business or residence address. Provides that a copy of the statement or billing in the usual and customary form is sufficient as notice under this section.

Sec. 53.253. DERIVATIVE CLAIMANT: NOTICE FOR SPECIALLY FABRICATED ITEMS. Requires a claimant who specially fabricates material for incorporation in the residential construction project to give notice under this section for a lien to be valid if specially fabricated materials have not been delivered to the property or incorporated in the residential construction project. Requires the claimant, once the specifically fabricated materials have been delivered, to give notice under Section 53.252. Requires the claimant to give the owner or reputed owner notice by a certain date. Requires the claimant, if the indebtedness is incurred by a person other than the original contractor, to also give notice within that time to the original contractor. Sets forth the required contents of the notice. Requires the notice to be sent by registered or certified mail to the last known business or residence address of the owner or the reputed owner or the original contractor, as applicable. Provides that the lien of a claimant who accepts an order but fails to give notice under this section is valid as to delivered items if the claimant has given notice under Section 53.252.

Sec. 53.254. HOMESTEAD. Requires the person who is to furnish material or perform labor and the owner to execute a written contract setting forth the terms of the agreement in order to fix a lien on a homestead. Requires the contract to be executed before the material is furnished or the labor is performed. Requires the contract, if the owner is married, to be signed by both spouses. Provides that if the contract is made by an original contractor, the contract inures to the benefit of all persons who labor or furnish material for the original contractor. Requires the contract to be filed with the county clerk of the county in which the homestead is located. Requires the county clerk to record the contract in records kept for that purpose. Sets forth the notice that must be conspicuously contained on an affidavit for lien filed under this subchapter that relates to a homestead. Sets forth the statement that must be included or attached to the notice required to be given to the owner under Section 53.252 in order for the lien on the homestead to be valid.

Sec. 53.255. DISCLOSURE STATEMENT REQUIRED FOR RESIDENTIAL CONSTRUCTION CONTRACT. Requires the original contractor, before a residential construction contract is executed by the owner, to deliver to the owner a disclosure statement described by this section. Sets forth the language for the required disclosure statement. Provides that the failure of a contractor to comply with this section does not invalidate a lien under this chapter, a contract lien, or a deed of trust.

Sec. 53.256. LIST OF SUBCONTRACTORS AND SUPPLIERS. Requires the original contractor, for the construction of improvements under a residential construction contract, to attach to the disclosure statement required by Section 53.255 or furnish to the owner before the commencement of construction a written list that identifies by name, address, and telephone number each subcontractor and supplier the contract intends to use in the work to be performed. Requires the contractor to provide the owner with an updated list of subcontractors and suppliers no later than the 15th day after the date a subcontractor or supplier is added or deleted. Sets forth the notice that the list is required to conspicuously contain. Provides that the failure of a contractor to comply with this section does not invalidate a lien under this chapter, a contract lien, or a deed of trust.

Sec. 53.257. PROVISIONS RELATED TO CLOSING OF LOAN FOR CONSTRUCTION OF IMPROVEMENTS. Requires the lender, if the owner is obtaining third-party financing for the construction of improvements under a residential construction contract, to deliver to the owner all documentation relating to the closing of the loan by a certain date. Authorizes the lender, if a bona fide emergency or another good cause exists and the lender obtains the written consent of the owner, to provide the documentation to the owner or the lender to modify previously provided documentation on the date of closing. Requires the lender to provide to the owner the disclosure statement described by Section 53.255(b). Requires the disclosure statement to be provided to the owner before the date of closing. Authorizes the lender, if a bona fide emergency or another good cause exists and the lender obtains a written consent of the owner, to provide the disclosure statement at the closing. Requires the lender to retain a signed and dated copy of the disclosure statement with the closing documents. Provides that the failure of the lender to comply with this section does not invalidate a lien under this chapter, a contract lien, or a deed of trust.

Sec. 53.258. DISBURSEMENTS OF FUNDS. (a) Requires the original contractor, for the construction of improvements under a residential construction contract, to provide to the owner a signed periodic statement that lists the bills or expenses that the original contractor represents will be paid or that have been paid and for which the original contractor is requesting payment. Provides that the original contractor is not required to include in the statement the bills or expenses for which the original contractor has obtained a valid lien release or waiver from the subcontractor or supplier to whom the bills or expenses are owed if the statement includes a written representation that the balance of any funds that are not itemized in the statement will be paid to a certain person.

(b) Requires the lender, if the owner finances the construction of improvements through a third party that advances loan proceeds directly to the original contractor, to obtain from the original contractor the signed periodic statement required by Subsection (a) that covers the funds for which the original contractor is requesting payment; and to provide to the owner a statement of funds disbursed by the lender since the last statement was provided to the owner.

(c) Requires the lender to provide to the owner the lender's disbursement statement and the disbursement statement the lender obtained from the contractor before the lender disburses the funds to the original contractor. Authorizes the disbursement statements to be provided in any manner agreed to by the lender and the owner.

(d) Provides that the lender is not responsible for the accuracy of the information contained in the disbursement statement obtained from the original contractor.

(e) Provides that the failure of the lender to comply with this section does not invalidate a lien under this chapter, a contract lien, or a deed of trust.

(f) Provides that a person commits a misdemeanor if the person intentionally, knowingly, or recklessly provides false or misleading information in a disbursement statement required under this section. Requires a person adjudged guilty of an offense under this section to be punished by a fine not to exceed \$4,000 or confinement in jail for a term not to exceed

one year or both a fine and confinement. Prohibits a person from receiving community supervision for the offense.

Sec. 53.259. FINAL BILLS-PAID AFFIDAVIT REQUIRED. (a) Requires the original contractor, as a condition of final payment under a residential construction contract, to execute and deliver to the owner, or the owner's agent, an affidavit stating that the original contractor has paid each person in full for all labor and materials used in the construction of improvements on the real property. Requires the original contractor, if the original contractor has not paid each person in full, to state in the affidavit the amount owed and the name and, if known, the address and telephone number of each person to whom a payment is owed.

(b) Requires the seller of any real property on which a structure of no more than four units is constructed and that is intended as the principal place of residence for the purchaser to execute and deliver to the purchaser, or the purchaser's agent, an affidavit stating that the seller has paid each person in full for all labor and materials used in the construction of improvements on the real property and that the seller is not indebted to any person by reason of any construction. Requires the seller, in the event that the seller has not paid each person in full, to state in the affidavit the amount owed and the name and, if known, the address and telephone number of each person to whom a payment is owed.

(c) Provides that a person commits a misdemeanor if the person intentionally, knowingly, or recklessly makes a false or misleading statement in an affidavit under this section. Requires a person adjudged guilty of an offense under this section to be punished by a fine not to exceed \$4,000 or confinement in jail for a term not to exceed one year or both a fine and confinement. Prohibits a person from receiving community supervision for the offense.

(d) Provides that a person signing an affidavit under this section is personally liable for any loss or damage resulting from any false or incorrect information in the affidavit.

Sec. 53.260. CONVEYANCE TO CONTRACTOR PROHIBITED. Prohibits an original contractor from requiring an owner of real property to convey the real property to the original contractor or an entity controlled by the original contractor as a condition to the performance of the residential construction contract for improvements to the real property.

SECTION 24. Repealer: Section 53.059, Property Code (Homestead).

SECTION 25. Effective date: September 1, 1997.  
Makes application of this Act prospective.

SECTION 26. Emergency clause.