

BILL ANALYSIS

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C.S.S.B. 1332
By: Deuell
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Committee Report (Substituted)

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Mechanic's and materialman's lien rights are provided for in both the Texas Constitution and Chapter 53 (Mechanic's, Contractor's, or Materialman's Lien), Property Code. Historically, these laws have tried to balance the rights of owners to know their cost to build a project, versus the rights of contractors, subcontractors, and suppliers to be paid for their labor and/or materials. These are important rights which aid contractors, subcontractors, and suppliers in the collection of the sums due them for labor and/or materials supplied to construction projects in Texas.

Currently, the only guidance as to what needs to be in a lien release is contained in Section 53.152 (Release of Claim or Lien), Property Code, but this language is vague. As a result, over time, virtually every lender, title company, owner, original contractor, subcontractor, and supplier has developed its own unique lien waiver forms. Each entity believes its waiver is appropriate and unchangeable. Some of these forms have become very long, with clauses that extend beyond the waiving of mechanic's and materialman's liens.

Often, as these waiver forms have become more complex, parties cannot agree on the terms of the waiver to provide in exchange for payment, even though funds are available to pay a lien or potential lien claim. Contractors, subcontractors, and suppliers have begun to engage legal counsel to review these documents prior to signing. These legal fees drive up the cost of construction, and the confusion about the terms of the lien waiver forms leads to payment delays, more liens being filed, and increased litigation.

In addition, despite Section 53.152, Property Code, stating that a waiver is not required until the "debt for labor materials is satisfied or paid by collected funds," an original contractor, subcontractor, or supplier is often required to provide an unconditional lien waiver prior to actual payment. This puts them in the unenviable position of having to waive their lien rights before they receive actual payment, or refusing to do so, and risking further delays in payment and incurring the costs of filing a lien and/or lawsuit to protect their rights.

The purpose of this bill is to create one set of statutory lien waiver forms, both conditional and unconditional, to be used during the payment process on private construction projects in Texas. By having uniform forms, delays in payment and battles over whose forms are going to be used will be avoided.

C.S.S.B. 1332 amends current law relating to the waiver and release of a mechanic's, contractor's, or materialman's lien or payment bond claim.

RULEMAKING AUTHORITY

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

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 53.085(c), Property Code, as follows:

(c) Authorizes the affidavit to include:

- (1) a waiver or release of lien rights or payment bond claims by the affiant that is conditioned on the receipt of actual payment or collection of funds when payment is made by check or draft, as provided by Subchapter L;
- (2) a warranty or representation that certain bills or classes of bills will be paid by the affiant from funds paid in reliance on the affidavit; and
- (3) an indemnification by the affiant for any loss or expense resulting from false or incorrect information in the affidavit.

SECTION 2. Amends Chapter 53, Property Code, by adding Subchapter L, as follows:

SUBCHAPTER L. WAIVER AND RELEASE OF LIEN OR PAYMENT BOND CLAIM

Sec. 53.281. WAIVER AND RELEASE OF LIEN OR PAYMENT BOND CLAIM. (a) Provides that any waiver and release of a lien or payment bond claim under this chapter is unenforceable unless a waiver and release is executed and delivered in accordance with this subchapter.

(b) Provides that a waiver and release is effective to release the owner, the owner's property, the contractor, and the surety on a payment bond from claims and liens only if:

- (1) the waiver and release substantially complies with one of the forms prescribed by this subchapter;
- (2) the waiver and release is signed by the claimant or the claimant's authorized agent; and
- (3) in the case of a conditional release, evidence of payment to the claimant exists.

Sec. 53.282. CONDITIONS FOR WAIVER, RELEASE, OR IMPAIRMENT OF LIEN OR PAYMENT BOND CLAIM. (a) Provides that a statement purporting to waive, release, or otherwise adversely affect a lien or payment bond claim is not enforceable and does not create an estoppel or impairment of a lien or payment bond claim unless:

- (1) the statement is in writing and complies with this subchapter;
- (2) the claimant has actually received payment in good and sufficient funds in full for the lien or payment bond claim; or
- (3) the statement is:
 - (A) in a written original contract or subcontract for the construction, remodel, or repair of a single-family house or duplex; and
 - (B) made before labor or materials are provided under the original contract or subcontract and a good faith dispute exists regarding the quality of the labor or material provided by the original contractor or subcontractor that has resulted in the nonpayment of the original contractor or subcontractor.

(b) Provides that this section does not affect the enforceability of an accord and satisfaction regarding a bona fide dispute or any agreement made in settlement of an action pending in any court if the accord and satisfaction or agreement made in settlement makes specific reference to the lien or payment bond claim.

(c) Provides that the filing of a lien rendered unenforceably by a lien waiver under Subsection (a)(3) does not violate Section 12.002 (Liability), Civil Practice and Remedies Code.

Sec. 53.283. UNCONDITIONAL WAIVER AND RELEASE: PAYMENT REQUIRED. Prohibits a person from requiring a claimant or potential claimant to execute an unconditional waiver and release for a progress payment or final payment amount unless the claimant or potential claimant received payment in that amount in good and sufficient funds.

Sec. 53.284. FORMS FOR WAIVER AND RELEASE OF LIEN OR PAYMENT BOND CLAIM. (a) Provides that a waiver and release given by a claimant or potential claimant is unenforceable unless it substantially complies with the applicable form described by Subsections (b)-(e).

(b) Requires the waiver and release, if a claimant or potential claimant is required to execute a waiver and release in exchange for or to induce the payment of a progress payment and is not paid in exchange for the waiver and release or if a single payee check or joint payee check is given in exchange for the waiver and release, to contain certain language in the waiver. Sets forth the required language to be included in the waiver.

(c) Requires the waiver and release, if a claimant or potential claimant is required to execute an unconditional waiver and release to prove the receipt of good and sufficient funds for a progress payment and the claimant or potential claimant asserts in the waiver and release that the claimant or potential claimant has been paid the progress payment, to:

(1) contain a notice at the top of the document, printed in bold type at least as large as the largest type used in the document, but not smaller than 10-point type, that contains certain language. Sets forth the required language to be included in the waiver; and

(2) below the notice, contain certain language. Sets forth the required language to be included below the notice.

(d) Require the waiver and release, if a claimant or potential claimant is required to execute a waiver and release in exchange for or to induce the payment of a final payment and is not paid in good and sufficient funds in exchange for the waiver and release or if a single payee check or joint payee check is given in exchange for the waiver and release, to contain certain language. Sets forth the required language to be included in the waiver.

(e) Requires the waiver and release, if a claimant or potential claimant is required to execute an unconditional waiver and release to prove the receipt of good and sufficient funds for a final payment and the claimant or potential claimant asserts in the waiver and release that the claimant or potential claimant has been paid the final payment, to contain certain language in the waiver. Sets forth the required language to be included in the waiver.

Sec. 53.285. ATTEMPTED COMPLIANCE. (a) Requires a waiver or release to be construed to comply with this subchapter and provides that it is enforceable in the same manner as a waiver and release under this subchapter if the waiver or release:

(1) is furnished in attempted compliance with this subchapter; or

(2) evidences by its terms intent to comply with this subchapter.

(b) Requires any provision in any waiver or release furnished in attempted compliance with this subchapter that expands or restricts the rights or liabilities

provided under this subchapter to be disregarded and the provisions of this subchapter to be read into that waiver or release.

(c) Provides that this section expires August 31, 2012.

Sec. 53.286. PUBLIC POLICY. (a) Provides that, notwithstanding any other law and except as provided by Section 53.282, any contract, agreement, or understanding purporting to waive the right to file or enforce any lien or claim created under this chapter is void as against public policy.

(b) Provides that this subchapter does not apply to a written agreement to subordinate, release, or satisfy all or part of a lien claimed after a notice of lien has been filed.

SECTION 3. Makes application of this Act prospective to September 1, 2011.

SECTION 4. Effective date: September 1, 2011.