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MISCONCEPTIONS, POTENTIAL TRAPS, AND PRACTICE TIPS FOR THE 2021 CHANGES TO THE TEXAS LIEN LAWS

In 2021, the Texas Legislature modified the mechanic's and materialmen's lien statute in significant ways.[3] While the modifications resolved certain problems, other potential issues were created by the changes. Here, we discuss new issues created, potential unforeseen traps, and key practice tips—many of which have not been addressed by other discussions about the 2021 Legislation.

I. BACKGROUND

First, some important background about the lien statutes: as many are aware, the Texas Constitution grants certain contractors in direct privity with the owner a lien for construction activities on buildings and articles made or repaired by such contractors.[4] The drafters of the Texas Constitution included a commandment to the Legislature to draft laws necessary for the enforcement of what is referred to as the "Constitutional Lien."[5] More than a century ago, the Legislature took that mandate one step further and created laws that also established the lien rights of lower-tier contractors and vendors, generally on privately-owned projects. The current embodiment of that effort can be found in Texas Property Code Chapter 53.[6]

The Texas Constitutional Lien provides an automatic and potentially limitless lien against the owner's property (i.e., to the extent of the work provided) in favor of the contractor in direct privity with the owner. A careful study of Chapter 53 of the Texas Property Code[7] provides a similar potentially limitless lien (i.e., to the extent of the work provided) against the owner's property for those in direct privity with the owner, provided certain minimal procedural requirements are met. Given the owner and its direct contractor are in direct privity with each other, it is not a stretch of contract law to permit a payment claim to extend to and be secured by the land and/or improvements that are being constructed.

However, for subcontractors and suppliers, the situation is different. Consider that subcontractors and suppliers have no direct privity with the owner. Accordingly, there are generally no direct obligations arising under contract law—or other theories, such as quantum meruit or unjust enrichment—in which the subcontractor or supplier can look to the owner for payment.[8] Unless the subcontractor can prove a Trust Fund Act violation by the owner,[9] then a subcontractor who has not perfected its lien claim generally has no viable cause of action against the owner.

With this conceptual legal framework in mind, when one examines Texas Property Code Chapter 53, one discovers the statute reflects a "deal" has been struck between the owner's interests, the contractor's interests, and the lower-tiered subcontractor without direct privity to the owner. As with all laws, there should be a balancing of the equities between all of the potentially affected parties. "The Deal"

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3. Tex. H.B. 2237, 87th Leg., R.S. (2021).
4. Tex. Const. art. XVI, § 37 ("Mechanics, artisans and material men, of every class, shall have a lien upon the buildings and articles made or repaired by them for the value of their labor done thereon, or material furnished therefor; and the Legislature shall provide by law for the speedy and efficient enforcement of said liens.").
5. *Id.*
6. Tex. Prop. Code §§ 53.001–53.287 (2022).
7. For the sake of this article all references to the lien statutes will relate to non-residential, non-homestead property unless otherwise indicated. Please note that there are important differences between attempting to secure a lien on residential or homestead property and non-residential, non-homestead property.
8. *E.g.,* Heldenfels Bros., Inc. v. City of Corpus Christi, 832 S.W.2d 39, 40–42 (Tex. 1992) (denying, subcontractor's quantum meruit and unjust enrichment claims against owner).
9. *E.g.,* Dealers Elec. Supply Co. v. Scroggins Constr. Co., 292 S.W.3d 650, 658 (Tex. 2009) (Chapter 2253 bond claim statute did not by itself exclude potential Trust Fund Act cause of action by subcontractor under Texas Property Code Chapter 162). Perhaps the subcontractor might assert a Prompt Pay Act claim (Texas Property Code Chapter 28), but the subcontractor would probably be limited only to recovery of interest, not its principal amount, and potentially have to address issues regarding whether it has standing to assert such a claim against the owner. E.g., Nat'l Env't. Serv. Co. v. Homeplace Homes, 961 S.W.2d 632, 636 (Tex. App.—San Antonio 1998, no pet.) (barring subcontractor's Chapter 28 claim against owner).

in the lien statute is this: the owner is obligated to withhold a certain portion of the original contractor's money as a fund for the potential payment of claims (often referred to as "retainage," although one of the changes in the law is a terminology change, to be discussed more below). The owner is also obligated to trap/hold funds belonging to its direct contractor—called the "original contractor" under the lien statute—once the owner receives proper statutory notice of non-payment from a lower-tier subcontractor/sub-subcontractor. This is referred to as "fund trapping." In exchange for the obligation of the owner's obligations to provide some protection for the subcontractors, the owner's liability is limited to retainage and the trapped funds.[10] To the extent the lien claims made are more than the proper amount withheld by the owner, the claimants share pro rata.[11] The original contractor receives a copy of the fund trapping notices and retainage notices, so it is informed of the claims and can attempt to resolve issues before a lien is filed.[12] The statute also provides the original contractor an option to obtain a bond to indemnify against a lien, to provide some quantum of protection for the owner's property.[13]

There have been two general categories of legislative changes to Chapter 53 over the years: (1) changes to who may be entitled to make a lien claim under the statute, that is, which kinds of parties to construction project even have a right to file a lien, assuming they follow the lien procedures correctly;[14] and (2) modifications of the procedures for claiming a lien.[15] The 2021 Legislation includes both types of changes. It also includes a less frequent change, namely, a change in the terminology used.

Two important issues regarding the 2021 Legislation must first be discussed. First, the 2021 changes apply only to Chapter 53, which again is effectively lien claims on private projects (except for a narrow portion dedicated to liens on funds due a public contractor. The changes do not affect Texas Government Code Chapter 2253. Chapter 2253 governs bond claims on public, non-federal projects in Texas. This is a critical distinction, since the deadlines under Chapter 2253—such as, importantly, a sub-subcontractor's requirement to send a second month notice to the original contractor—will not be affected by the 2021 changes. Second, it is important to understand the effective date of the 2021 Legislation. Both of these issues are discussed immediately below. They are potentially the source of misunderstandings and perhaps critical mistakes by those who make claims.

II. NO IMPACT ON GOVERNMENT CODE CHAPTER 2253 / SIMILAR P3 PROJECTS

For those of us who teach classes on lien and bond claims to various associations and client groups, we get to discuss problems and issues firsthand with those credit professionals and others who are responsible for providing notices for their businesses. In answering their questions over our careers it is generally apparent that most of those credit professionals do not see the issue they are facing initially as having lien claims arising under Property Code Chapter 53 or bond claims under Government Code Chapter 2253. These credit professionals have an unpaid invoice, which has turned into a payment problem necessitating they do something about it. After determining which set of rules apply—which, until very recently, were similar under Property Code Chapter 53 and Government Code Chapter 2253—the credit professionals prepare their notices.

Issue: Before the two most recent sets of changes to the lien statute—in 2011 and 2021—the principal difference between the statutory schemes for a bond claim on a public project and pre-lien notices on a private project was the requirement of a sworn statement of account.[16] With the 2011 and 2021 legislative changes to Property Code Chapter 53, the procedures between making a valid lien claim on a private project and a valid bond claim on a public project—or a letter of credit claim on a public-private-partnership project, as detailed below—are continuing to become more dissimilar. This means that those making claims are less able to follow one standard operating procedure and, thus, the risk of inadvertently mixing up the two processes in a detrimental way has increased. Will those credit managers who hear that there is no longer a second month notice requirement mistakenly believe that applies to both Property Code

10. Tex. Prop. Code § 53.084 (2022).
11. *Id.* § 53.122(b).
12. *See, e.g.,* Wesco Distrib., Inc. v. Westport Grp., Inc. 150 S.W.3d 553, 559 (Tex. App.—Austin 2004, no pet.) (noting "[t]he materialman's lien statute is designed to protect contractors, subcontractors, and owners . . . The purposes of [the lien statute's] notice [provisions] are: (1) to give those parties entitled to notice an opportunity to protect their interests, and (2) to prevent surprise.").
13. Tex. Prop. Code §§ 53.171–175 (2022).
14. *E.g.,* Tex. H.B. 208, 78th Leg., R.S. (2003) (adding demolition contractors as persons entitled to a lien under Texas Property Code Section 53.021).
15. *E.g.,* Tex. H.B. 1390, 82nd Leg., R.S. (2011) (effectively removing the prior early retainage notice requirement deadline and moving it to the end of the claimant's work or the project).
16. Tex. Gov't Code § 2253.041(c).

Chapter 53 and Government Code Chapter 2253? And thus inadvertently miss a critical Chapter 2253 notice deadline? Perhaps.

III. EFFECTIVE DATE

The 2021 changes only apply to an original contract entered into or after the effective date of the act, which was January 1, 2022. For original contracts entered into prior to January 1, 2022—and all subcontracts of any tier under such original contract—the previous version of the law applies.[17] Accordingly, unless claimants know for certain they are providing labor and/or materials under an original contract executed after January 1, 2022, such claimants must continue to comply with the pre-2021 version of Chapter 53.

Issue: One notable change we discuss in detail below is the removal of the requirement of a second month pre-lien notice letter for second-tier subcontractors (which includes subcontractors of any tier below second-tier subcontractor). If the second-tier subcontractor is performing work on a project in which the original contract was signed before January 1, 2022, then such subcontractors will need to continue sending second month notice letters or risk their liens being invalid.[18] If, however, such claimant is performing work under an original contract that was signed after January 1, 2022, there is technically no requirement to send a second month pre-lien notice letter under the 2021 Legislation. In this post-2022 situation, there are three potential options if you are a second-tier subcontractor: (1) continue to send second month notice letters until you are certain the original contract was executed after January 1, 2022; (2) stop sending second month pre-lien notice letters and risk an invalid claim because the original contract you are working under was signed before January 1, 2022; or (3) attempt to research when the original contract was signed, before deciding whether to send a second month pre-lien notice or not.

While the 2021 changes certainly simplified the lien perfection process in some aspects, the effective date of the 2021 Legislation might be considered a part of the process made more complicated by the 2021 changes. Recall those people who are most likely the ones determining what notice to send and what procedure to follow are not lawyers. They are credit managers, accounts receivable professionals, small business owners, and others who might not be aware of these nuances in the new law.

With the above in mind, we next examine changes from the 2021 Legislation. While the legislation enacted several changes, we focus below on ten key changes, then conclude with practice tips for all construction parties.

A. Expansion of who can make a claim

Prior to the 2021 changes, architects and other design professionals, to be entitled to a lien, had to have a written contract directly with the owner, its agent, trustee, or receiver.[19] The 2021 changes significantly expand the universe of those design professionals entitled to a lien. The revised statute now permits design professionals (a licensed architect, engineer, or surveyor)—*of any tier*—who are providing services to prepare a design, drawing, plan, plat, survey, or specification to have a lien if they have performed that service under a contract with the owner or the owner's agent, trustee, receiver, contractor, or subcontractor, without a need for direct privity with the owner, its agent trustee or receiver.[20]

This change, in our opinion, is a natural extension of the undeniable increase in the use of the design-build delivery method. In the design-build delivery method, of course, one entity is responsible for providing both the design and the construction of the building. That arrangement can take several different forms: (1) the designer and the constructor may form a joint venture, or already co-exist in the same legal entity; (2) the designer may become the original contractor entering into a contract with the owner and engaging a constructor as a sub-contractor; or (3) the constructor may become the original contractor entering into a contract with the owner and engaging the designer as a sub-consultant. Under the pre-2021 changes to Chapter 53, it was not clear whether the designer (architect or engineer) would have an equal chance to establish a lien under each of the three scenarios. The recent changes have effectively removed the potential for disparate treatment of essentially similar situations.

17. Tex. H.B. 2237, 87th Leg., R.S., §§ 37–38 (2021).
18. This second-month rule was confirmed just last year—shortly before the 2021 Legislation was signed into law—in an Austin Court of Appeals Opinion: Valle v. Hertz Electric, LLC, No. 03-20-00056-CV, 2021 Tex. App. LEXIS 3916, at *5 (Tex. App.—Austin May 19, 2021, no pet.) (mem. op.) (not designated for publication) ("***For a lien to be valid, a subcontractor must provide written notice*** of an 'unpaid balance' to the original contractor '***not later than the 15th day of the second month*** following each month in which all or part of the claimant's labor was performed or material delivered.'") (citing Tex. Prop. Code § 53.056(a), (b); Morrell Masonry Supply, Inc. v. Lupe's Shenandoah Reserve, LLC, 363 S.W.3d 901, 906 (Tex. App.—Beaumont 2012, no pet.)).
19. Tex. Prop. Code § 53.021(c) (2020) ("An architect, engineer, or surveyor who prepares a plan or plat ***under or by virtue of a written contract with the owner or the owner's agent, trustee, or receiver*** in connection with the actual or proposed design, construction, or repair of improvements on real property or the location of the boundaries of real property has a lien on the property.") (emphasis added).
20. Tex. H.B. 2237, 87th Leg., R.S., § 4 (2021); Tex. Prop. Code § 53.021(3) (2022).

Issue: Outside of the design-build context, the 2021 changes now also allow liens for, e.g., engineers or other sub-consultants, who contract directly the with architect/engineer and not directly with the owner, or seemingly sub-consultants of any tier. Before the 2021 changes, these engineers or other sub-consultants, who did not contract directly with the owner, simply had no lien rights and, worse, risked a potential Fraudulent Lien Act counterclaim if they proceeded with making a lien claim.[21] With this change, the owner and architect will need to carefully consider retainage, fund-trapping, and waivers in the context of the design agreement, as detailed in the Practice Tips section at the end of this article. They will also need to consider the inception of liens and whether to have the architect engage sub-consultants or whether the owner should engage such sub-consultants directly. Recall the lien statute is anchored on the concept of the "original contractor," defined simply as "a person contracting with an owner either directly or through the owner's agent."[22] In the "normal" design-bid-build scenario, the architect thus will be a separate "original contractor" than the construction original contractor. The 2021 changes certainly merit some consideration when deciding how to structure these relationships and risks on the project.

B. Change in terminology

The 10% retainage the owner once held, has now become "reserved" funds under the 2021 changes.[23] The problem with essentially the same terminology being used for the money the owner withholds on the original contractor and the money the original contractor withholds downstream became apparent in the 2011 changes to Chapter 53. There essentially were two separate concepts of retainage under Texas law: statutory retainage and contractual retainage. Statutory retainage was the 10% fund that a private owner was effectively obligated to withhold under Chapter 53 for the benefit of potential lien claimants. You can visualize that as a stack of dollars sitting on a table or in a bank account. As a result of the owner withholding retainage, original contractors would often impose a similar requirement in their subcontract agreements. This latter requirement is referred to as contractual retainage. The contractor is not generally holding a stack of cash from the subcontractor. The contractor is essentially passing on downstream the withholding the owner is doing.[24] Given that these two types of retainage are fundamentally a bit different, but known by the same term, there was quite a lack of clarity in the 2011 revisions to Chapter 53, concerning retainage. Under the 2021 change, the 10% statutory retainage the owner withholds is now called "reserved" funds.[25]

Issue: One should not mistake the change in terminology as the removal of the requirement for the owner to withhold what has traditionally been referred to as statutory retainage. We say the owner is "effectively obligated" to withhold the retainage because, if the owner does not withhold such retainage, it faces a significant risk: the owner could, for example, choose to only withhold 5%. But in that scenario, the owner then would open itself up to the substantial risk under the lien statute of paying valid lien claims up to the 10% the owner should have retained from the original contractor. This 10% liability concept was captured, and remains, in Property Code Section 53.105.[26]

C. Mandatory Forms

Following in the footsteps of the 2011 changes to Chapter 53, wherein statutory forms for lien waivers were introduced,[27] Chapter 53 now has prescribed forms of notice for contractual retainage[28] and fund-trapping notice of non-payment to the owner and original contractor.[29] Section 53.056 (a-2) and Section 53.057 each set out a standard form as well as a requirement that any notice

21. *E.g.,* Centurion Planning Corp., Inc. v. Seabrook Venture II, 176 S.W.3d 498, 507 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (affirming fraudulent lien liability under Texas Civil Practice and Remedies Code Chapter 12 because, among other things, the engineer filed a lien despite lack of a direct written contract with the owner).
22. Tex. Prop. Code § 53.001(7) (2022).
23. *E.g.,* Tex. H.B. 2237, 87th Leg., R.S., § 18 (2021).
24. For example, if the contractor has submitted a pay application for $100 as a result of $20 of work the contractor did and $80 worth of work the subcontractor has done, the Owner will issue a payment to the contractor of $90, and withhold the other $10 as retainage. That $10 is theoretically real dollars sitting somewhere. The contractor will pay the subcontractor $72 for its work and retain $18 for itself. Essentially each party is absorbing its share of the $10 the owner is withholding. Note that the Owner has the $10 of the contractor's money. The contractor does not have the other $8 of the subcontractor's money. The subcontractor's $8 is part of the $10 fund that the Owner is withholding. Once the owner pays the contractor the $10, the contractor can then pay $8 to the subcontractor.
25. Tex. Prop. Code § 53.101 (2022).
26. *Id.* § 53.105(a) ("OWNER'S LIABILITY FOR FAILURE TO RESERVE FUNDS. (a) If the owner fails or refuses to comply with this subchapter, the claimants complying with Subchapter C or this subchapter have a lien, at least to the extent of the amount that should have been reserved from the original contract under which they are claiming, against the improvements and all of its properties and against the lot or lots of land necessarily connected.").
27. Tex. H.B. 1456, 82nd Leg., R.S. (2011).
28. Tex. Prop. Code § 53.057(a-2) (2022).
29. *Id.* § 53.056(a-2).

used in an attempt to serve as a pre-lien or retainage notice must "be in substantially the following form."

Issue: It is worth emphasizing that these forms may substantially differ from forms of notice previously widely circulated by trade organizations and others for over a decade. In certain instances—where the 2021 Legislation governs the claim at issue—a lien claimant's use of such substantially differing trade organization forms may therefore doom the claimant's right to a lien.

D. Removal of Second Month Notice Letter Requirement.

As discussed briefly above, the second month pre-lien notice requirement for second tier claimants on non-residential projects is going away. What was the purpose of the prior version of the lien law for claims made by second tier subcontractors and suppliers? It was to first require a second month pre-lien notice letter to be sent to the original contractor to give the original contractor roughly 30 days to inquire with its subcontractor why payment had not been made downstream. It also allowed the original contractor roughly 30 days to rectify non-payment before the owner received the third month pre-lien notice letter that required the owner to withhold trapped funds from the original contractor.

Issues: In the new iteration of the statute, the original contractor is now deprived of the additional thirty days to attempt to rectify a payment issue, it may have been unaware of, prior to project funds, or a portion thereof, getting withheld.

As also discussed above, the second month notice letter requirement for sub-subcontractors has not gone away for making bond claims on public projects under Texas Government Code Chapter 2253.[30] A related scenario is also worth noting: on massive public-private-partnership projects ("P3")—for example, certain TxDOT projects[31]—where a letter of credit is furnished in place of a payment bond, claimants still often must follow claim procedures similar to Chapter 2253. Such procedures are simply found in or governed by the project's Comprehensive Development Agreement, instead of Chapter 2253. These non-Chapter 2253, P3 project procedures still often include a requirement of a second month notice by sub-subcontractors. The potential for confusion as to when a second month notice letter is required (Chapter 2253 or P3 public project) and when it is not required (private project) may lead to missed notice requirements on public projects.

Also, one thing to not lose focus on: the goal is not satisfying the minimum requirements for making a valid lien or bond claim. When one talks about the legal requirements, especially among lawyers, those requirements often become the focus of the discussion. The goal is to get paid what is owed. Despite the removal of the second month pre-lien notice, it may still be wise for lawyers to encourage their clients to send it anyways, as discussed in the Practice Tips below. Providing notice of non-payment could help get attention focused on the non-payment and potentially get payment addressed without the need for further lien procedures. Conversely, staying silent for an additional month likely will not move anyone closer to the goal of getting paid.

E. Deadlines for Providing Notice when the Deadline falls on a Weekend or Holiday

One of the 2021 changes to Chapter 53 is the addition of the following language to Section 53.003(e): "In computing the period of days in which to provide a notice or to take any action required under this chapter, if the last day of the period is a Saturday, Sunday, or legal holiday, the period is extended to include the next day that is not a Saturday, Sunday, or legal holiday."[32]

Issue: This new language has been interpreted by some to mean that—as to fund trapping notices—if the 15th day of the third month falls on a Saturday, Sunday, or legal holiday, then the date for providing notice is extended to the next day. However, the plain language of new Section 53.003(e) might not support that conclusion. To the contrary, the deadline for providing the 15th day pre-lien notices arguably has not changed.

First, a plain language reading of the statute[33] demonstrates how the new Section 53.003(e) might not apply to the third month pre-lien fund trapping notice requirement under Section 53.056. Again, Section 53.003(e) begins with "[i]n computing the period of days in which to provide a notice . . . ." However, Section 53.056 arguably

30. Tex. Gov't Code § 2253.047(c) (2022).
31. Tex. Transp. Code § 223.205.
32. Tex. Prop. Code § 53.003(e) (2022).
33. Fresh Coat, Inc. v. K-2, Inc. 318 S.W.3d 893, 901 (Tex. 2010) ("Presuming that lawmakers intended what they enacted, we begin with the statute's text, relying whenever possible on the plain meaning of the words chosen.") (internal citations omitted).

does not require one to compute a period of days.[34] The 15th day of the third month is not a period of days. It is a date certain. A period is typically defined as "a length of time during which a series of events or an action takes place or is completed."[35] One arguably does not have to calculate a period of days to determine when the 15th day of the third month falls. If the statute required notice to be sent within 30 days of an event taking place, then one must calculate the 30 day period to determine which day of the month the 30th falls on. For instance, Section 53.057(a-1) requires a notice of retainage to be sent "not later than . . . the 30th day after" completion of claimant's work or termination or abandonment of the original contract, whichever is sooner.[36] This particular notice would benefit from the application of the new Section 53.003(e) language. But the 15th day of the third month arguably does not work in a similar fashion. The 15th day of the third month following work performed on January 1 is a duration of 104 days. The 15th day of the third month following work performed on January 31 is 30 days shorter. If one performs the same exercise during a span of months which exclude February (a month with 28 days) and includes two months that contain 31 days, the number of days can have even more permutations.

Second, case law might also undermine the conclusion that the 15th day of a particular month is "a period of days" under Section 53.003(e). In 2007, the Beaumont Court of Appeals addressed this same issue in Suretec Insurance Company v. Myrex Industries.[37] In *Suretec*, the Beaumont Court of Appeals was asked to evaluate whether a similar rule found in the Code Construction Act would extend a similar deadline under Texas Government Code Chapter 2253 (an analogous provision relating to claims made on public projects). The *Suretec* court concluded the 15th day of the month is a date certain and not a period of days. The court of appeals explained:

> The notice deadline in section 2253.041 specifically and clearly requires claimants to mail their notice of claim on or before the 15th day of a certain month. The deadline will always fall on the 15th of a month. ***This statute, similar to [Election Code] article 13.12, establishes a deadline not requiring "computing a period of days" and does not require that an act be done within a certain number of days to be counted from a determinable starting point.*** Therefore, section 311.014 of the Code Construction Act is inapplicable.
>
> As for Myrex's argument that applying the Code Construction Act would not render the notice provision "foolish or futile," we note that section 2253.041(b)'s prior version required written notice and a sworn statement of account to the contractor and surety within ninety days after the tenth day of the month next following each month in which labor was performed or materials delivered. See Tex.Rev.Civ. Stat. Ann. art. 5160, repealed by Acts 1993, 73rd Leg., R.S., ch. 268, § 1, 1993 Tex. Gen. Laws 852, 986 (current version at Tex. Gov't Code Ann. § 2253.041). The prior version required an act be done within a certain number of days to be counted from a determinable starting point and would require "computing a period of days." The legislature, however, enacted new legislation requiring the mailing of a notice of claim on or before the 15th of the month. See Act of May 22, 1993, 73rd Leg., R.S., ch. 268, § 1 1993 Tex. Gen. Laws 852. We presume that the legislature, in adopting the amendment, intended to make some change in the existing law, and therefore, we will endeavor to give effect to the amendment. See Am. Sur. Co. of New York v. Axtell Co., 120 Tex. 166, 36 S.W.2d 715, 719 (1931). By applying section 311.014 of the Code Construction Act to section 2253.041, we would be negating the legislature's 1993 amendment changing the deadline for a notice of claim from a period of days to a date certain.[38]

34. *E.g.,* Tex. Prop. Code § 53.056 (a-1)(1)(A) (2022) ("For all unpaid labor or materials provided, the claimant must send a notice of claim for unpaid labor or materials to the owner or reputed owner and the original contractor. The notice must be sent: (1) for projects other than residential construction projects, not later than ***the 15th day of the third month*** after the month during which: (A) the labor or materials were provided . . . .") (emphasis added).
35. *Period*, The Britannica Dictionary, https://www.britannica.com/dictionary/period.
36. Tex. Prop. Code § 53.057 (a-1) (2022).
37. 232 S.W.3d 811 (Tex. App.—Beaumont 2007, no pet.).
38. *Id.* at 815–16 (emphasis added) (some internal citations omitted).

There are deadlines found in Chapter 53 of the Texas Property Code that do rely on a period of days. As just a few examples:

a. the 30 day retainage notice under Section 53.057(a-1), noted above;

b. the requirement under Section 53.055 that, after filing its lien affidavit, the lien claimant must send a copy of the affidavit to the owner "not later than the fifth day after the date the affidavit is filed . . . ."; and

c. the owner holding statutory retainage ("reserved" funds) for "30 days after the work is completed" under Section 53.055, among others.

These deadlines will be affected by the new Section 53.003(e) language, to the extent the Code Construction Act did not already apply.[39] But there is at least room for argument regarding whether Section 53.003(e) applies to the three month notice deadline under Section 53.056.

F. Statute of Limitations

The statute of limitations for filing suit on a non-residential project has been significantly shortened under the 2021 Legislation, from two years in most circumstances, to one year. Section 53.158 of the previous version of the statute stated: "suit must be brought to foreclose the lien within two years after the last day a claimant may file the lien affidavit under Section 53.052 or within one year after completion, termination, or abandonment of the work under the original contract under which the lien is claimed, whichever is later."[40] The new language requires suit to be brought "not later than the first anniversary of the last day a claimant may file the lien affidavit under Section 53.052."[41]

However, the statute also provides for the extension of a single additional one year period, provided the original period has not yet expired and the agreement extending the limitations period is recorded in the real property records.[42] Prior to this amendment, practitioners were left wondering whether recording such an extension was permissible and whether it overcame the defenses conferred on a bona fide purchaser without notice. Texas has now specifically authorized such an extension and has made clear in Section 53.158 that the recording of such agreement in the property records "is considered to be notice of the extension to any subsequent purchaser."[43]

Issues: Please note there is a definite distinction in how to calculate the first year anniversary and the second year anniversary, which merits careful attention. The deadline for the first year anniversary runs from the "last day a claimant may file the lien affidavit."[44] Consider a situation when someone files a lien prior to the last day the claimant may file the lien affidavit. The statute does not require calculation of the period from the day the lien is actually filed. That is different though for the one year permissive extension. The language for the second year permissive extension is calculated based on "the date the claimant filed the lien affidavit."[45]

Please also note the extension is limited. At least three types of questions remain unanswered:

1. Does an attempt to toll limitations for more than an additional year invalidate the entire attempt or does any such attempt simply end at the end of the permissible period?

2. Is an extension to toll limitations between parties beyond the additional year invalid as between the parties or does it simply not provide bona fide purchasers with notice of the extension? (i.e. does the application of the doctrine of estoppel have an effect in this circumstance?)

3. What is the practitioner to do on "Mega Projects" where retention is not contractually due, but a contractor who has provided work early in the project has already filed a lien for retainage? Recall the statute of limitations period runs

39. Tex. Gov't Code § 311.014 (2022) ("COMPUTATION OF TIME. (a) In computing a period of days, the first day is excluded and the last day is included. (b) If the last day of any period is a Saturday, Sunday, or legal holiday, the period is extended to include the next day that is not a Saturday, Sunday, or legal holiday . . . .").
40. Tex. Prop. Code § 53.158(a) (2020).
41. *Id.*
42. *Id.* § 53.158(a-2).
43. *Id.*
44. *Id.* § 53.158(a).
45. *Id.* § 53.158(a-2). If one files a lien early in the project, it is possible that the one year permissible extension to the statute of limitations expires even before the original statute of limitations expires (due to the original statute of limitations running from the last day the lien *could be filed* and the extension running from when the actually *was filed).*

from "the last day a claimant may file a lien affidavit,"[46] not when they actually filed the lien affidavit, as discussed more thoroughly below. Do you recommend waiting until the end of the project to file suit, sue within the first year of filing the lien affidavit, or attempt to toll limitations and file during the extended period?

Finally, a note for practitioners who handle mineral liens under Texas Property Code Chapter 56: it appears Chapter 56 claimants will now have the burden of the shorter statute of limitations under the 2021 Legislation. This is because Chapter 56 has long expressly provided its statute of limitations is the same as Chapter 53.[47] However, these same Chapter 56 claimants seemingly would not receive the other benefits of the 2021 Legislation, such as allowing delivery of notices via FedEx, or extending deadlines that fall on weekends or holidays. This is because the *procedures* for perfecting a Chapter 56 lien—i.e., pre-lien notice and filing an affidavit, as opposed to the statute of limitations to file suit—have long been held to be the exclusive purview of Chapter 56.[48] Such Chapter 56 perfection procedures were not touched by the 2021 Legislation[49] and thus should still be followed by Chapter 56 claimants, without regard to the 2021 Legislation.

G. Transmittal of Notices

Changes have been made to the lien statute to attempt to modernize notice procedures. Section 53.003 sets forth the requirements for the delivery of notices. Essentially, Section 53.003 removed Registered Mail as a specified option for delivery and added service via "any other form of traceable, private delivery or mailing service that can confirm proof of receipt."[50] Under Section 53.003(c), if notice is sent via Certified Mail Return Receipt Requested then "deposit or mailing of the notice in the United States mail in the form required constitutes compliance with the notice requirement."[51] Note, there is no similar provision for delivery via a private delivery or mailing service. Section 53.003 does still contain the following: "[i]f a written notice is received by the person entitled to receive it, the method by which the notice was delivered is immaterial.[52]"

Issue: Given Section 53.003(c)'s support of certified mail—and related case law effectively holding notice is effective the day it is deposited with the U.S. Postal Service[53]— certified mail generally should continue to be the preferred method of delivery for lawyers advising their clients. One also wonders if a court or arbitrator might view evidence of delivery by the U.S. Postal Service, rather than private delivery, as more reliable evidence, particularly in the summary judgment context. Notice via FedEx or other "traceable, private delivery" might therefore best be viewed as fallback option to assist claimants who have not yet consulted an attorney regarding perfecting a lien.

H. Deadline to file liens on unpaid retainage changed

In the pre-2021 version of Chapter 53, a lien claimant seeking a lien for retained funds was subject to several different time periods in which to file a lien. There was a lack of clarity in the statute around the differences between statutory retainage and claims for contractual retainage, as noted above. Examining and explaining the source of confusion in the prior law at this point would be nothing more than an academic pursuit that might add more confusion rather than clarity. As such, we are simply going to point out that Section 53.103 now requires a claimant, in order to claim a lien on the "reserved" funds (i.e. the 10% statutory retainage the owner has withheld from the original contractor), to satisfy the notice requirements and file a lien affidavit not later than the 30th day after the earliest of the completion, termination, or abandonment of the work under the original contract. An exception to this general rule is allowed when permitted by Section 53.057(f). Section 53.057(f) references the deadline in Section 53.052(d) which states "A claimant other than an original contractor claiming a lien for retainage must file an affidavit with the county clerk not later than the

46. *Id.* § 53.158(a).
47. *Id.* § 56.041(a) ("ENFORCEMENT. (a) A claimant must enforce the [Chapter 56] lien within the same time and in the same manner as a mechanic's, contractor's, or materialman's lien under Chapter 53.").
48. Energy-Agri Prods. v. Eisenman Chem. Co., 717 S.W.2d 651, 653 (Tex. App.—Amarillo 1986, no writ) (citing Ball v. Davis, 18 S.W.2d 1063, 1065–66 (Tex. 1929)).
49. Tex. H.B. 2237, 87th Leg., R.S. (2021).
50. Tex. Prop. Code § 53.003(b)(3) (2022).
51. *Id.* § 53.003(c).
52. *Id.* § 53.003(d).
53. *E.g.,* Wesco Distrib., Inc. v. Westport Grp., Inc. 150 S.W.3d 553, 558, 561 (Tex. App.—Austin 2004, no pet.) (noting "liberal construction [of the materialman's liens statute does] not save the materialman's lien from his failure to provide timely written notice" and that "service by mail [is] complete upon deposit of [a] properly addressed envelope, postage prepaid, with [the United States] Postal Service") (citing Mosser v. Plano Three Venture, 893 S.W.2d 8, 11 (Tex. App.—Dallas 1994, no writ)).

15th day of the third month after the month in which the original contract under which the claimant performed, was completed, terminated, or abandoned.[54]"

Issues: The above change went a long way toward clearing up confusion created by the 2011 changes to the lien statute. But new issues may arise as a result of this change. One very important issue: what happens when the original contract is terminated part way through the project? In the prior iteration of the statute, there was an attempt to provide a mechanism for owners to shorten the lien filing deadlines so they and their lenders could take stock of what the payment landscape looked like while preparing to resume the project with a completion contractor.[55] It appears this mechanism is no longer part of the statute. For completed projects, an owner may now be inclined to hold statutory 10% retainage (now called "reserved" funds) much longer before paying it out to the original contractor out of concern for the extended period in which a claimant may file a claim against the statutory 10% retainage (now called "reserved" funds).

I. Specially Fabricated Materials Notice

A primary underlying premise of the lien statutes was compensating someone providing labor and materials that added value to a specific piece of real property.[56] But in the case of undelivered specially fabricated materials, no such improvement had been made to the real property. For example, a metal worker fabricates ornamental railings to be installed at the end of a project and, due to the termination of the original contractor, the metal worker has no ability to deliver and install the railings. As the railings were created to the exact shape and specification for the project, they have no real use elsewhere except for the scrap value.

Under the previous version of the statute, a lien claimant could have a lien for undelivered specially fabricated materials only if they provided notice to the owner no later than the 15th day of the second-month after the month in which the claimant received and accepted the order for the material.[57] If the specially fabricated materials were ordered by a subcontractor, then the original contractor had to receive notice as well.[58] Once the materials were delivered to the project, they were treated like regular, non-specially fabricated materials that have been delivered to the project and the claimant had to provide notices just as it would for regular, non-specially fabricated delivered materials.[59]

These provisions, previously found in Section 53.058, have been removed from the new lien statute. The requirement related to specially fabricated materials is now found in Section 53.056, which describes the notices to be given. The deadline to provide notice is "not later than the 15th day of the third month after the month during which . . . (B) the undelivered specially fabricated materials would normally have been delivered.[60]"

Issue: The 2021 changes should simplify the perfection process for specially fabricated materials. But one potential new issue: there is no apparent guidance on when "would normally have been delivered" is to be determined. Is this based on the original schedule? Revised schedule? Does one account for critical path delays? Or if the scope has been deleted via a Change Order after fabrication or material ordering?

J. Notarization of Lien Waivers No Longer Required

Under the new statute, the statutory form Progress Payment and Final Payment Conditional and Unconditional Waivers and Release of Lien—found in Sections 53.284—no longer need to be notarized to be valid. In the prior version of the statute, Section 53.281(b)(2) required "the waiver and release is signed by the claimant or the claimant's authorized agent and notarized . . . "[61] In the new version of the statute, section 53.281(b)(2) simply

54. Tex. Prop. Code § 53.052(d) (2022).
55. *Id.* § 53.057(f) (2020).
56. *E.g.,* Texas Wood Mill Cabinets v. Butter, 117 S.W.3d 98, 105 (Tex. App.—Tyler 2003, no pet.) ("The Texas Constitution grants to mechanics, artisans, and materialmen of every class a lien on the buildings and articles made or repaired by them for the value of their labor done thereon, or material furnished therefor, and requires that the Legislature provide by law for the speedy and efficient enforcement of such liens.") (citing Tex. Const. art. XVI, § 37); CVN Group v. Delgado, 95 S.W.3d 234, 246 (Tex. 2002) ("Mechanic's liens . . . protect people or entities who have furnished materials or services for the construction of buildings or other improvements to real property. Strang v. Pray, 89 Tex. 525, 35 S.W. 1054, 1055 (1896). And they are based on the equitable principle that when a person increases the value of another's land by providing improvements, the improvements should be paid for . . .").
57. Tex. Prop. Code § 53.058 (2020); *compare* Tex. Gov't Code §2253.047(d) (Vernon 2022) ("The payment bond beneficiary must mail to the prime contractor, on or before the 15th day of the second month after the receipt and acceptance of an order for specially fabricated material, written notice that the order has been received and accepted.").
58. Tex. Prop. Code § 53.058(b) (2020).
59. *Id.* § 53.058(e), (f).
60. Tex. Prop. Code 53.056(a-1)(1)(B) (2022). This appears to somewhat track from the prior version of the statute language stating: "[i]n addition to notice under this section, the claimant must give notice under Section 53.056 if delivery has been made ***or if the normal delivery time for the job has passed.***" (emphasis added).
61. *Id.* § 53.281(b)(2).

requires "the waiver and release is signed by the claimant or the claimant's authorized agent."[62]

Issues: This change will help in the delivery of routine lien waivers through the use of online construction project management portals. However, to the extent someone intends to file an un-notarized lien waiver to demonstrate the release of a lien that has already been filed, one should consider Texas Property Code Section 12.001. Section 12.001(a) states "[a]n instrument concerning real or personal property may be recorded if it has been acknowledged, sworn to with a proper jurat, or proved according to law."[63] Section 53.152 of the Texas Property Code requires a claimant to provide a release of lien in "a form that would permit it to be filed of record" within 10 days after a written request following the satisfaction of the debt and/or lien.[64] As such, one should view the lack of a notarization requirement to apply solely to the normal procedure of exchanging lien waivers for payment during the course of the project. Once a lien has actually been filed, then a different rule applies.

Practitioners should also consider the potential value that notarization has when attempting to combat a claim that a signature on a lien waiver was forged.[65] Keep in mind, the statutory release forms have broad language benefiting the owner or other upstream party releasees; in the form, the releasor releases not only lien claims, but also bond claims, and generally "any claim for payment."[66] A notarization will go a long way to discouraging and/or defeating a claim that the signature was not authentic, thus better preserving the broad waiver of payment claims in favor of the releasee under the statutory form. A related issue: a notarized lien waiver may be contractually required by the lender or owner.

Also, a potential lost benefit to the releasor: to the extent the notarization process was a trigger for a final review and/or triggered an internal approval process, the absence of that requirement may necessitate a re-evaluation of internal procedures. That is, if the notary at a business was tasked with ensuring the release was authorized, that the dollar amount released was the proper amount, and the release was executed by the proper person before being sent, there might no longer be that procedural safeguard available.

At least one question remains: Can a contractor require its subcontractors to provide notarized lien waivers as a condition of payment to reduce or eliminate contentions about whether the signing of the release was authorized and genuine, or to comply with an owner or lender's requirement? The change in the law simply removed the requirement for notarization, it did not prohibit notarizations. Section 53.281(b) only requires that "the waiver and release substantially compl[y] with one of the forms" set forth in the statute.[67] A notarization does not change any of the substantive release language of the lien waiver. Undoubtedly, we will see disputes over this issue for quite some time.

IV. PRACTICE TIPS

Below are practice points for construction parties in light of the 2021 Lien Law changes. As can be seen below, the 2021 Legislation will impact all construction parties, who will need to adjust accordingly. Surprisingly, we are aware of little-to-no commentary regarding a group who could be impacted the most, namely, owners / developers / lenders. We begin with that group below.

A. Owners / Developers / Lenders

1. Make the owner/ developer / lender aware of the 2021 changes and potential limited effect of lien subordination agreements. The first key point is simply making these clients aware—often to their surprise and dismay—that there will likely be more valid liens on their projects in the future. Given the primary purpose of the 2021 Legislation was to make it easier to file a lien,[68] if the 2021 Legislation achieves this purpose, there will be more valid liens on future projects, to say nothing of the new groups of design sub-consultants who will now be entitled to lien.

a. A related point—which often comes as a surprise to this group—is that standard lien subordination agreements might be void under

62. *Id.* § 53.281(b)(2).
63. *Id.* § 12.001(a).
64. *Id.* § 53.152.
65. Generation X music fans sometimes refer to this "it wasn't me" argument as the "Shaggy Defense" (copyright 2000 Shaggy/Rikrok/MCA records, all rights reserved).
66. Tex. Prop. Code § 53.284(b) (2022).
67. *Id.* § 53.281(b)(1).
68. *See, e.g.,* House Research Organization, Bill Analysis, Tex. H.B. 2237, 87th Leg., R.S. (2021) ("CSHB 2237 would clean up Texas lien laws to allow ***general contractors and subcontractors to more easily comply with the law.***") (emphasis added).

the 2011 Texas Legislation and thus, do not offer much in the way of protection against these liens, particularly as to items deemed "removable."[69]

2. Early termination of the original contractor. This group also needs to be aware there may be some additional risk/delay built in after an original contractor is terminated and before a replacement contractor can get started, due to the time period for retainage claims, as detailed in this article.

3. Statutory Payment Bond. At least look into getting a Chapter 53, Subchapter I statutory payment bond,[70] especially if the owner is looking to sell the project quickly after completion, as well as projects where 10% statutory retainage ("reserved" funds) is not maintained by the owner for the project. If the bond complies with the requirements of Subchapter I, the claimant may not file suit against the owner or its property and a "purchaser, lender, or other person acquiring an interest in the owner's property or an insurer of title is entitled to rely on the record of the bond and contract as constituting payment of all claims and liens."[71] By the way, up until 2021, these Subchapter I payment bonds were typically obtained by the construction prime contractor as principal; but given the new class of design professional lien claimants,[72] and given that the owner's design professional is also considered an "original contractor,"[73] the owner must now also at least consider the somewhat odd arrangement of having its design professional obtain a Subchapter I payment bond to cover claims by these new design sub-consultant lien claimants.

4. 10% Retainage. Maintaining 10% statutory retainage ("reserved" funds) will become even more critical, particularly if no Subchapter I payment bond has been obtained, for minimizing the lien exposure of the owner / project property. As strange as it may seem, in addition to construction prime contractors, owners must also at least consider withholding 10% statutory retainage against the owner's design professional (who, again, is technically also an "original contractor"[74]), in light of the potentially numerous design sub-consultants under that design professional who will now have lien rights under the 2021 changes.[75]

5. Statutory All Bills Paid Affidavit for original contractor AND owner's design professional. At project completion, get a Property Code Section 53.085 All Bills Paid Affidavit from the prime contractor AND—in light of the new lien rights of design sub-consultants—the owner's design professional, if in a traditional, non-design-build delivery system. The affidavit is not a 100% guarantee but it is one other measure to try to limit the universe of potential liens: in the affidavit, the affiant must state the person has paid each of its subcontractors, laborers, or materialmen in full for all labor and materials provided to the person for the construction *or*, if the person has not paid each of its subcontractors, laborers, or materialmen in full, the person must 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 the payment is owed, among other information.[76] There are potential criminal and individual civil liabilities for false statements in the Section 53.085 affidavit.[77]

6. Lien release notarization. Make sure lien releases are notarized, particularly final payment releases, but expect some pushback as the statute no longer requires a notarization (as discussed above, it does not prohibit it either).

7. Statutory Affidavit of Completion. Consider filing and serving an Affidavit of Completion under Property Code Section 53.106, to more clearly trigger remaining lien deadlines.[78]

8. Joint Checks. Consider having contract language allowing joint check payments to subcontractors and sub-subcontractors who send lien notices.

69. Tex. H.B. 1456, 82nd Leg., R.S. (2011) (creating lien release agreement forms and making all other forms purporting to wave lien rights void, now codified in Tex. Prop. Code §§ 53.281–53.287); First Nat'l Bank of Dallas v. Whirlpool Corp., 517 S.W.2d 262, 269 (Tex. 1974) (noting the "rule [is] long standing that a mechanic's and materialman's statutory lien upon improvements made is superior to a prior recorded deed of trust lien where the improvements made can be removed without material injury to the land and pre-existing improvements, or to the improvements removed.").
70. Tex. Prop. Code §§ 53.201—53.211 (2022).
71. *Id.* §§ 53.201(b), 53.204.
72. *Id.* § 53.021(4).
73. *Id.* § 53.001(7).
74. *Id.* § 53.001(7).
75. *Id.* § 53.021(4).
76. *Id.* § 53.085(a).
77. *Id.* § 53.085(d), (e).
78. *Id.* § 53.106.

9. Where the owner and construction original contractor are related entities. On some projects—for various reasons, including tax savings—the project owner will "hire" a prime contractor to build the project, but the prime contractor has some relationship to the owner, via common ownership, common management, sometimes even sharing the same office space.[79] The key practice point for owners in these scenarios is that many of the above tips—e.g., maintaining 10% statutory retainage, getting an All Bills Paid Affidavit, considering a Subchapter I Payment Bond—will now need to be applied and considered regarding each of the prime contractor's subcontractors. This is because "subcontractors" in this scenario might be deemed original contractors for lien purposes.[80] This potential scenario was essentially the same under the prior statute, but the issue becomes even more prominent, given that subcontractors of any tier have a right to a lien[81] and many of them may no longer be required to send a second month notice.

B. Building Contractors in Direct Privity with the Owner

1. Note above owner practice points, in light of original contractor's statutory duty to defend/indemnify. In this section we discuss building contractors as "original contractors"; design professionals in direct privity with the owner, and thus also "original contractors" under the statute, are discussed in the section immediately below. For the first practice point for such building contractors, many of the above owner practice points will still at least need to be considered by original contractors to minimize lien exposure to the project (including maintaining 10% retainage and obtaining notarized lien releases, particularly for final payment), since an original contractor still ultimately has a duty effectively to defend and indemnify the owner from lien lawsuits filed by "a person other than the original contractor."[82]

2. Pre-2022 projects: statutory 30 day notice of dispute to owner. For pre-2022 projects, if a lien claimant sends a demand for payment to the owner then, under the pre-2022 version of Property Code Section 53.083, the original contractor must give the owner written notice the contractor intends to dispute the claim and do so not later than the 30th day after the day the contractor receives the demand. Under pre-2022 Section 53.083, if the original contractor fails to send such 30 day notice to the owner, the original contractor "is considered to have assented to the demand and the owner shall pay the claim."[83] Section 53.083 was completely repealed under the 2021 Legislation,[84] probably to the delight of original contractors. For pre-2022 projects, original contractors will want to keep an eye on this deadline. For 2022 projects moving forward, it may nevertheless be a good at times for the contractor to promptly notify the owner that it disputes a particular claim; otherwise, once an owner makes a payment to a claimant, it can be difficult, of course, to claw the payment back.

3. Where the 15th of the month is a weekend / holiday. In filing its statutory lien affidavit, if the 15th day of the fourth month deadline (or 3rd month, for residential)[85] falls on a weekend or holiday, the original contractor should file before that date, given the *Suretec* opinion, and related issues, discussed in this article.

79. Following a similar concept from the pre-2021 lien statute, the 2022 statute now captures the concept as a "purported original contractor," defined as "an original contractor who can effectively control the owner or is effectively controlled by the owner through common ownership of voting stock or ownership interests, interlocking directorships, common management, or otherwise, or who was engaged by the owner for the construction or repair of improvements without a good faith intention of the parties that the purported original contractor was to perform under the contract. For purposes of this subdivision, the term 'owner' does not include a person who has or claims a security interest only." *Id.* § 53.001(7-a).
80. *Id.* § 53.026(a).
81. Bassett v. Mills, 34 S.W. 93, 94 (Tex. 1896). It appears the 2021 Legislation attempts to more clearly capture in the new statute this previously established case law and statutory concept—regarding the application of the lien statute to subcontractors of all tiers—in the revised Chapter 53 definition of "subcontractor." Tex. H.B. 2237, 87th Leg., R.S., §2 (2021) ("(13) 'Subcontractor' means a person who labors or has furnished labor or materials to fulfill an obligation to an original contractor or to a subcontractor of any tier to perform all or part of the work required by an original contract.") (underlines in original bill).
82. Tex. Prop. Code § 53.153 (2022) ("(a) If an affidavit claiming a mechanic's lien is filed by a person other than the original contractor, the original contractor shall defend at his own expense a suit brought on the claim. (b) If the suit results in judgment on the lien against the owner or the owner's property, the owner is entitled to deduct the amount of the judgment and costs from any amount due the original contractor. If the owner has settled with the original contractor in full, the owner is entitled to recover from the original contractor any amount paid for which the original contractor was originally liable.").
83. Tex. Prop. Code § 53.053(a)–(b) (2020); *see, e.g.,* Private Mini Storage Realty, LP v. Larry F. Smith, Inc., 304 S.W.3d 854, 860–61 (Tex. App.—Dallas 2010, no pet.) (evidence legally and factually sufficient to support damages award in amount not paid to subcontractor, under Section 53.053).
84. *See* Tex. H.B. 2237, 87th Leg., R.S., § 36(8) (2021).
85. Tex. Prop. Code § 53.052(a)(1)–(2)(2022).

4. Certified Mail. Original contractors should preferably send the 5 day notice of the filing of their lien affidavit,[86] and other notices, via Certified Mail, not FedEx or other private courier, as discussed in this article.

5. New one year statute of limitations / tolling agreement option. Original contractors must be aware of the new, significantly shorter, one year statute of limitations for a lien lawsuit and consider using the new tolling agreement option[87] sparingly, as discussed in this article. As between filing suit or executing a tolling agreement, generally err on the side of filing suit. If using the tolling agreement option, be sure not to go beyond the two year maximum permissible tolling period outlined in the new statute and file well before that deadline; if 23 months is not enough time enough to get the dispute settled, 24 + months will not be either. One alternative to the tolling agreement, if the parties think they will get the dispute resolved: get a lawsuit on file and then potentially have it abated while the parties try to resolve the dispute.

C. Architect / Engineer / Other Design Professional in Direct Privity with the Owner

1. Note above owner practice points, in light of original contractor's statutory duty to defend / indemnify. The lien statute defines an "original contractor" as "a person contracting with an owner either directly or through the owner's agent."[88] The focus of this definition is frequently on the building contractor, not the design professional in direct contract with the owner; however, particularly given the 2021 expansion giving lien rights to design sub-consultants, more attention now must also be given to the owner's direct design professional. Thus, for the first practice point for such design professionals (as with building contractors in direct privity with the owner) many of the above owner practice points will still at least need to be considered by the owner's design professional(s) to minimize lien exposure to the project (including maintaining 10% retainage, getting notarized lien releases); again this is because an "original contractor" still ultimately has a duty effectively to defend and indemnify the owner from lien lawsuits filed by "a person other than the original contractor" under Section 53.153,[89] as detailed in Practice Point No. 1 for Building Contractors above.

2. Where the 15th of the month is a weekend / holiday. As with building contractors in direct privity with the owner, for the owner's design professional, in filing its statutory lien affidavit, if the 15th day of the fourth month deadline (or 3rd month, for residential)[90] falls on a weekend or holiday, the owner's design professional should file before that date, given the *Suretec* opinion, and related issues, discussed in this article.

3. Certified Mail. As discussed above for the owner's direct building contractor, the owner's design professional should preferably send the 5 day notice of the filing of its lien affidavit,[91] and other notices, via Certified Mail, not FedEx or other private courier, as discussed in this article.

4. Statutory lien release forms and related contract language. Since design professional sub-consultants may have lien rights under the 2021 Legislation, design professionals in direct contract with the owner must now familiarize themselves with the use of statutorily required lien release forms[92] from these sub-consultants and consider having contract language with such sub-consultants requiring such release forms, including particularly receipt of a final unconditional lien release form after final payment has been processed.

5. New one year statute of limitations / tolling agreement option. As detailed more in Practice Point No. 5 for Building Contractors above, the owner's design professional must be aware of the new, significantly shorter, one year statute of limitations for lien lawsuits and consider using the new tolling agreement option[93] sparingly.

D. Subs, sub-subs, and architect sub-consultants

1. Know your project / project owner and, thus, which statute applies. As detailed in this article, in light of the 2021 Legislation, there are now even more disparities between the claim processes in Property Code Chapter 53 for lien claims on private

86. *Id.* § 53.055.
87. *Id.* § 53.158.
88. *Id.* § 53.001(7).
89. *Id.* § 53.153.
90. Tex. Prop. Code § 53.052(a)(1)–(2)(2022).
91. *Id.* § 53.055.
92. *Id.* §§ 53.281–285.
93. *Id.* § 53.158.

projects and Government Code Chapter 2253 for bond claims on public projects. Determining the project owner is thus particularly important for subcontractors of every tier. Generally speaking, for example, if the project is owned by a governmental or quasi-governmental authority authorized by Texas state law to make a public work contract,[94] it is a project governed by Chapter 2253 and the bond claim procedures therein (no lien claims allowed). As just one example, a sub-subcontractor on such a Chapter 2253 project, as detailed in this article, will still be required to send a second month notice to the prime contractor, whereas such a requirement generally will not exist for post-2021 Chapter 53 projects. And, as noted above, claim procedures very similar to Chapter 2253 are often found under Comprehensive Development Agreement claim procedures on large P3 projects, e.g., TxDOT projects using a letter of credit instead of a payment bond.

2. Where the 15th of the month is a weekend / holiday. Under the new statute, in filing their statutory lien affidavit, if the 15th day of the fourth month deadline (or 3rd month, for residential)[95] falls on a weekend or holiday, subcontractors of every tier should file before that date, given the *Myrex* opinion, and related issues, discussed in this article. The same goes for their third month (second month for residential) fund trapping notices under Section 53.056.[95]

3. New Statutory Notice Forms. Subcontractors of every tier must be sure to use the new forms, or something substantially similar, now provided in Section 53.056,[97] as to fund trapping, and Section 53.057,[98] as to retainage notice, for post-2021 projects. If the claimant has any doubt as to whether the project is pre-2022, or post-2021, consider using a form that combines the requirements of both the prior and current statute as to these sections.[99]

4. Second Month Notice by Sub-subcontractors. As detailed above, though Chapter 53 now omits the requirement of the second month notice letter on private projects, the requirement still exists on Chapter 2253 public projects. For ease of the lien claimant's company procedures, it may be advised to continue to send second month notice letters on both private and public projects as one standard operating procedure. Further, as detailed in this article, sending such a notice may get the claim resolved before the need to send a third month notice arises.

5. Certified Mail. As discussed above, subcontractors should preferably send the 5 day notice of the filing of their lien affidavit,[100] as well as their notices required under Section 53.056 (third month fund trapping) and Section 53.057 (retainage), via Certified Mail, not FedEx or other private courier, as discussed in this article.

6. New one year statute of limitations / tolling agreement option. As detailed more in Practice Point No. 5 for Building Contractors above, subcontractors of every tier must also be aware of the new, significantly shorter, one year statute of limitations and consider using the new tolling agreement option[101] sparingly.

94. Tex. Gov't Code § 2253.001(1).
95. Tex. Prop. Code § 53.052(a)(1)–(2)(2022).
96. *Id.* § 53.056(a-1)(1)–(2).
97. *Id.* § 53.056(a-2).
98. *Id.* § 53.057(a-2).
99. Giving credit where it is due: the authors were first introduced to this interesting idea of a combination notice during a presentation regarding the new lien laws given by Fred D. Wilshusen and Greg Harwell to the State Bar of Texas Construction Law Section on October 13, 2021.
100. Tex. Prop. Code § 53.055 (2022).
101. *Id.* § 53.158.