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WAYS TO INVALIDATE AND REMOVE A MECHANIC'S LIEN

STEP ONE—Did the Lien Claimant Timely Serve the Notice of Claim? Anyone not hired directly by the Property Owner, the Property Owner's Agent, or a Tenant, is required to timely serve Notice (commonly referred to as a "Preliminary Notice", "Notice of Claim", "Intent to Lien" or "Pre-Lien Notice") of the unpaid debt on the Property Owner and General Contractor before recording the Lien Affidavit. Failure to serve, or timely serve this Notice, will invalidate a Mechanic's Lien. Therefore, the first step to invalidating a Subcontractor, Supplier, or Laborer Lien is to determine whether the Lien Claimant served, and/or *timely* served a Notice prior to recording the Lien Affidavit.

General Contractors (also referred to as an "Original Contractor" or "Direct Contractor"), or anyone hired directly by the Property Owner, the Property Owner's Agent, or a Tenant, are not required to serve any preliminary Notice before recording a Mechanic's Lien.

Residential Properties: On Residential Properties (Properties in which the Property Owner already is, or will, occupy the house as a permanent residence or vacation home) the Notice must be served on the Property Owner and the General Contractor by no later than the 15th day of the second month, from each and every month, the Lien Claimant provided unpaid labor/material/equipment to the Property.

Example: If the Lien Claimant provided unpaid labor/material/equipment in January and again in April, then a Notice must be served by no later than March 15 (for the unpaid work performed in January) and again by no later than June 15 (for the unpaid work performed in April).

Commercial Properties: On Commercial Properties (Properties that do not fall under the definition of a "Residential Property" as defined above) the Notice must be served on the Property Owner and the General Contractor by no later than the 15th day of the third month, from each and every month, the Lien Claimant provided unpaid labor/material/equipment to the Property.

Example: If the Lien Claimant provided unpaid labor/material/equipment in January and again in May, then a Notice must be served by no later than April 15 (for the unpaid work performed in January) and again by no later than August 15 (for the unpaid work performed in May).

Tip One: The deadline is not calculated from the date of the invoice, but instead from the month in which the unpaid labor/material/equipment were provided to the Property. It is not uncommon for the unpaid invoice to be generated 30 – 60 days

after the work was performed and for Lien Claimants to incorrectly use this date to calculate the deadline.

Tip Two: Review the Notice carefully, it is not uncommon for a Notice to be sent for the full amount owed, even if the deadline has passed for some of the unpaid work. This especially true for Material and Equipment Suppliers.

Tip Three: The Notice can be served by any of the following methods: (1) in person to the person entitled to receive it; (2) certified mail; (3) by any other form of traceable private delivery or mailing service that can confirm proof of receipt. If the Notice is sent by certified mail, it is deemed served when placed with the U.S. Postal Service. Notwithstanding these required methods of service, if a Notice is actually received (e.g., by email), the method by which it was served is immaterial and will not invalidate the Lien.

To add one other layer of complexity, for Claimants whose work was provided at the end of a Project, the Notice must be served before the Property Owner releases final payment to the General Contractor, even if the deadline to serve the Notice has not passed. A Property Owner who has not otherwise received any prior “fund trapping” Notices and who has withheld the required statutory retainage, may release all remaining construction funds to the General Contractor within after 30 days from substantial completion. As such, if the Property Owner: (1) withheld the required 10% retainage throughout the course of the Project; (2) has not received any prior Notices; and (3) released the statutory retainage to the General Contractor within after 30 days from substantial completion, then the Property Owner may not be personally liable, and its Property may not be subject to Lien foreclosure by any unpaid Subcontractors, Material Suppliers, and/or Laborers. In other words, a Lien Affidavit filed after these conditions have occurred, is invalid.

Failure to serve or timely serve this Notice is one of the most common ways to entirely defeat or reduce the amount of a Mechanic’s Lien claim.

STEP TWO—Does the Notice Contain the Required Statutory Language? The Notice must include certain statutory language in order to be valid. For Commercial Properties, this requirement is easily satisfied by: (1) identifying the Project location; (2) identifying the Property Owner, Original Contractor, and the Lien Claimant; (3) stating the amount owed; (4) providing a description of the unpaid work; (5) identifying the months in which the unpaid work was performed; and (6) including the following statutory language (or something substantially similar):

NOTICE OF CLAIM FOR UNPAID LABOR OR MATERIALS. WARNING:
This notice is provided to preserve lien rights. Owner's property may be subject to a lien if sufficient funds are not withheld from future payments to the original contractor to cover this debt.

For Residential Homestead Properties, the statutory notice requirements are more substantial and consist of the above required information for commercial Properties, plus the following language, which is rarely included in the Notice unless prepared by a Construction Attorney:

If a subcontractor or supplier who furnishes materials or performs labor for construction of improvements on your property is not paid, your property may be

subject to a lien for the unpaid amount if: (1) after receiving notice of the unpaid claim from the claimant, you fail to withhold payment to your contractor that is sufficient to cover the unpaid claim until the dispute is resolved; or (2) during construction and for 30 days after completion of your contractor's work, you fail to reserve 10 percent of the contract price or 10 percent of the value of the work performed by your contractor.

If you have complied with the law regarding the reservation of 10 percent of the contract price or value of work and you have withheld payment to the contractor sufficient to cover any written notice of claim and have paid that amount, if any, to the claimant, any lien claim filed on your property by a subcontractor or supplier, other than a person who contracted directly with you, will not be a valid lien on your property.

In addition, except for the required 10 percent reservation, you are not liable to a subcontractor or supplier for any amount paid to your contractor before you received written notice of the claim.

If you have received a *timely* Notice from an unpaid Subcontractor, Material Supplier, or Laborer, review the Notice carefully to determine whether it contains the above required information, or something substantially similar. If not, the Notice may be defective and any Lien Affidavit filed thereafter, may also be invalid.

STEP THREE—Was the Lien Affidavit Timely Recorded? In order for the Lien to be valid it must be timely recorded. The deadline to record the Lien Affidavit first depends upon whether the Property is considered “residential” or “commercial” for Lien purposes. As stated above, Property is deemed “residential” if the Property Owner occupies or intends to occupy the Property, either as a permanent residence or as a vacation home. Generally speaking, for Lien purposes, all other Properties would be considered “commercial”.

Example: If a Property Owner has a vacation home that it occasionally occupies, the Property would be considered residential for lien purposes. However, if that same Property is primarily leased out as an income generating Property, then the Property might be considered commercial.

For Residential Properties, a Lien Claimant has until the 15th day of the third month from when its contract has been completed (or when it last provided labor, material, or equipment to the Project), has been terminated, or has abandoned the Project in which to timely record a “statutory” Lien Affidavit.

Example: If the Lien Claimant completes its scope of work (meaning the work is substantially complete, which excludes punch-list and warranty items) in January, then the Lien Affidavit must be filed by no later than April 15, or the next business day if the 15th is a weekend or federal holiday.

For Commercial Properties, a Lien Claimant has an additional month, or until the 15th day of the fourth month from when its contract has been completed (or when it last provided labor, material,

or equipment to the Project), has been terminated, or has abandoned the Project in which to timely record a “statutory” Lien Affidavit.

Example: If the Lien Claimant completes its scope of work (meaning the work is substantially complete, which excludes punch-list and warranty items) in January, then the Lien Affidavit must be filed by no later than May 15, or the next business day if the 15th is a weekend or federal holiday.

To be clear, a Direct Contractor’s deadline begins to accrue when it completes the work, abandons the Project or is terminated from the overall Project. In contrast, for all other Lien Claimants, the deadline begins to accrue when they last provide labor, material, or equipment to the Project. If the Lien Affidavit was not timely recorded, then the Lien is invalid.

STEP FOUR—Does the Lien Affidavit Contain the Required Information? A properly prepared Lien Affidavit must include: (1) the identity of the Lien Claimant; (2) the identity of the Property Owner, the Original Contractor and the party who hired the Lien Claimant; (3) a description of the Property, such as the address, lot/block, and/or meets and bounds; (4) the amount owed; (5) a description of the unpaid work; (6) identification as to when the unpaid work was performed or completed; (7) if the Lien Claimant was not hired by the Property Owner, the date and method used to serve the Notice of Claim and who it was served on; and (8) a notarized sworn statement that the information contained in the affidavit is true and correct. Additionally, if the Lien is being filed against a homestead Property, then the Lien Affidavit must contain the following notice at the top of the document in at least 10 font boldface: “NOTICE: THIS IS NOT A LIEN. THIS IS ONLY AN AFFIDAVIT CLAIMING A LIEN.” (As a side note, this is a rather misleading notice, in that although it is true that it is just an “Affidavit Claiming a Lien”, it is equally true that once the Affidavit has been recorded against the Property, it is a formal encumbrance like a Deed of Trust and will be viewed by third parties as valid until released. Generally speaking, failure to include any of the aforementioned information may invalidate the Lien.

STEP FIVE—Does the Lien Claimant Have a Right to a Constitutional Lien? The above deadlines concern a “statutory” Lien; meaning a Lien authorized by Texas Property Code, Chapter 53. There is a second type of Lien authorized by the Texas Constitution, Article XVI, Section 37, appropriately referred to as a “Constitutional Lien”. The deadline to record a Constitutional Lien, against either a Residential or Commercial Property, is four (4) years from when the contract was completed, terminated or abandoned. However, not every contractor has a right to file a Constitutional Lien. First, only a Lien Claimant who was hired directly by the Property Owner, Property Owner’s Agent, or Tenant, has the right to record a Constitutional Lien. Second, the unpaid work must have been performed on a structure, like a house, an office, a shed, a garage, or a barn. As such, a Direct Contractor does not have the right to file a Constitutional Lien for unpaid design services, architectural services, engineering services, earth work, fencing, pool construction and maintenance, landscaping, irrigation, water wells, or paving exterior to the structure (with some exceptions). Third, the Constitutional Lien is lost, or waived, if the Property is sold to a “good faith purchaser” (someone who essentially does not know the debt is owed) before the Lien Affidavit is recorded. Last, if the Property is a Residential Homestead, then the additional conditions must be satisfied to have the right to a Constitutional Lien: (1) there must be a written contract signed by both spouses (if a married couple), before any work was performed at the Property; (2) the contract must have been signed at a title company, lender’s office or before an

attorney; (3) the contract must be recorded in the real property records; and (4) the contract must contain a provision which allows the homeowner the right to rescind the contract within three days of signing. If any of the above requirements have not, or cannot be satisfied, then the Lien Claimant does not have the right to maintain a Constitutional Lien.

STEP SIX—Have the Homestead Requirements Been Satisfied? It is not easy to perfect a Lien on a homestead Property and most Liens filed against a homestead are in fact invalid. However, if the rules are followed, then a Lien Claimant can actually foreclose (sell) a residential homestead Property to pay the amount of the Lien claim. With that said, the two most important requirements for perfecting a statutory Lien against a homestead Property are: (1) the Direct Contractor must have a written contract signed by both spouses (if a married couple) before any work has been performed at the Property; and (2) the contract must be recorded with the County Clerk’s Office (this can be done concurrently with recording the Lien Affidavit or thereafter). If these two requirements have not been satisfied, then the Direct Contractor and anyone working under the Direct Contractor, are not entitled to record a valid Lien against the Property. If the Lien being filed is a Constitutional Lien, then in order for the Lien to be valid the contract must have been signed at a title company, lender’s office or before an attorney; and the contract must contain a provision which allows the homeowner to rescind the contract within three days of signing the contract. Additionally, the Lien Affidavit must contain the following notice at the top of the document in at least 10 font boldface: “NOTICE: THIS IS NOT A LIEN. THIS IS ONLY AN AFFIDAVIT CLAIMING A LIEN.” If the Lien Claimant was not hired directly by the Property Owner, then the Notice of Claim (the Notice required to be served prior to filing the Lien) must contain the following language for the Lien to be valid:

If a subcontractor or supplier who furnishes materials or performs labor for construction of improvements on your property is not paid, your property may be subject to a lien for the unpaid amount if: (1) after receiving notice of the unpaid claim from the claimant, you fail to withhold payment to your contractor that is sufficient to cover the unpaid claim until the dispute is resolved; or (2) during construction and for 30 days after completion of your contractor's work, you fail to reserve 10 percent of the contract price or 10 percent of the value of the work performed by your contractor.

If you have complied with the law regarding the reservation of 10 percent of the contract price or value of work and you have withheld payment to the contractor sufficient to cover any written notice of claim and have paid that amount, if any, to the claimant, any lien claim filed on your property by a subcontractor or supplier, other than a person who contracted directly with you, will not be a valid lien on your property.

In addition, except for the required 10 percent reservation, you are not liable to a subcontractor or supplier for any amount paid to your contractor before you received written notice of the claim.

STEP SEVEN—Was the Lien Affidavit Timely Served? After the Lien Affidavit has been recorded, the Lien Claimant must serve the Property Owner and General Contractor (if applicable) with a copy of the Lien Affidavit within 5 business days from recording the Lien. The Lien Affidavit can be served by any of the following methods: (1) in person to the person entitled to receive it; (2) by certified mail; (3) by any other form of traceable private delivery or mailing

service that can confirm proof of receipt. If the Affidavit is sent by certified mail, it is deemed served when placed with the U.S. Postal Service. Notwithstanding these required methods of service, if you actually receive the Affidavit by some other form of service (e.g., by email), the method by which it was served is immaterial and will not invalidate the Lien. Failure to timely and properly serve the Lien Affidavit will invalidate the Lien.

Tip One: The Lien Claimant is not required to serve a copy of the filed/recorded Lien Affidavit, but can serve a copy of the fully executed and notarized copy instead; which is not uncommon. You can tell if the copy served has been recorded by looking at the top of the document for a stamped instrument number or by checking for the same information on the last page of the document.

Tip Two: Although failure to timely serve the Lien Affidavit will invalidate the Lien, you do not want to raise this defense until the deadline to file the Lien Affidavit has passed; otherwise, the Lien Claimant can release the Lien, refile the Lien Affidavit and then timely and properly re-serve the Affidavit. Of course, this is true with any of the defenses listed herein—do not raise them until the deadline to correct them has passed.

STEP EIGHT—Has the Deadline to File a Lawsuit to Foreclose Passed? Recording and serving the Lien Affidavit is not the last step for perfecting a valid Lien. If the Lien claim is not otherwise informally resolved, then the Lien Claimant must file a lawsuit to foreclose the Lien within one year from the last date that the Lien affidavit could be filed. Generally speaking, this deadline tends to run approximately one year from when the Lien was recorded since most Lien Claimants wait until the last date to record the Lien Affidavit. If a lawsuit is not filed within this deadline (unless it is a Constitutional Lien, then the deadline would be four years), then the Lien becomes invalid even if all other Lien requirements have been satisfied.

Tip One: Even though the Lien will be invalid and unenforceable if a lawsuit to foreclose is not timely filed, title companies, lenders and purchasers will still consider the Lien to be a valid encumbrance on the Property and will generally require the Property Owner to have it removed before refinancing or obtaining clear title.

Tip Two: Don't ignore an invalid Lien. The longer you wait to have it removed, the more difficult it may become to remove. As explained below, to remove the Lien you will typically need to involve the Lien Claimant and if the company goes out of business, the Lien Claimant moves out of state, or simply cannot be located, then you may not be able to remove the Lien.

METHODS USED TO REMOVE AN INVALID LIEN CLAIM

OPTION ONE (Preferred Option)--Informal Demand to Release Lien: By far the most expeditious and least expensive method to defeat a Contractor's threat to file an invalid Lien or remove an already filed invalid Lien, is to prepare and send the Lien Claimant a "Release of Lien" and a demand that: (1) thoroughly outlines the applicable Lien laws; (2) describes how the Lien Claimant has not or cannot satisfy these requirements; (3) identifies the defects with the Lien Claimant's Lien documents; and (4) explains the sanctions that will be sought and imposed by the

Court if the invalid Lien is filed and/or not immediately removed, *i.e.*, \$10,000.00 or actual damages if higher, plus attorneys' fees. Over the years we have found this option to be very effective. This type of Demand can be prepared in response to a Subcontractor/Supplier/Laborer Notice of Claim, to a Direct Contractor's verbal or written Demand threatening a Lien, or as a response to the filing of an invalid Lien Affidavit.

OPTION TWO--Lawsuit and Summary Motion to Remove an Invalid Lien: If the Lien Claimant refuses to informally release the Lien, then Texas Property Code, Section 53.160, provides a formal method for removing an invalid Lien by Motion, if one or more of the following *procedural* defects or conditions exist:

1. The Lien Claimant failed to *timely* or *properly* serve the Property Owner and Original Contractor with the Notice of Claim;
2. The Lien Claimant Failed to include all of the required information in the Lien Affidavit and/or failed to *timely* record and/or serve the Lien Affidavit;
3. The Lien Affidavit was filed against a homesteaded Property and not all of the homestead requirements were or can be satisfied;
4. The Lien is for unpaid retainage and the Property Owner followed the requirements for releasing retainage to the Original Contractor before the Lien Affidavit was recorded;
5. The Property Owner has deposited all funds subject to the Lien in the Court's registry; or
6. The Lien Claimant executed a valid Lien Waiver & Release prior to recording the Lien Affidavit.

Through this process, a lawsuit is filed against the Lien Claimant, along with a Motion to Remove the Lien. At a minimum, this process can take up to 3 - 4 months. If the Court grants the Motion, the Plaintiff is typically entitled to reimbursement of the attorneys' fees and costs incurred to remove the Lien. In addition, if the Court concludes that the Lien Claimant knowingly filed and/or maintained an invalid Lien with the intent to cause you harm, then you may be entitled to a minimum \$10,000.00 or actual damages if higher, punitive damages, plus reimbursement of attorneys' fees/costs.

OPTION THREE--Bond Around the Lien: In some circumstances it is possible to purchase a bond from a Surety that stands in place of the Lien. This process is commonly referred to as "bonding around the Lien". Upon recording the bond with the County Clerk's Office, the Lien is released and the Lien Claimant can no longer foreclose its Lien against the Property, but instead must assert a timely claim against the bond. To purchase such a bond, you generally need to deposit 1.5 – 2 times the Lien amount with the Surety or offer a Letter of Credit in the same amount, and pay a premium. Bonding around a Lien can be very expensive and is generally reserved for companies who have sufficient assets to purchase the bond and who can pay to defend the Surety against a lawsuit to enforce the bond. Further, this type of bond is typically only available for commercial Properties.

OPTION FOUR--Motion to Deem the Lien Invalid: If the Lien Claimant cannot be located, then the only remaining option might be to file a Motion with the Court to deem the Lien invalid. Unlike a Motion to Release a Lien (explained above), you do not need to sue or serve the Lien Claimant for this type of Motion. However, through this process, the Court does not have the power to actually remove the Lien, but instead can only issue an order deeming the Lien invalid. This order is then recorded in the Real Property records and most title companies and lenders will

accept the order as proof that the Lien is no longer an encumbrance on the Property. This process can be accomplished within 30 – 60 days depending upon the Court’s availability and costs just a little more than preparing an informal demand letter to release the lien (Option One, above).

IF YOU HAVE BEEN THREATENED WITH A LIEN OR NEED TO REMOVE AN INVALID LIEN, PLEASE CONTACT US TO DISCUSS HOW WE CAN ASSIST YOU. FOR NO CHARGE, WE WILL: (1) ANALYZE THE LIEN CLAIM, (2) ANSWER ANY LIEN QUESTION, AND (3) RECOMMEND A COURSE OF ACTION.