



## **Mechanic's Liens in the Time of Corona**

As business slow-downs become imminent due to the onset of the Coronavirus it is now more important than ever for contractors to secure their lien rights through the sending out of notices and recording of mechanic's and materialman's liens. Below are a few things to consider that might affect "business as usual" when preserving your lien claim:

- (A) Are time extensions likely in this type of emergency?
- (B) What will change about the lien recording process?
- (C) How will I send notices if the Post Office shuts down?
- (D) Will pursuing my lien claim in a time of crisis hurt my business relationships?
- (E) Where can I look for reliable information about things that will impact my lien rights?

All of these topics are discussed below as they relate to the preservation of Mechanic's and Materialman's lien rights pursuant to the Texas Property Code.

### **(A) Time Extensions...Can you count on them?**

In past emergencies, the Supreme Court of Texas has issued extensions for statutory deadlines based on the closure of government offices and inaccessibility of certain counties due to flooding/ storm damage. One such instance, Texans may recall, was Hurricane Ike, which hit Texas on September 13, 2008, and devastated a large number of Texas residents. The Supreme Court of Texas also issued an order asking all courts throughout the State of Texas to allow for the extension of litigation related deadlines for Hurricane Harvey victims in 2017. A key caveat to these Court mandated time extensions was that parties had to show they missed their deadlines/needed more time due to complications from the storm when arguing for the foreclosure of their liens. These instances differ from the Coronavirus state of emergency because, unlike the damage experienced by Texas in the wake of past hurricanes, the infrastructure of the State at present remains largely intact. While the United States, the State of Texas, and many of its individual counties have declared a state of emergency an extension of any statutory deadlines will likely not be granted unless government offices officially cease operations. At this time, there is no order in place which would allow for the extension of deadlines relating to lien notices and filings; therefore, it is important to remain diligent about preserving your right to payment on all of your open accounts.

### **(B) Recording...Is the County Clerk's office in operation?**

Chapter 53 of the Texas Property Code requires that liens be filed/recorded in the County in which the real property is located. Many Counties throughout Texas are starting to close their physical doors to the public but remain open to perform government functions online. With the wide adoption of electronic filing throughout the State of Texas liens can still be recorded in the real property records online. It's important to note that some counties still do not have electronic filing capabilities. If you find yourself needing to preserve your lien rights in such a county you should send: (1) the original version of your executed lien affidavit (2) a check for the filing fee and (3) a letter asking for the lien to be recorded. This request should be made through a certified mail carrier/ tracking service so that you can verify that your package was received by the Clerk's office.

If you have to mail your lien affidavit be sure to do so early rather than late. There is no guaranty that the Clerk's office will get to your affidavit in time to record it if it arrives on the same day as the deadline to file your lien. This is even more crucial when your lien deadline falls on a weekend because there is no extension to the next business day for recording. As a result, all liens must be recorded on the business day **prior** to a lien deadline that falls on a weekend/ holiday regardless of whether or not you have to physically mail in the affidavit.

In summary, if you have lien deadlines coming up you should try to answer the following questions a few weeks in advance or seek the advice of counsel:

- Is the County Clerk's office where the project is located still operating?
- If the County Clerk's office is open, does the County Clerk's office have electronic filing/ recording capabilities?
- Do I have the ability to electronically file documents if need be and/or does my attorney have electronic filing capabilities?
- If the County Clerk does not yet have electronic filing capabilities when should I mail the original lien affidavit to ensure timely recording?

If there comes a time when County Clerk offices close it is important to maintain clear records of when and how you notified a debtor and all relevant parties in the project chain about a lien right you maintain through certified mail and e-mail. Should a relevant County Clerk offices close, include language in your notice letters stating that you reserve the right to file and record your lien when the County Clerk offices re-open. It is not a perfect solution but providing notice subject to that caveat will help bolster your claim when it comes time to foreclose on your lien in Court. Not all counties will operate

the same so make sure to check individual county websites for information about their specific operations.

**(C) Certified Mailings...What if the government shuts down the post office?**

It is under rare circumstances indeed that the United States Postal Service would be shut down; however, it is important to be prepared for all eventualities. This effects how notices are generally sent. Pursuant to Tex. Prop. Code 53.003(d) if someone receives the proper notice the method of delivery is technically immaterial; however, the gold standard for notices is to send them via certified mail/ return receipt requested with a stamped receipt from the post office so that all you have to prove in Court is delivery rather than the opposing parties' receipt of the notice. Should the Post Office fail to function, for whatever reason, then alternative measures must be taken to ensure that your notices are delivered as follows:

- The best option would be to prepare the notice letter and then drop it in the blue box receptacle at the Post Office. The person who actually deposits the letter should then sign an affidavit swearing to the date the notice was placed in the mail.
- Tex. Prop. Code 53.003(b) allows for notices to be delivered in person to the party required to receive notice or to their registered agent.
  - This may not be the preferred method because of the element of contact; however, it may be possible for you to hire a process server to deliver the notice and then have the process server sign an affidavit verifying proof of delivery. This of course is dependent upon process server offices continuing to run.
- It never hurts to e-mail the relevant party a copy of the notice and request a delivery and a read receipt on the correspondence. You should not solely rely on this method and should perform one of the two options above to protect your rights but it may be helpful to have an electronic receipt of delivery when in Court.

**(D) Business Relationships...Can you show empathy while preserving your right to payment?**

While preserving your right to payment is always top of mind it is important to understand that businesses and the economy in general are being deeply impacted by the Coronavirus. You may be wondering whether or not you should forego your lien rights to be empathetic to the plight of your fellow man or to preserve your long-standing business relationships. **The answer is No!** You can still show empathy and maintain your lien rights by preserving your claim while engaging in an open dialogue with the debtor to work out a payment plan that works for both parties. You can also preserve your claim and then wait to file suit to foreclose on a lien if you believe the debtor will

have the ability to turn things around. Keep in mind, pursuant to Texas Property Code 53.158(a), you have two years from the date you file your lien to file suit before the statute of limitations on your claim runs. Time is only on your side when you have preserved your right to payment. You can be more flexible with payment plans and alternative solutions when you have a secured claim but you significantly reduce your leverage and negotiation options by failing to protect your company and its right to payment.

If your business contacts fail to understand this logic feel free to reframe the conversation and explain that the protection of your company's right to payment helps secure the salaries/wages for your employees who are also hurting from the rippling effect the Coronavirus is having on all aspects of daily life. Empathy can and should go both ways in these discussions so that companies can work together to weather this storm and maintain productive relationships when the economy rebounds.

#### **(E) Resources...Where should you look for information in this dynamic situation?**

There are a lot of sources of information which may impact your business and lien procedures. Below are a few suggested websites to monitor in order to ensure you have the most up to date information that may affect mechanic and materialman's liens in the weeks to come:

- [The Supreme Court of Texas](#) for information relating to emergency measures taken to assist people during disaster relief.
- [The office of the Governor for the State of Texas](#) for information relating to state government operations.
- [The USPS Newsroom](#) for up to date information on the status of the post office's operations.
- Local County Clerk websites as needed to determine if offices are open and if they have electronic filing capabilities.

In times of uncertainty and crisis it is important to stay calm, remain vigilant, and trust but verify sources of information outside of those listed above to ensure that your lien rights remain intact.

**For more information, please contact Jason Walker at 713.850.4234 or via [email](#) or Katy Baird at 713.850.4225 or via [email](#).**