



TEXAS CONSTRUCTION ASSOCIATION

NEWSLETTER

Winter II 2018

BUILDING SOMETHING GREAT

PREPARING FOR THE 2019 LEGISLATIVE SESSION



Securing the Construction Team's Retainage Loan

Section 53.101 of the Texas Property Code states "the owner shall retain 10 percent of the contract price of the work to the owner," and Section 53.102 states, "the retained funds secure the payment of artisans and mechanics who perform labor or service and the payment of other persons who furnish material, material and labor, or specially fabricated material..." While typically 10% is being deducted from

contractors' and subcontractors' monthly pay requests, it has become apparent that the amount deducted is not being put aside for the benefit of the artisans, mechanics and material suppliers.

It is common practice in the construction industry that an owner who is not self-funded usually borrows only 90% of the monthly construction *Continued on page 11...*

IT'S ONLY FAIR!!!

Responsibility for Defective Plans and Specifications

Flash back to the turn of the 20th century. Following recovery from the Civil War, the landscape of Texas was changing. It was a building boom, as statewide population increases led to larger towns and cities. Building practices changed significantly with the innovations of the use of steel, steam-heating and electrical lighting. Gone were the utilitarian buildings. Although brick and stone were still extensively employed for structure and visual interest, in large cities there were commercial buildings of three

to six stories that became sources of considerable pride. These changes brought forth more sophisticated building components, a surge in the number of architects and engineers, and an increased risk.

It was during this time, in 1899, that the Thomas Lonergan Co. was contracted to construct a building in San Antonio. The owner of the building, San Antonio Loan Trust Co., had hired an architect to draw up plans for a five-story building. Lonergan *Continued on page 10...*

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Message from the President

In September, we welcomed Jennifer Fagan to TCA as its Vice-President of Governmental Affairs. Her predecessor, Mike White, retired this summer. He and his wife, Nancy, have settled near a golf course in Denton. Jennifer brings vast experience to TCA from her work inside and outside the Capitol. With Jennifer at the reins, hold on!

With the general election behind us, our attention is turned to the Texas Legislative Session that begins on January 8, 2019, and continues for 140 days. Although the Republicans still hold the majority in the Texas House, there are significantly more Democrats. We anticipated a contentious race for Speaker of the House; however, as of this writing, it appears Rep. Dennis Bonnen will be elected. In anticipation, he has already appointed several key staff positions and is organizing for a quick start. We expected later than usual House Committee assignments due to the uncertainty of who will be the Speaker. Now, with Rep. Bonnen being the presumptive Speaker, the chances are pretty high for speedier committee appointments.

Getting House committees rolling will be especially important this session due to new committee chairmanships and committee composition. While House committee members are feeling their way into the positions, the Senate committees will be moving ahead due to the limited change expected there. House committees moving slower, combined with a possible slam of bills coming from the Senate, may mean a larger than typical traffic jam of bills in the House.

What does this mean for TCA? It means that the TCA staff and lobby team will be working harder to get our issues moved early. To that end, we must have the help of a formidable weapon: our TCA Members.

Many of our members have been active during the election cycle renewing friendships, helping friends get elected, and making new friends. However, we need all of our TCA Members to take a little time from their businesses to establish or solidify the relationship with their legislators. Making your legislators aware of your concern on the issues before and during the session will help us advance the issues. While the TCA staff and lobby team can push issues, there's nothing more valuable than contact from a constituent.

Lastly, please make plans to attend TCA's Walk on the Capitol event on January 30. Activities start on January 29 with presentations from the TCA lobby team and a TCA hosted reception for Texas Legislators and TCA★PAC contributors. There is no registration fee for the Walk on the Capitol on January 30. Register online at the TCA web site, www.texcon.org, look for "Upcoming Events" under the News & Events tab.

Raymond

Building Something Great



Texas' Broken Lien Laws Need REBUILDING

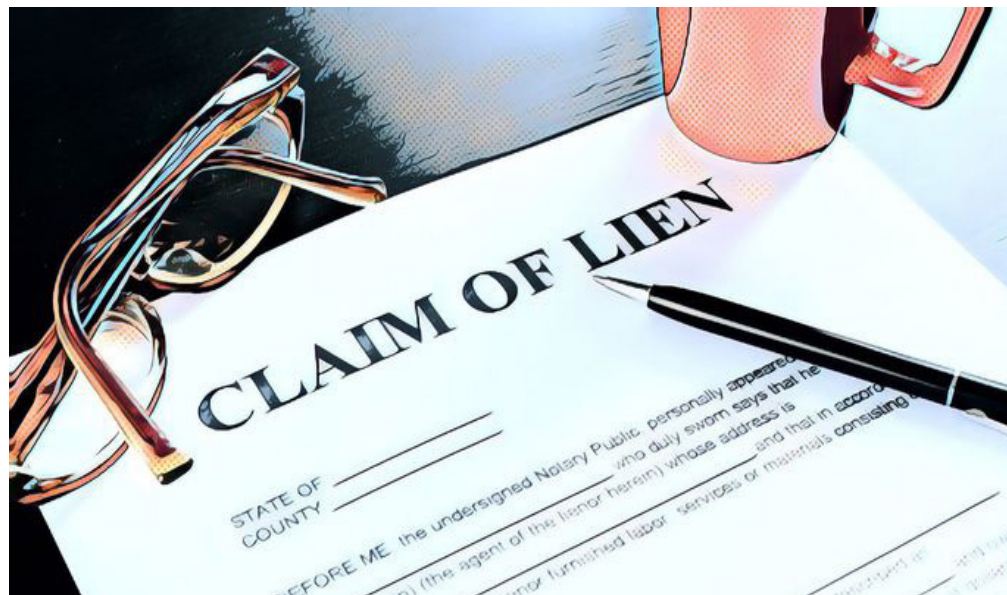
The lien laws in Texas are broken. Of all the states, Texas has the most burdensome and complex lien law scheme. Due to its complexity, many subcontractors and suppliers fail to comply with the statutory requirements and lose the ability to recover amounts owed to them. People who provide labor or materials should not be required to navigate thru a statutory quagmire in order to establish a lien for unpaid work and materials.

The Texas Constitution, as adopted in 1876, Article 16, Sec. 37, states that “mechanics, artisans and materialmen, 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[e]; and the Legislature shall provide by law for the *speedy and efficient enforcement of said liens.*”

In line with the Texas Constitution, the Legislature has enacted laws dealing with the statutory lien rights for people furnishing labor and material on private work. These lien rights provide security to the contractor, subcontractor and supplier in exchange for the improvements being made to the owner's property. However, they are neither speedy, nor efficient. Over the past century, the Legislature has periodically amended Chapter 53 of the Property Code, resulting in current liens laws that are difficult for attorneys to decipher and nearly impossible for the lay person to understand. The problems presented in perfecting lien rights are numerous: often it is difficult to obtain the legal description of the property or the name of the owner; deadlines for filing notices vary and depend on the position of the person in the construction chain; and owners do not necessarily have knowledge of all the subcontractors and suppliers

on a project who have a right to file a lien. All of these can serve as a trap for honest mistakes that prevent claimants from protecting their lien rights or result in surprise liens for owners.

TCA, Associated Builders and Contractors (ABC) of Texas and Associated General Contractors (AGC) Texas Building Branch have been working together to craft a Lien Law Modernization Bill to fix the broken Texas lien law system. These groups have reached out to many other lien law stakeholders to achieve a bill that addresses pitfalls faced by all industry segments. Sound changes include an early-notice system that is consistent with many other states, eliminating several confusing concepts unique to Texas such as statutory retainage, and providing owners, contractors, claimants, lenders and title companies with more timely and accessible information regarding projects via an internet portal. The proposed changes will result in a fairer system, more transparency on each project and eliminate surprise liens from parties the owner did not even know were on the job. Rebuilding our Texas lien law structure is sound public policy and will benefit everyone involved in construction. ★



Fundraiser Friends of the TCA★PAC

WHY ARE THESE PEOPLE SMILING? AND WHY CAN WE ONLY SEE THEM FROM THE WAIST UP?



BECAUSE THEY ARE (NOT) GOING TO THE NO PANTS PAC PARTY!



Thank you to our legislators, members & hard working TCA Member Associations for coming together and making TCA★PAC Fundraisers a success! Special thanks to American Subcontractors Association Texas Chapters of Houston & North Texas, Central Texas Subcontractors Association, and Texas Masonry Council for hosting TCA★PAC Events! ★

Spotlight on Executive Director Brianna Wright American Subcontractors Association - Houston Chapter



Brianna Wright, LEED AP, Executive Director, American Subcontractors Association-Houston Chapter (ASA-HC), has been with the organization since 1997. As the only staff person at ASA-HC, she is responsible for all aspects of running the organization including working directly for the board of directors, financial administration, membership fulfillment, committee management, education programming, event coordination, all communications inside and outside of the organization, liaison to industry organizations, and public relations. With more than 25 years of association management experience, Wright provides ASA-HC with the leadership, experience and knowledge needed for it to continue its path of success. ★

TCA staff thanks you for all you do!

TEXAS CONSTRUCTION ASSOCIATION PAC

Q: WHAT IS A POLITICAL ACTION COMMITTEE (PAC)?

A political action committee is the name given to a group organized to combine the contributions of many individuals and make contributions to elect or defeat candidates for public office.

Q: WHAT DOES THE TEXAS CONSTRUCTION ASSOCIATION PAC (TCA*PAC) DO?

The Texas Construction Association PAC is organized primarily to make contributions to individuals running for the Texas Legislature. Contributions are also made to Texas statewide races such as those for governor, lieutenant governor, and comptroller.

Q: WHY DO CONSTRUCTION INDUSTRY MEMBERS NEED A PAC?

The Texas Legislature is involved in your business. Its decisions affect the way you do your business every day. It passes or defeats laws involving your taxes, your tort liability, your contracts, your insurance protection, the roads you travel, the education of your workforce, and a myriad of other issues. In order to have a say in these issues, you have to be involved and your advocates must have the ability to make contributions to candidates who are sympathetic to your viewpoint. If you don't have a well-funded PAC, you are at a disadvantage.

Q: WHO DECIDES WHERE THE TCA*PAC MONEY GOES?

The TCA staff provides information about the candidates to the TCA*PAC Board. The board is made up of TCA members and ultimately determines which candidates to support or oppose. Factors considered include a candidate's position on construction issues, support by local construction industry members, and the candidate's ability to win.

Q: WHY SHOULD I CONTRIBUTE TO THE TCA*PAC WHEN I ALREADY MAKE CONTRIBUTIONS TO CANDIDATES?

The TCA*PAC is able to pool the resources of numerous construction industry members to have a greater impact than a single individual. Individual contributions are important, and TCA members are encouraged to continue making individual contributions, but the combined dollars of the PAC have a greater impact on more races.

Q: IF I CONTRIBUTE TO THE TCA*PAC, DO I HAVE A SAY AS TO WHERE THE DOLLARS GO?

All contributors to the TCA*PAC can inform the TCA*PAC Board which candidates the contributor supports or opposes. Input from members is strongly considered when making decisions to support or oppose.

Q: ARE THERE LIMITS ON HOW MUCH I CAN CONTRIBUTE?

There are no limits to how much an individual can contribute to the PAC. The only limitation is that corporate funds cannot be used as contributions to candidates for the Legislature and statewide offices in Texas. The TCA*PAC contributions to the candidates must be non-corporate dollars. Thus, the funds contributed to the TCA*PAC should be non-corporate funds.

Q: WHEN SHOULD I MAKE A CONTRIBUTION?

Right now! Contributions to the PAC can be made throughout the year.

Q: HOW DO I BECOME INVOLVED WITH TCA*PAC?

Easy. Contact the Texas Construction Association if you want to become involved. To contribute monetarily, complete the form provided and return to Texas Construction Association PAC at 1011 San Jacinto Blvd, Suite 330, Austin, TX 78701. For more information on the TCA*PAC contact TCA at 512-473-3773.



Texas Construction Association PAC EZ PLEDGE

Now joining TCA*PAC is faster and easier than ever before with less immediate impact on your wallet! The new TCA*PAC EZ Pledge allows you to automatically pay your TCA*PAC membership monthly. You specify the contribution amount and the account to be charged each month. You can make your contribution on a Discover, VISA, MasterCard, or American Express account. Your contribution amount will be conveniently charged as you direct until you make changes or cancel the service. TCA*PAC can accept only non-corporate contributions. Contributions are not deductible for federal income tax purposes.

1011 San Jacinto Blvd, Ste 330 Austin Texas 78701-2494
512-473-3773 Phone 512-473-3777 Fax

MEMBER INFORMATION

First Name Last Name Occupation

Email Address Preferred Telephone Number

Cardholder's Home Address City State Zip

Contribution Amount: Check for \$ Check #
 One Credit Card Charge of \$ Monthly Credit Card Charge of \$

Monthly billing will occur on or about the 1st of each month. Contact TCA*PAC if you wish billing to stop.

For credit card donations, please complete the following information:

Visa MasterCard American Express Discover

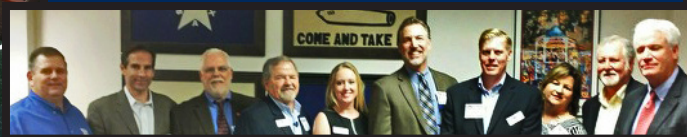
Cardholder Name Billing address is same as home address Card Billing Address:

Credit Card Number Name on Credit Card

Expiration Date (MM/YY) Verification Number Cardholder Signature



★ Please ★ ★ Join Us! ★



Mid-Afternoon of Tuesday, January 29, 2019 ~ Lobbyist Briefing & Political Pundits

DoubleTree Guest Suites Hotel
303 West 15th Street, Austin
2pm - 4pm

Evening of Tuesday ~ TCA★PAC Roundup & Legislator Reception

Opportunity to visit with Legislators & their Staff over libations & hors d'oeuvres
El Mercado
1702 Lavaca St, Austin
5:30pm - 8:30pm

Morning of Wednesday, January 30, 2019 ~ Walk on the Capitol

DoubleTree Guest Suites Hotel
303 West 15th Street, Austin
Breakfast & Briefing
7:30am - 9am
Walk on the Capitol
9am-?

Please RSVP!

*For hotel information, please contact Patrick Finnegan
at the TCA office 512-473-3773, or by email at pfinnegan@texcon.org
www.texcon.org*





Mail this form to:
 Texas Construction Association
 1011 San Jacinto Blvd, Ste 330
 Austin, TX 78701-2494

Registration Form

Or FAX to:
 Texas Construction Association
 (512)473-3777

2019 TCA★PAC Roundup & Walk on the Capitol

Tuesday & Wednesday, January 29-30, 2019

I will attend: *The Lobby Briefing on the 29th* *The Roundup on the 29th* *The Breakfast & Walk on the 30th*
 (All TCA Members Invited) (TCA★PAC Membership Required) (All TCA Members Invited)
 Complete the Form Below

Attendee Name & Company _____

Attendee Email Address _____

Company Address w/City & Zip _____

HOME Address w/City & Zip _____

Cell Phone () _____ Office Phone () _____ Fax () _____

Please use a separate registration form for each attendee. Thank you!

Sponsorship

May use corporate funds

I'll be a Roundup Sponsor for: \$2,500 \$1,000 \$500

A check is enclosed Charge the card below Please invoice me

Credit Card: Visa MasterCard American Express Discover

Name on Credit Card _____ Expiration Date: _____

Company Name _____

Card Billing Address w/City & Zip _____

Card No. _____ Card ID No. (3-4 digits) _____

TCA★PAC Membership Contribution

May NOT use corporate funds. Select option A or B.

A. I want to attend the Roundup. I have donated to the TCA★PAC after February 1, 2017!

B. I want to attend the Roundup. Please accept my TCA★PAC Contribution:

Gold Badge Member \$1000 Silver Badge Member \$500 Blue Badge Member \$250 Red Badge Member \$100

My personal check (payable to TCA★PAC) is enclosed Charge the non-corporate card below Please invoice me

Charge the non-corporate card below \$_____ each month.

(Contact TCA at 512-473-3773 when you want billing to cease.)

Visa MasterCard

Discover American Express

Name on Credit Card _____

Card Billing Address _____

(street) _____

(city, zip) _____

Card No. _____

Card ID No. (3-4 digits) _____ Expiration Date: _____

- Please check if you are a member of any of the following TCA Member Associations
- American Subcontractors Association - Texas Chapters
 - Central Texas Subcontractors Association
 - DFW Drywall & Acoustical Contractors Association
 - Fire Sprinkler Contractors Association of Texas
 - Mechanical Contractors Association of Texas
 - National Electrical Contractors Association of Texas
 - National Utility Contractors Association of Texas
 - Plumbing-Heating-Cooling Contractors Association of Texas
 - Precast Concrete Manufacturers Association of Texas
 - Southwest Terrazzo Association
 - Subcontractors Association of the Metroplex
 - Texas Council Painting & Decorating Contractors
 - Texas Crane Owners Association
 - Texas Glass Association
 - Texas Iron Workers Employers' Association
 - Texas Masonry Council
 - Texas Structural Steel Institute





A Preview of the 86th Texas Legislature

There will be many major issues vying for the attention of Texas legislators in the upcoming session convening on Jan. 8, 2019. Among those will be public school finance, school safety, eminent domain and post-hurricane Harvey issues.

PUBLIC SCHOOL FINANCE

Public school finance has already taken center stage as stated by presumed Speaker-elect Dennis Bonnen (R-Angleton) at his press conference on Nov. 12, 2018. At the end of the last session in 2017, the House and Senate both had competing proposals, the main sticking point being the level of property tax increase allowable without a public vote (6% in the House version vs. 4% in the Senate version). This time around Gov. Greg Abbott has weighed in on the issue and has put forth a proposal requiring a vote for any increase more than 2.5%. This is just one element of a complex public school finance system that supports more than 5 million public school students in Texas.

PUBLIC SCHOOL SAFETY

Safety in our public schools will also be an issue for the 86th Legislature. During the interim, Lt. Gov. Dan Patrick appointed the Senate Select Committee on Violence in School and School Security. The Committee issued an interim report in August which includes 19 recommendations for the upcoming legislative session.

EMINENT DOMAIN

Since the Supreme Court's *Kelo* decision in 2005, the issue of eminent domain has been one of the top issues in the Texas

Legislature. In the 85th legislative session, bills addressing attorney fees failed and are expected to be refiled along with other bills affecting pre-suit negotiations and property valuation.

HURRICANE HARVEY

Hurricane Harvey made landfall in Texas on Aug. 24, 2017, with damaging winds followed by widespread flooding, eventually impacting 22 counties in Southeast Texas. The damage estimates run as high as \$125 billion. Nearly two years later, the communities along the Texas coast continue to recover and rebuild. Lessons learned from this disaster will undoubtedly focus legislators' attention on what

changes are necessary to quickly prepare for and recover from a similar natural disaster in the future. During the interim, House and Senate committees were charged to study 63 different issues related to Harvey. Recommendations are forthcoming.

OTHER ISSUES

In addition to the above, commentators have also suggested that the Legislature will see bills relating to occupational licensing, public education, higher education, school vouchers, mental health issues, criminal justice reforms and online sports betting. These will be among the almost 7,000 bills expected this session. ★





Notice and Right to Correct Within a Reasonable Time

Currently, a property owner can initiate a lawsuit or arbitration over an alleged construction defect without prior notice to the contractor. A statute that provides for notice of possible defects, a timeframe for inspection by the contractor and a right to repair the alleged defect will greatly reduce unnecessary lawsuits, but it will not prevent a lawsuit when a dispute over a construction defect cannot be otherwise resolved.

Additionally, under current law, the Statute of Repose controls the time period applicable to the initiation of a lawsuit or arbitration over an alleged construction defect. The current law allows for up to 10 years. Damage to a structure can be caused in many ways: defective construction, poor maintenance or normal wear and tear. The possibilities of defective construction being the culprit are reduced as time goes on; therefore,

the majority of states have reduced the old Statute of Repose from 10 to five years. Texas should follow suit. Reducing the period of liability will decrease insurance costs and litigation, yet allow for a reasonable period of time for construction defects to be determined and addressed. These savings can be passed on to owners through lower construction costs. ★

Protect Employer/Employee Relationships from Local Ordinances

Local businesses provide unique and important benefits to their customers and communities, and Texas must continue to support them to see them thrive. The more they grow, the more they innovate, the more people they can employ and the more they can give back to their communities. There are no losers when local businesses succeed.

Unfortunately, Texas businesses are under fire now more than ever. Some Texas municipalities have taken actions to pass burdensome regulations on businesses in recent years, making it increasingly difficult for some to remain profitable and conduct business across city lines. Specifically, cities are exploring the adoption of local ordinances mandating certain employer benefits, as well as scheduling and hiring practices like mandatory paid sick-leave policies. Such local ordinances can force employers to slash budgets, lay off

employees or, at the very worst, close their businesses for good.

This breed of local regulations is adversely affecting the employer-employee relationship and in doing so has highlighted a real need for statewide legislation that would preempt municipalities from instituting these local ordinances in the first place. A statewide solution is necessary to provide certainty to businesses, especially to those operating in urban areas with multiple neighboring cities, and is appropriate because varying city ordinances can make it difficult for Texas to attract new businesses. One voice on behalf of the business community in favor of statewide legislation is the Alliance for Securing and Strengthening the Economy in Texas, or ASSET.

ASSET is a 501(c)(4), nonprofit advocacy coalition of 16 business groups, including the Texas Construction Association, formed to fight for public policies

that protect Texas businesses from burdensome government regulations. Its goal is to bring more businesses to the table to advocate for a statewide legislative solution that would put a stop to these harmful patchwork ordinances. At the end of the day, employers and their employees are in the best position to decide what's best for their businesses—not local or state government.

While offering better benefits allows businesses to stay competitive and retain top talent, local regulations shouldn't force them to make these costly decisions. Just because the government mandates something to be done doesn't mean a business can afford it, after all. Small, medium or large, all local businesses need to have the freedom to set their employment practices in a manner that they determine is best for their industry, their employees and their communities. ★





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info@txconstructionwc.com

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*By law, dividends cannot be guaranteed and are subject to the approval of the Texas Mutual Insurance Company Board of Directors.

It's Only Fair!!! Responsibility for Defective Plans and Specifications *Continued...*

undertook the construction of the building, following the architect's plans to the letter; however, it collapsed before it was finished. Lonergan refused to rebuild the building based on the architect's design, and San Antonio Loan Trust sued for damages. The case went all the way to the Texas Supreme Court. *Lonergan v. San Antonio Loan & Trust Co.*, 104 S.W. 1061 (Tex. 1907). In its opinion, the Court noted, "The fact that Lonergan Co. contracted to construct the building according to the specifications furnished implied that they understood the plan. We are of opinion that Thos. Lonergan Co., having failed to comply with their agreement to construct and complete the building in accordance with the contract and the specifications, must be held responsible for the loss, notwithstanding the fact that the house

fell by reason of its weakness arising out of defects in the specifications and without any fault on the part of the builder. Liability of the builder does not rest upon a guaranty of the specifications but upon his failure to perform his contract to complete and deliver the structure."

Flash forward to 2018. Lonergan is still the law of the land in Texas (although 49 states follow the *Spearin* doctrine set forth by the U.S. Supreme Court in 1917, which holds the opposite of *Lonergan*). There have been countless changes in the construction industry; chief among them is the state of Texas' policy decision in the 1930s to license architects and engineers, among other design professionals. Through the passage of licensing statutes, the Legislature determined that in the interest of public health and safety, a certain degree of knowledge is necessary for a person to hold themselves out to the public as a design professional. In fact, the applicable statutes include prohibitions on unlicensed persons performing acts reserved in statute for licensed professionals.

Unfortunately, the Texas Supreme Court has failed to evolve in its reasoning. While it seems reasonable for a contractor to rely on plans and specifications prepared by design professionals hired by the project owner to build a project,

if the work turns out to be defective due to an error in the plans and specifications, contractors bear the risk of liability for the consequences of defective design. Additionally, an implied warranty of constructability by the original contractor to the owner gets passed via contract to the subcontractors. Therefore, under current law, a subcontractor three or four tiers below the original contractor could be held liable for construction defects attributable to an architect's or engineer's plans. Typical general liability insurance carried by a contractor or subcontractor does not cover this obligation and the possible loss may well exceed a company's net worth.

Bottom line: the current system is not fair. The construction team should not be liable for construction that is defective due to erroneous documents prepared by licensed professionals and furnished to the contractor by the owner. The Texas Supreme Court's reasoning in *Lonergan* is no longer appropriate in this day and age. Therefore, the Legislature must amend the law to provide for the equitable distribution of liability in construction cases between all parties, including owners and design professionals. Everyone comes to the table and is held responsible for their own work. Period. ★



Securing the Construction Team's Retainage Loan *Continued...*

costs during a construction project, leaving the retainage with the lender. The 10% retainage has not been loaned to the owner by the lender; therefore, the owner is not paying interest or fees on the retainage, and the lender is under no obligation to release the money in the event that an owner defaults on the construction loan.

The reality is that retainage is a loan by the construction team to the owner. The owner financing the construction with a bank loan will rarely borrow money to fund its retainage obligation until the end of a project when the retainage is due to the original contractor. Instead, the owner borrows from

the construction team. Thus, the bank holds a note for 90% of the construction costs, and the construction team members finance the remaining 10% through deductions in their monthly pay requests.

The bank's loan is secured by a deed of trust. When executed and timely filed, the deed of trust provides a high-priority lien on the property.



The construction team's loan is unsecured unless a retainage lien under Chapter 53 is perfected. Even then, that lien is secondary to the bank's deed of trust. In the event of a foreclosure by the bank, all mechanics liens are wiped away—the bank's loan trumps the construction team's loan. If owners want to continue to finance 10% of their projects on the backs of the construction team, the construction team's retainage loan needs to be protected. This can be done by ensuring that a perfected lien for retainage survives the foreclosure of the bank's lien on a project. Only then will the current retainage system be just and reasonable. ★

Your company is eligible to participate in the largest and most tenured office supply discount program simply because of your membership in the Texas Construction Association.

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- Guaranteed **at least 5%** off the lowest price from officedepot.com or in store
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Texas Construction Association
Patrick Finnegan 512-473-3773
pfinnegan@texcon.org



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