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**To:** Clients and Friends

**From:** David F. Dulock

**Subject:** Part One of 2011 Legislative Update from 82nd Regular Session of the Texas Legislature – Bills Effective September 1, 2011

This legislative update summarizes eight bills effective September 1, 2011, that we consider are of interest to our clients. The legislative updates that follow this update will summarize the following bills that we consider are of interest to our clients: (i) bills effective September 1, 2011, that are not addressed in this legislative update, (ii) bills that we consider important enough to be the subject of a separate legislative update, and (iii) bills and constitutional amendments effective after September 1, 2011.

- **REQUIRING PAYOFF STATEMENTS FOR HOME LOANS (HB 558)**

House Bill 558 amends Chapter 343, Finance Code, by adding Section 343.106, which requires a payoff statement from a mortgage servicer, outlines required elements for the payoff statement, and details provisions for correcting errors in a payoff statement. The terms “mortgage servicer,” “mortgagee,” and “mortgagor” used in Section 343.106 have the same meanings as defined in Section 51.0001, Property Code – *see [Our Comments](#)* below for definitions.

**Our Comments:** Section 51.0001, Property Code, provides the following definitions:

1. “Mortgage servicer” is the last person to whom a mortgagor has been instructed by the current mortgagee to send payments for the debt secured by a security instrument. A mortgagee may be the mortgage servicer.
2. “Mortgagee” is (i) the grantee, beneficiary, owner, or holder of a security instrument; (ii) a book entry system; or (iii) the last person to whom the security interest has been assigned of record.
3. “Mortgagor” is the grantor of a security instrument.

***Payoff statement for a home loan.*** The Finance Commission of Texas must adopt rules governing requests from title insurance companies for payoff statements from mortgage servicers for home loans, including rules prescribing a standard payoff statement form that must be used by mortgage servicers. The completed payoff statement form must state the proposed closing date, as specified in the title company’s request, and the payoff amount that would be valid through that date. In adopting these rules, the Finance Commission must set a time— at least seven business days after the date the request is received— by which the payoff statement must be delivered to the requestor on the prescribed payoff statement form.

***Actions from an error in a payoff statement.*** Except as provided below, once a mortgage servicer provides a completed payoff statement meeting the requirements of Section 343.106 and the Finance Commission rules adopted thereunder, the mortgage

servicer or mortgagee is prohibited, on or before the proposed closing date, from demanding that a mortgagor pay more than the payoff amount specified in the payoff statement.

If the payoff statement is incorrect, a corrected payoff statement may be delivered on or before the second business day before the proposed closing date. The corrected payoff statement must be delivered to the requestor by certified mail, return receipt requested, and electronically if the requestor has provided the means to do so.

If a mortgage servicer (i) submits an incorrect payoff statement that results in a requested underpayment of the payoff amount, (ii) does not deliver a corrected payoff statement as stated above, and (iii) receives the amount specified in the incorrect payoff statement, the difference between the correct and incorrect payoff amounts remains the liability of the mortgagor owed to the mortgagee, and:

(1) If the payoff statement is in connection with the sale of the real property: (i) the deed of trust or other contract lien is released, (ii) within a reasonable time after receipt of payment, the mortgagee or mortgage servicer must deliver to the title company a release of the deed of trust or other contract lien, and (iii) any proceeds disbursed at closing to or for the benefit of the mortgagor, excluding closing costs, are subject to a constructive trust for the benefit of the mortgagee to the extent of the underpayment.

(2) If the payoff statement is in connection with a refinancing of the existing home loan: (i) the lien securing the existing home loan becomes subordinate to the lien securing the new home loan, and (ii) any proceeds disbursed at closing to or for the benefit of the mortgagor, excluding closing costs, are subject to a constructive trust for the benefit of the mortgagee to the extent of the underpayment.

House Bill 558 requires the Finance Commission of Texas, as soon as practicable after its effective date, to adopt the rules, including the standard payoff statement form, required by Section 343.106. House Bill 558 further provides that a mortgage servicer is not required to comply with Section 343.106 until 90 days after the Finance Commission adopts the rules required by Section 343.106.

***Effective date.*** House Bill 558 takes effect September 1, 2011.

- REGULATION OF NONJUDICIAL FORECLOSURE ON RESIDENCES OWNED BY MEMBERS OF THE MILITARY (SB 101)

The purpose of Senate Bill 101 is to afford a safeguard in addition to the federal Servicemember's Civil Relief Act (SCRA) to prevent nonjudicial foreclosures from being carried out on homes owned by active military duty service members, whether due to a deed of trust, mortgage, or other contract lien or a lien securing an assessment payable to a condominium or other property owners' association.

In order to accomplish this purpose, Senate Bill 101 amends the following sections of the Property Code - Sections 51.002 (Sale of Real Property under Contract Lien) and 51.015 (Sale of Certain Property Owned by Member of the Military), as follows:

(1) Senate Bill 101 adds subsection (i) to Section 51.002 to require that the notice of foreclosure sale and the notice of default served on the debtor by certified mail as required by subsections (b)(3) and (d), respectively, must state the name and address of the sender of the notice and contain a statement that is conspicuous, printed in boldface or underlined type, and substantially similar to the following:

**“Assert and protect your rights as a member of the armed forces of the United States. If you are or your spouse is serving on active military duty, including active military duty as a member of the Texas National Guard or the National Guard of another state or as a member of a reserve component of the armed forces of the United States, please send written notice of the active duty military service to the sender of this notice immediately.”**

(2) Senate Bill 101 amends subsections (a) and (b) of Section 51.015 to include a lien securing the payment of an assessment or assessments to a condominium or property owners’ association as an obligation to which Section 51.015 applies.

Senate Bill 101 takes effect September 1, 2011.

- EXECUTION OF WRITTEN INSTRUMENTS RELATING TO RESIDENTIAL REAL ESTATE TRANSACTIONS (SB 1320)

In addition to amending the Business and Commerce Code and the Property Code relating to the conveyance of and transactions involving residential real estate, which will be discussed in the Part Two Legislative Update for bills effective September 1, 2011, Senate Bill 1320 also amends Section 121.005(a), Civil Practice and Remedies Code, to permit an officer authorized to take acknowledgments of written instruments to accept a current passport issued by a foreign country as proof of identity of the acknowledging person with respect to a deed or other instrument relating to a residential real estate transaction.

**Our Comments:** Although Senate Bill 1320 defines the term “residential real estate” in its amendment to the Business and Commerce Code, Senate Bill 1320 does not define “residential real estate” in its amendment to Section 121.005(a) of the Civil Practice and Remedies Code.

Senate Bill 1320 takes effect September 1, 2011.

- SCOPE AND VALIDITY OF CORRECTION INSTRUMENTS IN THE CONVEYANCE OF REAL PROPERTY (SB 1496)

***Background and Purpose.*** A long-standing practice in Texas is for a correction instrument to be filed in order to correct nonsubstantive errors in deeds of record. A Texas court recently considered a case involving foreclosure and the misuse of a correction deed and its opinion seemed to suggest that certain correction instruments might be void, particularly a correction instrument pertaining to additional property. That court decision has created an uncertainty within the real estate industry as to what can be corrected and as to the validity of

certain correction documents. To address this uncertainty Senate Bill 1496 amends the Property Code by adding Sections 5.027, 5.028, 5.029, 5.030, and 5.031.

**Section 5.027 (Correction Instruments – Generally).** Section 5.027 authorizes a correction instrument that complies with Section 5.028 (nonmaterial corrections) or Section 5.029 (material corrections) to correct an ambiguity or error in a recorded original instrument of conveyance to transfer real property or an interest in real property, including an ambiguity or error relating to the description or extent of the interest conveyed. Section 5.027 prohibits a correction instrument from correcting an ambiguity or error in a recorded original instrument of conveyance to transfer real property or an interest in real property not originally conveyed in the instrument of conveyance for purposes of a sale of real property under a power of sale under Chapter 51, Property Code, (*i.e.*, foreclosure sale) unless the conveyance otherwise complies with all requirements of Chapter 51. Section 5.027 makes a correction instrument subject to Section 13.001, Property Code, governing the validity of an unrecorded instrument.

**Section 5.028 (Correction Instruments – Nonmaterial).** Section 5.028 authorizes a person who has personal knowledge of facts relevant to the correction of a recorded original instrument of conveyance to execute a correction instrument to make a nonmaterial change that results from a clerical error, including:

(1) a correction of an inaccurate or incorrect element in a legal description, such as a distance, angle, direction, bearing or chord, a lot, block, unit, building designation or section number, an appurtenant easement, a township name or number, a municipality, county, or state name, a range number or meridian, a certified survey map number, or a subdivision or condominium name; or

(2) an addition, correction, or clarification of:

(i) a party's name, including the spelling of a name, a first or middle name or initial, a suffix, an alternate name by which a party is known, or a description of an entity as a corporation, company, or other type of organization;

(ii) a party's marital status;

(iii) the date on which the conveyance was executed;

(iv) the recording data for an instrument referenced in the correction instrument; or

(v) a fact relating to the acknowledgment or authentication.

In addition, Section 5.028 authorizes a person who executes a correction instrument relating to nonmaterial corrections to execute a correction instrument that provides an acknowledgment or authentication that is required and was not included in the recorded original instrument of conveyance.

Lastly, Section 5.028 requires a person who executes a correction instrument to:

(1) disclose in the instrument the basis for the person's personal knowledge of the facts relevant to the correction of the recorded original instrument of conveyance;

(2) record the correction instrument and evidence of notice (*see* (3) below), if

applicable, in each county in which the recorded original instrument of conveyance is recorded;  
and

(3) if the correction instrument is not signed by each party to the recorded original instrument of conveyance, to send a copy of the correction instrument and notice by first class mail, e-mail, or other reasonable means to each party to the recorded original instrument of conveyance and, if applicable, a party's heirs, successors, or assigns.

**Our Comments:** Please note that:

- (1) Section 311.005(13) of the Code Construction Act (Chapter 311 of the Government Code) defines the words "includes" and "including" as "*terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded.*" This means that Section 5.028 is not limited to the nonmaterial corrections listed in Section 5.028 and that other nonmaterial corrections not listed in Section 5.028 are also permissible.
- (2) Section 5.028 permits a correction instrument correcting only a nonmaterial error to be executed by any person who has personal knowledge of facts relevant to the correction, even if that person is not one of the parties to the recorded original instrument of conveyance being corrected.
- (3) Section 5.028 does not specify the type of information the notice must contain nor the manner of recording it (*i.e.*, must the notice be attached to the correction instrument or may it be a separate instrument suitable for recording?).

***Section 5.029 (Correction Instruments – Material).*** Section 5.029 authorizes the parties to the original transaction or the parties' heirs, successors, or assigns, as applicable, to execute a correction instrument (which may include nonmaterial corrections) to make a material correction to the recorded original instrument of conveyance, including a correction to:

(1) add (i) a buyer's disclaimer of an interest in the real property the subject of the recorded original instrument of conveyance; (ii) a mortgagee's consent or subordination to a recorded document executed by the mortgagee or an heir, successor, or assign of the mortgagee; or (iii) land to a conveyance that correctly conveys other land;

(2) remove land from a conveyance that correctly conveys other land; or

(3) accurately identify a lot or unit number or letter of property owned by the grantor that was inaccurately identified as another lot or unit number or letter of property owned by the grantor in the recorded original instrument of conveyance.

Section 5.029 requires a correction instrument that makes a material correction to a recorded original instrument of conveyance to be (i) executed by each party to the recorded original instrument of conveyance or, if applicable, a party's heirs, successors, or assigns, and (ii) recorded in each county in which the recorded original instrument of conveyance is recorded.

**Our Comments:**

- (1) Unlike Section 5.028, Section 5.029 requires all parties who executed the recorded original instrument of conveyance to execute a correction instrument making a material correction (even when the correction instrument also makes a nonmaterial correction).
- (2) As stated in the foregoing Our Comments for Section 5.028, Section 311.005(13) of the Code Construction Act defines the words “includes” and “including” as “*terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded.*” This means that Section 5.029 is not limited to the material corrections listed in Section 5.029 and that other material corrections not listed in Section 5.029 are also permissible.
- (3) Section 5.029 contains confusing language regarding the execution of the correction instrument. First, it authorizes “*the parties to the original transaction*” to execute the correction instrument. Second, it requires the correction instrument to be “*executed by each party to the recorded original instrument of conveyance.*” Nothing in the text of Section 5.029, or the other Sections enacted by Senate Bill 1496, indicates whether the above quoted language is synonymous or actually means different parties. If it does mean different parties, then “*the parties to the original transaction*” would mean all parties to the original transaction, including parties who did not execute the recorded original instrument of conveyance.

***Section 5.030 (Correction Instrument – Effect).*** Section 5.030 provides that a correction instrument that complies with the above provisions relating to nonmaterial or material corrections is: (i) effective as of the effective date of the recorded original instrument of conveyance, (ii) prima facie evidence of the facts stated in the correction instrument, (iii) presumed to be true, (iv) subject to rebuttal, and (v) notice to a subsequent buyer of the facts stated in the correction instrument. Section 5.030 further provides that a bona fide purchaser of property that is subject to a correction instrument may rely on the correction instrument against any person making an adverse or inconsistent claim.

***Section 5.031 (Correction Instruments – Before 9-1-11).*** Section 5.031 provides that a correction instrument recorded before September 1, 2011, that substantially complies with the above provisions relating to nonmaterial or material corrections and that purports to correct a recorded original instrument of conveyance is effective to the same extent as provided by Section 5.030 unless a court of competent jurisdiction determines otherwise.

**Our Comments:** Our reading of the text leads us to conclude that Sections 5.027 – 5.031 enacted by Senate Bill 1496 apply only to deeds and other instruments that convey real property or an interest in real property (*e.g.*, a lease) and not to other real property instruments, such as deeds of trust and other lien instruments, transfers and other assignments of lien, releases, modifications, etc., because “instrument of conveyance” is not defined by Senate Bill 1496. (*See* Section 5.021, Property Code, and Section 311.011, Government Code, for authority.)

Senate Bill 1496 take effect September 1, 2011.

- SELLER'S DISCLOSURE OF A HAZARDOUS DRAIN IN A SWIMMING POOL, HOT TUB, OR SPA ON RESIDENTIAL REAL PROPERTY (SB 710)

Section 5.008(a) of the Property Code requires a seller of residential real property comprising not more than one dwelling unit to provide the purchaser with a written seller's disclosure notice. The disclosure must reveal details concerning the condition of the property and must be substantially similar to the "Seller's Disclosure Notice" form in Section 5.008(b).

Senate Bill 710 amends paragraph 4. of the Seller's Disclosure Notice form in Section 5.008(b) to include a space for the seller to indicate if the seller is aware of the presence of a single blockable main drain in a pool, hot tub, or spa located on the property and adds a statement to the disclosure notice warning that a single blockable main drain may cause a suction entrapment hazard.

Senate Bill 710 also adds Section 5.008(g) to provided the following definitions:

"(1) 'Blockable main drain' means a main drain of any size and shape that a human body can sufficiently block to create a suction entrapment hazard.

"(2) 'Main drain' means a submerged suction outlet typically located at the bottom of a swimming pool or spa to conduct water to a recirculating pump."

Senate Bill 710 takes effect September 1, 2011, and applies only to a transfer of property occurring on or after that date. A transfer of property occurring before September 1, 2011, is not subject to the amendments to Section 5.008 made by Senate Bill 710. A transfer of property occurs before September 1, 2011, if the contract binding the purchaser to purchase the property is executed before September 1, 2011.

- SELLER'S DISCLOSURE OF NATURAL OR LIQUID PROPANE GAS ON RESIDENTIAL REAL PROPERTY (HB 3389)

Section 5.008(a) of the Property Code requires a seller of residential real property comprising not more than one dwelling unit to provide the purchaser with a written seller's disclosure notice. The disclosure must reveal details concerning the condition of the property, including whether the property has natural gas or liquid propane gas lines, and must be substantially similar to the "Seller's Disclosure Notice" form in Section 5.008(b).

House Bill 3389 amends paragraph 1. of the Seller's Disclosure Notice form in Section 5.008(b) to require the seller's disclosure notice to distinguish whether the gas source of a property fueled by liquid propane gas lines is located on the property or is community based and therefore captive.

House Bill 3389 takes effect September 1, 2011, and applies only to a transfer of property occurring on or after that date. A transfer of property occurring before September 1, 2011, is not subject to the amendment to Section 5.008 made by House Bill 3389. A transfer of property occurs before September 1, 2011, if the contract binding the purchaser to purchase the property is executed before September 1, 2011.

**Our Comments:** According to the House Research Organization's bill analysis, House Bill 3389 increases transparency for home buyers in those areas of Texas where natural gas is unavailable and developers have installed underground propane lines from a single large propane tank to serve individual homes in a subdivision. Many buyers are unaware of the implications of being part of this captive community propane system. As propane gas is an unregulated energy source in Texas, these consumers may be subject to significant rate increases. Also, some deed restrictions prohibit the buyer from switching to electric appliances, and homeowners in a captive system often do not realize that they will be unable to choose their gas company.

- **MAXIMUM \$30 CHARGE FOR A DISHONORED PAYMENT DEVICE (HB 2793)**

Section 3.506(a), Business and Commerce Code, defines a payment device as a check, item, paper or electronic payment, or other payment device used as a medium for payment. Current Section 3.506(b) allows the holder of a dishonored payment device to charge the drawer or endorser a "reasonable processing fee of not more than \$30."

House Bill 2793 amends Section 3.506(b) to allow a "maximum processing fee of \$30" for a dishonored payment device and repeals the current requirement that the fee be "reasonable."

**Our Comments:** According to the House Research Organization's bill analysis, it was necessary to amend Section 3.506(b) to avoid the lawsuits that have occurred in other states that challenge the meaning of the word "reasonable," and the changes to Section 3.506(b) make the law clear by specifying a maximum amount.

HB 2793 takes effect September 1, 2011.

- **RETAINAGE NOTICE UNDER CONSTRUCTION CONTRACTS (HB 1390)**

House Bill 1390 revises the retainage notice provisions in Chapter 53 of the Property Code (Mechanic's, Contractor's, or Materialman's Lien) by amending Sections 53.053(e), 53.057, 53.103, 53.105(a), 53.106(a) and (d), 53.107(b) and (d), 53.159 and 53.160(b).

**Our Comments:** These amendments to Chapter 53 of the Property Code will mainly be of interest to those lenders who make construction loans – both interim and construction-permanent loans.

**Background.** As most of you are aware, if a contractor, subcontractor, or supplier of labor or materials used in the construction, repair or improvement of real property is not paid, the unpaid contractor, subcontractor, or supplier may perfect a mechanic's and materialman's lien against the property and/or the improvements to secure payment and, if the debt is not paid, the lien may be foreclosed. Chapter 53 of the Property Code governs who is entitled to a mechanic's and materialman's lien, procedures for perfecting the lien, and what actions may be taken after the lien is perfected.

**Section 53.053 (Accrual of indebtedness).** House Bill 1390 amends Section 53.053(e) by adding the words "the earliest of" and "terminated" so that it reads as follows:

“(e) A claim for retainage accrues on the earliest of the last day of the month in



which all work called for by the contract between the owner and the original contractor has been completed, finally settled, terminated, or abandoned.”

**Our Comments:** The retainage the subject of the above amendment is contractual retainage – *i.e.*, the amount defined in Section 53.001(11) that is specified to be retained in an agreement or contract between the claimant and the original contractor or between the claimant and a subcontractor. It does not include, and is not to be confused with, the statutory retainage required by Section 53.101.

***Section 53.057 (Notice to owner of contractual retainage claim).*** House Bill 1390 amends the contractual retainage notice requirements in Section 53.057 for notice by a claimant.

The first amendment to subsection (b) requires the claimant to give notice to the owner of contractual retainage not later than the earlier of:

(1) the 30th day after the date the claimant’s agreement providing for retainage is completed, terminated, or abandoned; or

(2) the 30th day after the date the original contract is terminated or abandoned.

The second amendment to subsection (b) adds subsection (b-1) to amend the last sentence in current subsection (b) in order to change the notice period in which the claimant must notify the original contractor of the claimant’s contractual retainage agreement with a subcontractor to the same period specified in amended subsection (b) above.

The amendment to subsection (c) replaces the existing content requirements for the notices required by subsections (b) and (b-1) with new ones requiring that the notices must generally state the existence of a requirement for retainage and contain the name and address of the claimant and, if the agreement is with a subcontractor, the name and address of the subcontractor.

The amendment to subsection (d) deletes the requirement that the notices be sent by registered or certified mail.

**Our Comments:** The contractual retainage the subject of the above amendments to subsections (b), (c) and (d) is not to be confused with the statutory retainage required by Section 53.101 - *see Our Comments* under Section 53.053 immediately above.

***Section 53.057 (Additional procedure to obtain a lien on statutory retainage).*** Section 53.103 provides that under an original contract for which a mechanic’s lien may be claimed, a claimant has a lien on the funds required to be retained by the owner pursuant to Section 53.101 (*i.e.*, statutory retainage) if the claimant (i) satisfies the notice requirements of Chapter 53 and (ii) files an affidavit claiming a lien not later than the 30th day after the work is completed, the original contract is terminated, or the original contractor abandons performance thereunder, whichever is earliest. All claimants – *i.e.*, claimants who have agreed to contractual retainage and claimants who have not agreed to contractual retainage - may use the procedure under Section 53.103 to perfect a lien on statutory retainage. House Bill 1390 adds subsections (f) and (g) to Section 53.057 to provide another procedure, in addition to the existing procedure in

Section 53.103, for a contractual retainage claimant to perfect a lien on statutory retainage.

New subsection (f) provides that the claimant has a lien on, and the owner is personally liable to the claimant for, the statutory retainage required by Section 53.101 if the claimant:

- (1) gives notice in accordance with Section 53.057 (*see above*) and:
  - (A) complies with Subchapter E ( *i.e.*, Sections 53.101 through 53.107); or
  - (B) files a lien affidavit not later than the earliest of:
    - (i) the date required for filing an affidavit under Section 53.052;
    - (ii) the 40th day after the date stated in an affidavit of completion as the date of completion of the work under the original contract, if the owner sent the claimant notice of an affidavit of completion in the time and manner required (*see* Section 53.106);
    - (iii) the 40th day after the date of termination or abandonment of the original contract, if the owner sent the claimant a notice of such termination or abandonment in the time and manner required (*see* Section 53.107); or
    - (iv) the 30th day after the date the owner sent to the claimant to the claimant's address contained in the subsection (c) notice for contractual retainage a written notice of demand for the claimant to file the affidavit claiming a lien; and
- (2) gives notice of the filed affidavit required by Section 53.055.

New subsection (g) provides that the owner's written notice of demand in (f)(1)(B)(iv) above:

- (1) must contain the owner's name and address and a description (legally sufficient for identification) of the real property on which the improvement is located;
- (2) must state that the claimant must file the lien affidavit not later than the 30th day after the date the owner's demand is sent; and
- (3) is effective only for the amount of contractual retainage earned by the claimant as of the day the owner's demand was sent.

**Section 53.103 (Lien on statutory retainage).** House Bill 1390 amends paragraph (2) of Section 53.103 by adding "except as allowed by Section 53.057(f)," to provide an exception to the requirements of paragraph (2) for a contractual retainage claimant who uses the procedure in Section 53.057(f) to perfect a lien on statutory retainage.

**Section 53.105 (Owner's liability for failure to retain).** House Bill 1390 makes technical amendments to subsection (a) of Section 53.105 by adding the words "Subchapter C or" and replacing the word "chapter" with the word "subchapter."

**Section 53.106 (Affidavit of Completion).** Under Section 53.106, an owner may file an affidavit of completion stating that the improvements have been completed and the date of completion. House Bill 1390 amends subsection (a)(6) of Section 53.106 to read as follows:

"(6) a conspicuous statement that a claimant may not have a lien on retained funds unless the claimant files an ~~the~~ affidavit claiming a lien not later than the 40th ~~30th~~ day after the date the work under the original contract is completed ~~[of completion]~~."

House Bill 1390 makes technical amendments to subsection (d) of Section 53.106 by adding the words “and Section 53.057” in two places to specify that filing the affidavit of completion is also pima facie evidence of the date of completion for Section 53.057.

**Section 53.107 (Owner’s notice of termination or abandonment).** Under Section 53.107(a) an owner must give notice of termination or abandonment of the original contract not later than the 10th day after the date of termination or abandonment to each subcontractor who has previously notified the owner. Section 53.107(b) specifies the contents of the owner’s notice. House Bill 1390 amends the conspicuous statement in the notice required by subsection (b)(7) by increasing the claimant’s time for filing a lien affidavit on the retained funds from the 30th day to the 40th day after the date of termination or abandonment.

House Bill 1390 amends Section 53.107(d) to read as follows:

“(d) If an owner is required to send a notice to a [A] subcontractor under this section and fails to send the notice, the subcontractor is not required to comply with Section 53.057 to claim retainage and may claim a lien by filing a lien affidavit as prescribed by Section 53.052 [who fails to file a lien affidavit in the time prescribed by Section 53.103(2) has a lien to the extent authorized under this subchapter if: (1) the subcontractor otherwise complies with this chapter; and (2) the owner did not provide the subcontractor notice as required by this section].”

**Our Comments:** Subsection (e) states that Section 53.107 does not apply to a residential construction project.

**Section 53.159 (Obligation to furnish information).** Sections 53.159(a) and (b) require an owner and an original contractor, respectively, to furnish certain specified information within 10 days after a request for the information by a person who furnished labor or material or work for the project. House Bill 1390 amends Sections 53.159(a) and (b) to include in this information the date on which the original contract for the project was executed.

House Bill 1390 adds Section 53.159(g) to provide that if a subcontractor requests the execution date of the original contract from the owner and does not receive this information within the prescribed 10-day period, the subcontractor is not required to comply with Section 53.057 and may perfect a lien for retainage by filing a lien affidavit under Section 53.052. Section 53.159(g) expires September 1, 2013.

**Section 53.160 (Summary Motion to remove invalid or unenforceable lien).** House Bill 1390 amends the grounds specified in Section 53.160(b) for objecting to the validity or enforceability of a claim or lien in a motion to remove the claim or lien, by adding to subsection (b)(4) the requirement that the deadlines for perfecting a lien claim for retainage under Chapter 53 have expired. House Bill 1390 also makes the following technical amendment to subsection (b)(5): “all funds subject to the notice of a claim to the owner and a notice regarding the [perfection of a claim against the statutory] retainage have been deposited in the registry of the court and the owner has no additional liability to the claimant.”

**Effective date.** House Bill 1390 takes effect September 1, 2011, and applies only to a lien claim under a subcontract where the original contract was entered into on or after that date.

- DESIGNATING *NYMPHAEA* TEXAS DAWN AS THE OFFICIAL WATERLILY OF TEXAS (HCR 24):

*Nymphaea* Texas Dawn is a hybrid created in 1985 by Texas resident Kenneth Landon, a world-renowned expert in the field of *Nymphaea* and the director of the International Waterlily Collection in San Angelo - recognized as one of the most important exhibits of its kind in the world, and the focal point of the 2010 symposium of the International Waterlily & Water Gardening Society (IWGS). The presence of this widely admired facility has given Texas great prominence among water gardening enthusiasts.

In 1990, *Nymphaea* Texas Dawn received the American Award from the IWGS and is listed by other hybridizers as a parent for more than a dozen named waterlilies.

A hardy and exceptionally lovely plant, *Nymphaea* Texas Dawn is described as one of the most stunning yellow waterlilies to be introduced in more than a century, and frequently blooms 10 inches above the surface of the water in clusters of six or more. In early spring, the base of the petals produces a light orange glow, and in late summer and fall, the flowers may suffuse with pink.

As this noteworthy species is the first waterlily to be named for Texas, and as its unique beauty and resilient character make it a fitting symbol for the Lone Star State, the 82nd Legislature of the State of Texas designated *Nymphaea* Texas Dawn as the official State Waterlily of Texas.

No attempt was made by this legislative update to summarize all the bills effective on September 1, 2011, that could affect mortgage lending or mortgage lenders or brokers. This legislative update is simply an attempt to advise our clients as to those bills effective on September 1, 2011, that we believe are of interest to our clients. The above summaries are not complete descriptions of these bills, and you are urged to review the entirety of any bill summarized above that you believe affects your business. You may request copies of these bills from us, if you so desire.

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