MECHANIC'S LIEN "REMOVABLES": REPRESENTING THE CONTRACTOR IN DEFAULT SITUATIONS

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Biographical Information

Thomas J. "Tom" Walthall, Jr.

Thomas J. "Tom" Walthall, Jr. joined The Gardner Law Firm in 1991. Mr. Walthall received his undergraduate degree from The University of Texas at Austin with a Bachelor of Science in Mechanical Engineering with Honors in 1977. While at the University of Texas he was a member of the Pi Tau Sigma and Tau Beta Pi engineering academic honor societies. He received his Doctorate of Jurisprudence from The University of Texas School of Law in 1980.

Mr. Walthall was licensed to practice law in Texas and admitted to the Texas Bar in 1980. He was admitted to practice before the United States District Courts for the Western District of Texas in 1983. He is a member of the San Antonio Bar Association, Texas Bar Association (Construction Law Section) and is currently serving by appointment of the State Bar President as a member of the Editorial Committee in charge of writing and editing the State Bar's Real Estate Forms Book. He was the author, and is responsible for the mechanic's lien chapter of the Texas Real Estate Forms book.

Mr. Walthall's law practice consists primarily of representation of clients involved in the building and construction industry. His construction law practice includes representation of all areas of the industry, with particular emphasis on suppliers, subcontractors and engineers.

Mr. Walthall gives several seminars each year to local construction trade organizations regarding construction contracting and contracts, mechanics liens, and bond claims. Such seminars have included presentations to the American Subcontractor's Association, National Association of Credit Managers, United States Tennis Court & Track Builders Association, Steel Joist, Deck and Construction Supply, Dunsite Credit Corporation, Associated Builders & Contractors. He also presented papers and talks regarding mechanic's lien and construction bond claims at the following seminars: 1997 and 2000 Advanced Real Estate Courses for the State Bar of Texas, Advanced Real Estate Drafting Course of the State Bar of Texas in 1998, and University of Texas Law School's Mortgage Lending Institute in 1998 (mechanic's cliens) and 2000 (bond claims). Mr. Walthall also regularly provides bond, lien and construction contract negotiation seminars on an individual or small group basis for several clients.

Mr. Walthall has handled and tried arbitration and court trials, both jury and non-jury, in the construction law area, including bond claim, lien claim, Prompt Pay Act, Texas Construction Trust Fund cases for subcontractors and suppliers, delay/impact litigation, Miller Act litigation, bankruptcy discharge litigation regarding the Texas Construction Trust Fund Act and construction defect litigation.

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1. THE TEXAS STATUTORY OR CONSTITUTIONAL MECHANIC'S LIEN - PREREQUISITE TO REMOVABILITY.

a. First - "Get a Lien"

No discussion of "removables" can take place without a few understandings, and some misconceptions straightened about perfecting a claim for an involuntary mechanics lien.

No "removables" claim can be asserted, or discussed, without first considering whether the mechanic's lien claimant has in fact perfected his/her lien in accordance with the Texas Property Code, Ch. 53 or Texas Constitution Art. XVI, Section 37. The Texas Supreme Court discussed the importance of compliance with the notice and affidavit filing procedures in ***First National Bank in Graham v. Sledge,*** **653 S.W.2d 283 Tex. 1983**.

> "Our first question is whether the subcontractors have perfected statutory liens under the Hardeman Act. [FN1] Because a subcontractor is a derivative claimant and, unlike a general contractor, has no constitutional, common law, or contractual lien on the property of the owner, a subcontractor's lien rights are totally dependent on compliance with the statutes authorizing the lien. ***Da-Col Paint Manufacturing Co. v. American Indemnity Co***., 517 S.W.2d 270 (Tex.1974). However, substantial compliance with the statutes is sufficient to perfect a lien under the Act. ***Conn, Sherrod & Co. v. Tri- Electric Supply Co.,*** 535 S.W.2d 31 (Tex.Civ.App.--Tyler 1976, writ ref'd n.r.e.)."

Original Contractors have direct privity of contract with the owner of the project, whose interest in the real property is being improved. Original contractors, or general contractors, with direct privity of contract with the project owners have a "Constitutional" Lien. The Texas Constitution, Art. XVI, Sect. 37 provides an additional, separate mechanic's lien right called a "Constitutional Lien" which is separate from, and in addition to, the statutory lien under Texas Property Code, Ch. 53. The Texas Constitutional Lien requires no special notice to owners or general contractors. It is considered "self-enacting", and arises merely from the claimant's performance of the work. Two important distinguishing features of Constitutional Liens are noted: a. such liens arise only in favor of "original contractors" (persons with contracts directly with the owner of the property interest improved); and b. bona fide purchasers or lien holders without notice of the Constitutional Lien claim do not take subject to it. Even though the Constitutional Lien is considered self enacting, the claimant must as a practical matter take some action to put the world on notice of the Constitutional Lien claim prior to an intervening sale or other encumbrance of the property. Such notice might be given by either filing an affidavit claiming the Constitutional Lien in the real estate records in the county where the property is located, or by filing suit with Lis Pendens notice filed. No special form of notice is applicable, the Claimant is merely placing constructive notice of the Constitutional Lien claim in the Real Estate records by filing the Affidavit.

Be that as it may, the claimant must perfect the lien claim, either by putting the owner, and others on notice of a Constitutional Lien claim, or by obeying the notice and lien affidavit filing and notice requirements of the Texas Property Code Ch. 53.

b. Foreclose the Lien in Court.

Countless mechanic's lien clients are out there with incorrect notions of "macho repo" (self help, summary carrying off whatever they furnished when they aren't paid). Self help repo is an urban construction job site legend. These improper self help stories of course occur regardless of perfection of a mechanic's lien or notice of a Constitutional Lien to the owner.

However, the statutory mechanic's lien or Constitutional lien must be perfected, and established and foreclosed by Court action only. No self help remedy exists for removal of anything. My favorite story about "mach-repo" was told to me by my late partner Holmes Bennett. Holmes said his client called him from jail. This client had convinced himself (with no input from Bennett I can assure you) that he had furnished removable items for the project and that he'd save lawyer fees, and help keep the Court system uncluttered by going himself to the job site and getting his stuff back, "which nobody had paid me for". Problem: this was some kind of State project – like a state office building. A Texas Ranger knocked on his door later that evening, cuffed him and took him "downtown". The story was that he called Bennett from jail. He was then tutored about bond claim perfection (public works can't be "liened"), and the doctrine of bail bonds. (Always get the name of a quick bail bondsman before you remove your stuff.)

Bennett's talk to construction industry groups on this subject, which he loved to give, was called "How to Avoid Getting Paid and Get Sued".

The unpublished case of ***RDI Mechanical, Inc. v. WPVA, L.P.*** 2008 WL 920315 (Tex.App.-Hous. (1

Dist.), 2008) indicates that in the lien foreclosure lititgation, the defendant must plead the prior foreclosure as an affirmative defense.

c. Basics of Statutory Perfection.

The mechanic's lien statutes "....are very lengthy, have been subjected to several revisions,***286** and are not exactly a model of clarity." ***First National Bank, supra at 285-286.***

The original contractor simply records an affidavit or other notice in the real estate records to notify of his/her Constitutional claim. However the statutory claimant, including all subcontractors and suppliers under the Original contractor, must substantially comply with dreaded Ch. 53 of the Property Code.

Here is an abbreviated discussion and "handy" charts of deadlines:

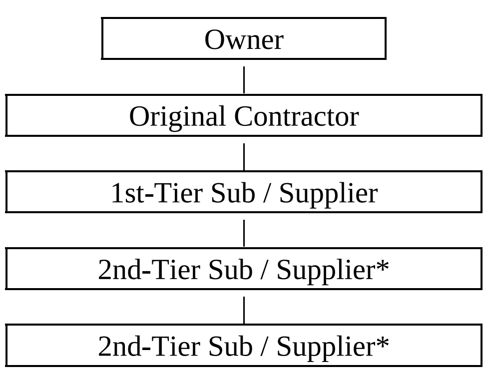
(a.) <u>"First-Tier" Subs/Suppliers</u>

These are persons or entities with a subcontract, purchase order or other agreement directly with the Original Contractor. These people must provide notice to the Owner according to the statutory deadlines, but need not provide separate additional notices to the Original Contractor.

(b.) <u>"Second-Tier" and Lower Tier Subs/Suppliers</u>

These persons or entities have subcontracts or agreements with a First-Tier, Second-Tier or lower-tier Subcontractor. In other words, these people have no contract with the Original Contractor. Therefore, they are required to give notice to the Original Contractor, plus additional notice to the Owner as a prerequisite to perfecting a valid mechanic's lien.

The "food chain" of parties to a construction project may therefore look like this:



*All tiers below "1st-tier" are treated the same, as "2nd-tier" claimants

(c.) <u>Time Charts for Notices and Filing Mechanic's Lien Affidavits</u>

The following discussion, and charts provide the deadlines for filing the Mechanic's Lien Affidavit, plus sending the notices required. The deadlines for notice and lien filing are different depending on the type of project: residential and non-residential. A chart therefore follows for each type project.

<u>TIME LIMITS</u>

A. <u>RETAINAGE CLAIMS:</u>

All projects, residential and non-residential, which are not bonded, require special advance notice if the Claimant is to later properly perfect a claim for unpaid retainage. <u>Texas Property Code</u> §53.057. The claimant who gives the retainage notice referenced below (F*orm 7*) by the time stated below does not have to give other notices with regard to retainage, except the notice of the filing of the Mechanics Lien Affidavit by the date stated set out in the sections which follow. Note however that a claim consisting in part of retainage and in part of other billings on a job must comply with this section with regard to the retainage notice, and also the other notices otherwise applicable as set out in paragraph B, "OTHER CLAIMS".

(1) 2nd Tier Claimants(Subs/Suppliers with no contract with Original Contractor): NOTICE TO ORIGINAL CONTRACTOR AND OWNER -- Not later than the fifteenth (15th) day of the <u>second</u> month following <u>THE FIRST</u> month of delivery/work.

(2) BY 1ST TIER CLAIMANTS (Subs/Suppliers with contract with the Original Contractor) NOTICE TO OWNER -- Not later than the fifteenth (15th) day of the <u>second</u> month following <u>THE FIRST</u> month of delivery/work.

B. <u>OTHER CLAIMS:</u>

a. Non-Residential Projects:

{Capitalized sub-paragraph letters below correspond with the columns on the charts which follow on pages 7 and 8}

(1) NOTICE TO ORIGINAL CONTRACTOR BY 2nd TIER CLAIMANTS (Subs/Suppliers with no contract with Original Contractor -- Not later than the fifteenth (15th) day of the <u>second</u> month following <u>each</u> month of delivery/work.[1]

(2) NOTICE TO OWNER AND TO ORIGINAL CONTRACTOR -- all "derivative" claims. (1st Tier

[1] See however ***Suretec Ins. Co. v. Myrex Industries***, 232 S.W.3d 811 (Tex.App.-Beaumont Aug 16, 2007) (NO. 09-06-433CV), review denied (Feb 15, 2008) in which the Court held that if the 15th falls on a weekend or holiday the deadline is NOT extended to the next business day (which is the case for other statutory periods of time under Tex. Gov't. Code §311.014).

and 2nd Tier Subs). -- Not later than the fifteenth (15th) day of the third month following each month of delivery/work.

(3) TIME LIMITS FOR LIEN AFFIDAVITS -- The earlier of the following dates:

(a.) fifteenth (15th) day of the fourth calendar month after the earliest of the following:

1. For a subcontractor, the last day of the last month in which his labor was performed or material furnished.
2. For a contractor furnishing specially fabricated material, the last day of the last month in which: (a) the material was furnished; (b) the material would have been furnished; or (c) the owner, contractor, or subcontractor breached or terminated the contract or subcontract with the Claimant.
3. For claims for unpaid retainage, the last day of the month of completion of the whole project (or termination or abandonment of the project); **OR**

(b). **WARNING:** Within 30 days of final completion, termination or abandonment of project to share in payment from owner's required retainage.[2]

(NOTE: Warranty work does not count to extend time of final completion.)

TIME CHART
NON RESIDENTIAL PROJECTS

Month of Activity described in A, B or C:	A 2nd tier Notice to Original Contract or by: *Form 1*	B First Tier Notice to Owner and Second Tier Notice to Owner and Original Contractor by: *Form 2*	C* File Lien Affidavit by earlier of following dates or 30 days after final completion, termination or abandonment of overall project: *Form 4 & 5*
Jan.	March 15	Apr. 15	May 15
Feb.	Apr. 15	May 15	June 15
March	May 15	June 15	July 15
Apr.	June 15	July 15	Aug. 15
May	July 15	Aug. 15	Sept. 15
June	Aug. 15	Sept. 15	Oct. 15
July	Sept. 15	Oct. 15	Nov. 15
Aug.	Oct. 15	Nov. 15	Dec. 15
Sept.	Nov. 15	Dec. 15	Jan. 15
Oct.	Dec. 15	Jan. 15	Feb. 15
Nov.	Jan. 15	Feb. 15	March 15
Dec.	Feb. 15	March 15	Apr. 15

*The deadlines in column C are for ***filing the affidavit*** – in non- residential situations. These are based on the **last** calendar month in which the claimant delivered labor or material. Determine the affidavit filing date (Column C) corresponding with the **last** month in which the claimant furnished labor or delivered material in the "Month of Activity" column on the left. Remember however that the affidavit must be filed by the thirtieth day after completion, termination or abandonment of the entire project, if earlier than the date specified by this Column C.

b. Residential Projects:

{Capitalized paragraph letters correspond with the chart columns below}

2 In reaction to the Supreme Court decisions in the Page v. Structural Wood Components, Inc., 102 S.W.3d 720, 46 Tex. Sup. Ct. J. 561 (Tex. 2003) and Page v. Marton Roofing, Inc., 102 S.W.3d 733, 46 Tex. Sup. Ct. J. 571 (Tex. 2003) cases, the Legislature added to section §53.103, and added §53.107 to require a new owner notice of termination or abandonment. For original contracts executed after September 1, 2005, involving non residential projects only, a notice of termination or abandonment is required of owners. The notice must be sent not later than the 10th day after the date an original contract is terminated or the original contractor abandons the project. The owner is to send this notice to every claimant who has (a) provided the owner with notice of a lien claim, or (b) sent a request to the owner for notice of termination or abandonment. Tex. Property Code §§53.103, 53.107. If the non-residential claimant fails to file a lien affidavit within the thirty days of the deadlines in §53.103 (completion, termination or abandonment), but the owner has also failed to give the described notice of termination or abandonment (§ 53.107), then the claimant will nevertheless have a lien for his share of retained funds if he has otherwise complied with the statutory prerequisites for lien perfection. If the owner fails to send the notice of termination or abandonment to a claimant then that particular claimant is not required to file the lien affidavit under §53.103 within thirty days of termination or abandonment in order to have a lien under §§53.101 – 106.

A. NOTICE TO OWNER AND TO ORIGINAL CONTRACTOR -- all "derivative" claims. (i.e. 1st Tier and 2nd Tier Subs) -- Not later than the fifteenth (15th) day of the second month following each month of delivery/work.1

B. TIME LIMITS FOR LIEN AFFIDAVITS -- Not later than the earlier of the following dates:

(a) fifteenth (15th) day of the third calendar month after the earliest of the following:

1. For a subcontractor, the last day of the last month in which his labor was performed or material furnished.
2. For a contractor furnishing specially fabricated material, the last day of the last month in which: (a) the material was furnished; (b) the material would have been furnished; or (c) the owner, contractor, or subcontractor breached or terminated the contract or subcontract with the Claimant
3. For claims for unpaid retainage, the last day of the month of completion of the whole project (or abandonment of the project). ***OR***

*(b.) **WARNING**: To share in payment from owner's required retainage, must file within 30 days of final completion, termination or abandonment of project. (NOTE: Warranty work does not count to extend time.) 2

TIME CHART
RESIDENTIAL PROJECTS

Month of Activity described in A, B or C above:	A First Tier and Second Tier Notice to Owner and Original Contractor by: *Forms 2 & 3*	B* File Lien Affidavit by earlier of following dates or 30 days after final completion of overall project: *Forms 4 & 5*
Jan.	March 15	April 15
Feb.	April 15	May 15
March	May 15	June 15
April	June 15	July 15
May	July 15	Aug. 15
June	Aug. 15	Sept. 15
July	Sept. 15	Oct. 15
Aug.	Oct. 15	Nov. 15
Sept.	Nov. 15	Dec. 15
Oct.	Dec. 15	Jan. 15
Nov.	Jan. 15	Feb. 15
Dec.	Feb. 15	March 15

2. "REMOVABLES" - THE GENERAL RULE.

The "removables doctrine" says that a mechanic's lien claim can be superior to a prior recorded deed of trust or other lien if the particular improvements (items which are the subject of the lien) pass the following tests: 1. the improvements can be removed without material injury to the land; 2. the improvements can be removed without material injury to the preexisting improvements, and 3. the improvements can be removed without material injury to the improvements removed. Also, of late the cases say, that the lien claimant must have actually the furnished the stuff they are attempting to "remove". ***Dorsett Bros. Concrete Supply, Inc. v. Safeco Title Ins. Co.,*** 880 S.W.2d 417 (Tex.App.-Hous. (14 Dist.) 1993) writ denied. Thus making some lien claimants "more equal" than others.

Construction lenders of course insist on filing their Deed of Trust prior to any visible commencement of work on the site in order to obtain priority over any subsequent mechanic's lien claimants. The lender's problem, however, arises from a long series of cases, including ***Exchange Savings and Loan Association v. Monocrete, Ltd.,*** 629 S.W.2d 34 (Tex. 1982), and ***First National Bank in Dallas v. Whirlpool***, 517 S.W.2d 262 (Tex. 1974), which hold that the mechanic's lien claimant has priority over the previously filed Deed of Trust lien, and may foreclose to the extent the claimant furnished "removables." This is so even though the lender filed its Deed of Trust before construction commenced. Prior foreclosure under the Deed of Trust does not affect the lien claimant's "removable" claim.

The above cases, and a myriad of others specifically applying the "removables" doctrine hold as follows: The claimant may foreclose in spite of the prior lender's deed of trust on the "removable" items, which meet the three pronged test stated above. Lots of cases exist determining which items are removable and which are not. ***Occidental Nebraska Federal Savings Bank v. East End Glass Co.***, 773 S.W.2d 687 (Tex.App -- San Antonio 1989, no writ); and ***Richard H. Sykes, Inc. v. L&N Consultants, Inc.***, 586 (S.W.2d 950) (Tex.Civ.App -- Waco 1979, writ ref'd n.r.e.).

In addition, in the unpublished opinion of ***GCI GP, LLC v. Stewart Title Guar. Co***. 2009 WL 943777 (Tex.App.-Hous. (1 Dist.) 2009) the Court considered the issue of whether the mortgagee's title insurance policy covered a mechanic's lien removables claim. The Court held, "Accordingly, we conclude that the title policy, pursuant to section 6 and within the extent of its provisions, provides indemnity for losses or damages resulting from mechanic's liens on removable improvements."
Id. *@ 8.*

3. HISTORY OF REMOVABLES.

Eldon Youngblood has written many papers on the historical progression of this doctrine. See 12 St. Mary's L.J. 889 Saint Mary's Law Journal 1981 Symposium: Real Estate Finance--An Emphasis on Texas Law COPING WITH TEXAS MECHANICS' LIENS: A LENDER'S GUIDE TO PRIORITIES Eldon L. Youngblood.

a. History of 3 Step Removables Test.

The "removables" test: (1.) the improvements can be removed without material injury to the land; (2.) the improvements can be removed without material injury to the preexisting improvements, and (3.) the improvements can be removed without material injury to the improvements removed.

The basis for Removables lies in the Mechanic's Lien statute. Section 53.123 provides:

> "§ 53.123. Priority of Mechanic's Lien Over Other Liens
>
> (a) Except as provided by this section, a mechanic's lien attaches to the house, building, improvements, or railroad property in preference to any prior lien, encumbrance, or mortgage on the land on which it is located, and the person enforcing the lien may have the house, building, improvement, or any piece of the railroad property sold separately.
>
> (b) The mechanic's lien does not affect any lien, encumbrance, or mortgage on the land or improvement at the time of the inception of the mechanic's lien, and the holder of the lien, encumbrance, or mortgage need not be made a party to a suit to foreclose the mechanic's lien."

The foregoing statutory language has not been substantially changed since its first version adopted as a part of the earliest legislation on Mechanic's Liens.

Although the first cases interpreting this language declared the mechanic's lien superior to the mortgagee's interest in the improvements, over the years Courts have come to the three-step "removability" test defined above. ***First Nat'l Bank v. Whirlpool Corp., 517 S.W.2d 262, 266*** (Tex. 1974).

The early cases distinguished between new construction and renovation or addition to existing structures. The removable test really originally intended to protect the interest of the mortgagee secured by *preexisting* improvements, and not to protect liens on improvements built during the project from which the lien arose. See ***Land Mortgage Bank v. Quanah Hotel Co.***, 89 Tex. 332, 34 S.W. 730 Tex. Mar 16, 1896.

Land Mortgage involved an old version of the lien statute, ".....(Laws 21st Leg. p. 110; Sayles' Supp. Rev. St. art. 3171), which is in this language: 'The lien herein provided for shall attach to the houses buildings or improvements for which they were furnished or the work was done in preference to any prior lien or incumbrance or mortgage upon the land on which houses buildings or improvements have been put or labor performed and the person enforcing the same may have such house building or improvement sold separately: provided, any lien incumbrance or mortgage on the land or improvement at the time of the inception of the lien herein provided for shall not be affected thereby and holders of such liens need not be made parties in suits to foreclose liens herein provided for.' ***Land Mortgage Bank*** *supra at 732-733.*

This language is almost identical to current Section 53.124. Texas Property Code.

The issue was relative priority of the mechanic's lien claims versus the vendor's lien retained by the lender prior to the project commencing. The vendor's lien involved the prior transaction, and not the subsequent construction project resulting in the mechanic's lien claims. The Court allowed severance of the newly constructed improvements from the preexisting improvements and land, giving the lien claimant priority on new stuff (from which the lien claim arose).

However this preexisting vs. new construction analysis has evolved into "removables". The modern approach is found in ***Hammann v. H.J. McMullen & Co.,*** 122 Tex. 476, 62 S.W.2d 59 (Tex. 1933). Contrary to ***Land Mortgage's*** approach (to sell the property and apportion the proceeds to protect the mortgage lien on the preexising improvements and land), Hammann said,

> "A prior vendor's lien or deed of trust lien is superior to a subsequent mechanic's lien, unless the mechanic's lien is given priority or equality by statute. This has been the uniform rule, beginning with the common law. Chapter 2 of title 90 (article 5452 et seq.) makes provision for the inception and securing of mechanics', contractors', and materialmen's liens. Article 5459 is the article of said statutes relating to priority of liens. It provides: 'The lien herein provided for shall attach to the house, building, improvements or railroad for which they were furnished *483 or the work was done, in preference to any prior lien or encumbrance or mortgage upon the land upon which the houses, buildings or improvements, or railroad have been put, or labor performed,

> and the person enforcing the same may have such house, building or improvement, or any piece of the railroad property, sold separately; provided, any lien, encumbrance or mortgage on the land or improvement at the time of the inception of the lien herein provided for shall not be affected thereby, and holders of such liens need not be made parties in suits to foreclose liens herein provided for.'
>
> The proviso of said article has been given full effect by this court. It is repeated here for emphasis: 'Provided, any lien, encumbrance or mortgage on the land or improvement at the time of the inception of the lien herein provided for shall not be affected thereby, and holders of such liens need not be made parties in suits to foreclose liens herein provided for." Id at 482-483

The Court then cited ***Quinn v. Dickinson***, 146 S. W. 993, at page 1000, finding that a

> "......mechanic's lien **63 was inferior and subordinate to a prior mortgage or vendor's lien: 'The record in this case shows without controversy that the materials furnished and labor performed by Agnew & Agnew under their contract resulted in enhancing the value of the entire property from $1,500 to $2,000; but the record also shows with equal conclusiveness that the improvements placed upon the property by Agnew & Agnew consisted of paints, papering the walls, and other similar improvements that cannot be detached from the building in such way as to be of any value to Agnew & Agnew without materially injuring the property as it stood prior to said improvements being made (that is, the record shows conclusively that <u>the improvements placed upon the property by Agnew & Agnew became a part and parcel of the realty as it existed prior to said improvements)</u>; and therefore we hold that, while under the Constitution and the law Agnew & Agnew have a lien to the extent of the amount unpaid on their indebtedness on all the improvements and the land, the same is subject to and inferior to the liens that were in existence at the time they made said improvements, …".

Hammann Supra @ 486-487.

This was the origin of the three-step test for "removable" priority. Thus "part and parcel" language became important in deciding which items were "removable.

4. THE CLAIMANT MUST HAVE FURNISHED THE "REMOVABLES"

Kaspar v. Cockrell-Riggins Lighting Co., 511 S.W.2d 109 (Tex.Civ.App.-Eastland 1974) required the claimant to identify materials it had furnished which at time of trial were susceptible of segregation from those supplied by others.

> **"The record in the instant case reflects that the quantity of materials furnished by plaintiff would equip only a part of the apartments constructed and similar materials were purchased by defendant from other suppliers. The fixtures in question had no identifying serial numbers. The defendant testified that in her opinion a person could not pick out which fixtures were sold by plaintiff and which were not. The record does not properly disclose which apartment units contained the items furnished by plaintiff.**
>
> **The jury found in answer to Special Issue No. 3 that the items furnished by plaintiff could not be identified and segregated from like items purchased from suppliers other than plaintiff. There was evidence to support the jury's finding and we do not think the issue was immaterial.**
>
> **We hold the court erred in disregarding the answer to Special Issue No. 3. The judgment of the trial court is reversed and judgment is rendered for defendant."**

On the other hand General Contractors may assert a removables claim to all items supplied under the general contract for construction even though the claimant did not furnish such items with its own forces, but provided them by subcontractors and suppliers. See ***L & N Consultants, Inc. v. Sikes,*** 648 S.W.2d 368 (Tex.App.-Dallas 1983), writ refused n.r.e.:

> " .... In those cases, recovery was denied to the lien claimant, who was one of several suppliers of materials, because he was unable to identify the specific materials he furnished. Here, by contrast, all materials and labor were furnished by Sikes, the general contractor, under its construction contract with the owner. *See* <u>*Richard H. Sikes, Inc.*, 586 S.W.2d at 956;</u> *cf.* <u>*In Matter of Jamail*, 609 F.2d 1387, 1390-91 (5th Cir.1980)</u>, noted in *Heath,* New

Developments in Real Estate Financing, 12 St. Mary's L.J. 860-61 (1981).;

Sikes held that:

"...As we construe articles 5452(1) and 5459 § 1, they do not limit the amount of a contractor's lien to that portion of the contract price that may be allocated to removables; rather, they give him a preference lien on the removables furnished under his contract, and for which he is responsible, for the entire amount due him for the materials and labor furnished by him under that contract, even though some of the items furnished are not removable. *See* *Wallace Gin*, 104 S.W.2d at 892. We conclude, therefore, that the trial court was correct in determining Sikes' mechanic's and materialman's lien to be superior to L & N's deed of trust lien."

Sikes supra at 370-371

5. THE WHIRLPOOL, AND MONOCRETE TEXAS SUPREME COURT DECISIONS

The current removables rule, and cases interpreting stuff that is, and is not removable revolve around two Supreme court cases ***First National Bank v. Whirlpool Corp.*** 517 S.W.2d 262 (Tex. 1974) and ***Exchange Savings & Loan Association v. Monocrete Pty. Ltd***., 629 S.W.2d 34 (Tex. 1982). Understanding theses cases is key in interpreting "removability".

6. *FIRST NATIONAL BANK V. WHIRLPOOL CORP.*, 517 S.W.2D 262 (TEX. 1974).

This case involved the supplier, Whirlpool Corporation, furnishing appliances for an apartment project. When the supplier was not paid it perfected its mechanic's liens and filed suit against the mortgage lender and purchaser of property to establish and foreclose its statutory and constitutional materialman's liens. Whirlpool furnished electric ranges, refrigerators, dishwashers, and garbage disposals. The Defendant, First National Bank foreclosed its deed of trust and bought in the property on December 1, 1970. In January of 1971, the bank sold the property to Jo Anna R. Kaspar. First the Court examined whether the appliances were fixtures and therefore appropriate subjects for perfection of statutory or constitutional mechanic's liens. In this analysis, the key was the method by which the items furnished by the claimant were attached, and could be detached from the building. The detail was as follows:

"The refrigerators furnished by Whirlpool are connected with the realty only by electrical cords which are plugged into 110 volt electrical outlets. Likewise, the ranges are associated with the realty only by electrical cords which are plugged into 220 volt electrical outlets. On the other hand the disposals are installed under the kitchen sinks by screwing the top of the disposal into the drain outlet of the sink, screwing the bottom of the disposal into the drain pipe, and connecting the disposal to an electrical power source. Each of the dishwashers (with the accompanying dishwasher panel) is installed in a place provided under the kitchen cabinet by connecting the dishwasher to the underside of the cabinet top with several screws, connecting it to a water pipe and a drain pipe, and plugging it into an electrical outlet. There was evidence that the dishwashers and disposals were intended to remain permanently as a part of the building until they wore out. They were fixtures incorporated into the structure of the building and were thus subject to the Hardeman Act lien. We think the test applicable to this type of property was properly stated in ***McConnell v. Frost***, 45 S.W.2d 777, 780 (Tex.Civ.App.1937, writ ref.), as follows:

'Whether a chattel attached to permanent improvements has become a part thereof depends on the intention with which the fixture is annexed or put into position, and this intention is to be inferred from the nature of the article affixed, the relation and situation of the party making the annexation and the policy of the law in relation thereto, the structure and mode of the annexation, and the purpose or use for which the annexation is made. If from all these circumstances it appears to be the intention of the party making the annexation that it be permanent, or that it shall so remain annexed until it has become worn out, then it is a part of the permanent improvements; otherwise it is not.'

The refrigerators and ranges, which were not built into or in any other manner affixed or incorporated in the work (construction of the building), fall in the same category as floor lamps, irons, television sets and other chattels which are connected by cords and plugs into an electrical outlet. One of Whirlpool's witnesses compared them to television sets. Merely plugging in an electrical cord is simply not the 'incorporation' or 'consumption' envisioned in the Act. Such items have not lost their identity as chattels."

Thus, if the stuff is "too removable" it never becomes a fixture, and no lien can be filed.

On the other hand, if it's permanent by attached, a lien can be filed for it, and that's when the "removable" test comes into play:

> "As to dishwashers and disposals attached to the realty as in the present case, the Oregon Supreme Court drew the same distinction which we have adopted between *267 them and plugged-in electrical ranges and refrigerators, holding that the dishwashers and disposals were sufficiently annexed to be subject to a materialman's lien. ***Builders Appliance Supply Company v. A. R. John Construction Company***, 253 Or. 582, 455 P.2d 615 (1969).
>
> This is not to say that there is no statutory lien available to the supplier of chattels, such as the ranges and refrigerators, whose status as personality has not been altered. Chapter 9 of the Texas Business and Commerce Code, V. T.C.A., provides a procedure for perfecting liens on this type of personal property."

Whirpool concluded that the dishwashers and disposals, permanently affixed within the cabinetry of the apartment units, were proper subjects of valid mechanic's liens, both under the Texas Constitution and Texas Property Code.

The Court then addressed priority of the lien claims as opposed to the foreclosed Deed of Trust lien of First National Bank. The Removables Test was announced: "The effect of the bank's interpretation of the ambiguous words, 'shall not be affected thereby,' would attribute to the legislature an intent to nullify the preference which it had just given in clear and unambiguous terms to mechanic's and materialman's liens. This would defeat the clear purpose and intent of Article 5459. The provisions have been harmonized under the rule of long standing that a mechanic's and materialman's statutory lien upon improvements made is superior to a prior recorded deed of trust lien where the improvements made can be removed without material injury to the land and pre-existing improvements, or to the improvements removed."

The Supreme Court found that there was "evidence in the instant case clearly supporting the trial court's finding that the disposals and dishwashers (with accompanying panels) 'may be removed from such project without injury to the project, the realty, the remaining improvements or the materials themselves,' the trial court properly ordered foreclosure of the statutory lien in favor of Whirlpool on such items."

7. *EXCHANGE SAVINGS & LOAN ASSOCIATION V. MONOCRETE PTY. LTD.***, 629 S.W.2D 34 (TEX. 1982)**

In this case the roofing company did not get paid, and perfected a mechanic's lien. In the meantime the Savings and Loan with a first lien Deed of Trust foreclosed and bought the condominiums at the trustee's sale. The roofer sued, claiming the concrete roof tiles were "removable". The judgment of the Court of Appeals allowing such foreclosure was reversed.

The Texas Supreme Court reviewed the particular installation of the concrete roof tiles, as follows:

> "Monier seeks to remove pre-cast concrete roofing tiles from a completed dwelling. The roof is constructed by laying one-half inch plywood decking over the rafters. The decking is covered by a layer of 30 pound felt paper. A support system of one inch by four inch wooden lathe strips is laid lengthwise over the decking and paper. The tile is then placed over the lathing. The rows of tile are secured by nailing every other tile in every other row to the plywood decking. A nail-size hole is molded into each tile. Trim tiles are nailed to the fascia board around the edge of the roof. Rake tiles and ridge tiles are set with mortar at the valleys and ridges. Overlapping lead flashing is used around vents and walls. The interlocking effect and the density of the tiles prevent water from leaking through to the non-waterproof layers below.

Key to the Court's decision is language that the trial court had to consider the "... probabilities of post-removal damage to the existing structure".

> "The question is whether, under the Whirlpool test, removal of the roofing tiles constitutes material injury to the existing structure or the roofing tiles. Monier contends the existing structure would not be materially injured in the process of removing the tiles. The evidence is that nail holes may be left in the plywood decking; paint on the lead flashing may crack; and the felt paper may be torn in places. Exchange Savings suggests the evidence also shows possible damage to the fascia board around the perimeter of the roof. Whether the removal of a specific improvement will cause material injury under the Whirlpool test is generally a question for the fact finder. The materialman may have his materials sold separately, provided the prior lien "... shall not be affected thereby...." art. 5459. The purpose

> of the statutory proviso is to protect the security of the prior lien holder. Accordingly, evidence of the effect of removal of improvements upon the security of the prior lien holder is pertinent. In weighing the evidence, the court of civil appeals incorrectly refused to consider evidence of the *37 nature of the improvements sought to be removed and the probabilities of post-removal damage to the existing structure." ***Monocrete*** **at pg. 37.**

The factors to be considered by the court were set forth as follows: "Some factors that may be considered are:

- the manner and extent of attachment to the land or existing improvements;
- the extent to which removal would necessitate repairs, modification and/or protection of the land or existing improvements;
- the stage of completion of improvements under construction at the time removal is sought; and
- the function of the improvements sought to be removed."

The Texas Supreme Court's analysis of roof tile installation resulted in the following statements - "Cement roofing tiles necessary to prevent penetration of the elements through the roof of a completed structure become an integral part of its construction and necessary to its completion as a livable dwelling. The roofing tiles became an ***integral part*** of the basic structure of the townhomes. At the time the roofing tiles were furnished and affixed to the roof, the townhomes were of such a nature as to give notice to Monier that the roofing tiles could not be separated from the basic structure without material injury and had necessarily become a part thereof." ***Supra at 37***.

In spite of all the foregoing the ***Monocrete*** Court nevertheless claims, "[8] This is not a departure from the test set up in Whirlpool. Improvements found removable, even though connected to the realty, are separable from the basic structure. " ***Monocrete supra*** **@ 37.**

Then, to underscore this confusion, ***Monocrete*** cites a string of example cases allowing removal, including ***Parkdale State Bank v. McCord***, 428 S.W.2d 121 (Tex.Civ.App.-Corpus Christi 1968, writ ref'd n. r. e.) (***entire structure removable*** from foundation).

Subsequent cases have valiantly attempted to untangle ***Monocrete.*** Judge Ayres made a most noble effort in the bankruptcy case, ***In re Orah Wall Financial Corp***, 84 B.R. 442 (Bankr. W.D. Tex. 1986). Judge Ayres interprets ***Monocrete*** as making a distinction between removable and non-removable items based on an "incorporation test". If "incorporated" as an "integral" part of the basic building structure, ***Orah Wall*** holds that such items are not removable.

Judge Ayers in ***Orah Wall*** first articulates what most lien lawyers thought about ***Monocrete,***

> "The roofing tiles in ***Monocrete*** were obviously removable. The damage to the structure was slight. But the tiles were part of--not "separable" from--the structure and thus were not legally removable. The "why" seems answered "because"--because mechanics cannot be permitted to dismantle structures piecemeal. The economic consequences are too great. Even if roofing tiles are "removable" as a factual matter, to allow legal removal would (probably) do little to protect the mechanic and would (obviously) do great economic injury to the structure. ***Monocrete supra at *446***

The legal test according to ***Orah Wall*** is that if an item is removable it is also "separable" from the basic structure. That is to say, it is not an "integral part of the basic structure...."

> ***Monocrete*** does little, however, to set forth and define the legal issue, "separability". Clearly, the way to determine "separability" is to look first to facts. Then, if the facts show that the materials are "of such a nature as to give notice ... that they [can] not be separated ... and [have] become a part ..." of the structure, the items become non-removable as a matter of law. This distinguishes *factual* removability from *legal* removability. This is the **"*Monocrete*** Incorporation Test."

Orah Wall suggests five questions to define ""incorporation":

1. Is the item merely attached to the structure in such a manner that it is obvious that removal and/or replacement is always possible?
2. Is the item one which is removed and/or replaced as part of ordinary maintenance?
3. Is the item one which is removed and/or replaced as part of the ordinary operation of the building?
4. Is removal, while not usual, or even usually contemplated, so simple and so non-destructive of item, structure or freehold, that to deny removability (or separateness) would violate the purpose of the mechanic's lien statutes? ***First Nat'l Bank v. Whirlpool, Inc.***, 517 S.W.2d at 269.
5. Is the item, though easily removable, such a part of the finished structure that no party would ever

contemplate removal and/or replacement during the ordinary operation and maintenance of the building?

Remember that the value of the removables, and whether it makes economic sense to actually remove the items, is not the test. See ***Monocrete*** @ 37-38 and ***Gill Sav. Ass'n v. International Supply Co., Inc.***, 759 S.W.2d 697 (Tex.App.-Dallas , 1988, writ denied.

8. EXAMPLE CASES – REMOVABLE/ NOT REMOVABLE

Given the vagueness of this analysis, the cases diverge on many of the same construction items. Here's a list compiled by subject matter.

A. AIR CONDITIONING / HVAC:

- ***Removable:***
  air conditioning components - ***Richard H. Sikes, Inc. v. L&N Consultants, Inc.***, 586 S.W.2d 950 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.

  compressors and air-handling units inside of air conditioning units ***American Amicable Life Insurance Co. v. Jay's Air Conditioning & Heating, Inc.***, 535 S.W.2d 23 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.).

  heating and air conditioning systems – including a furnace, an air conditioning coil, compressor, thermostat and condensing unit. ***Houk Air Conditioning, Inc. v. Mortgage & Trust, Inc.***, 517 S.W.2d 593 (Tex., Civ. App.—Waco 1974, no writ).];

  air conditioning, heating and mechanical systems; ***In re Orah Wall Financial Corp***, 84 B.R. 442 (Bankr. W.D. Tex. 1986)

  air-conditioning grills or registers ***In re Orah Wall Financial Corp***, 84 B.R. 442 (Bankr. W.D. Tex. 1986)

- ***Not removable:***
  duct work and piping ***In re Orah Wall Financial Corp***, 84 B.R. 442 (Bankr. W.D. Tex. 1986)

B. APPLIANCES:

- ***Removable***
  garbage disposals and built-in dishwashers ***First National Bank v. Whirlpool Corp.*** 517 S.W.2d 262 (Tex. 1974).

  Appliances; smoke detectors ***Richard H. Sikes, Inc. v. L&N Consultants, Inc.***, 586 S.W.2d 950 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.)

C. BUILDING !!!

- ***Removable***
  partially completed structure attached to a concrete foundation; ***Mogul Prod. & Ref. Co. v. Southern Engine & Pump Co.***, 244 S.W. 212 (Tex. Civ. App.—Galveston 1922, no writ).

  frame building ***Wallace Gin Co. v. Burton-Lingo Co.***, 104 S.W.2d 891 (Tex. Civ. App.—Austin 1937, no writ).

  a rock house ***R. B. Spencer & Co. v. Brown***, 198 S.W. 1179 (Tex. Civ. App.—El Paso 1917, writ ref'd).];

  building structures above the concrete foundations - ***Parkdale State Bank v. McCord,*** 428 S.W.2d 121 (TexCivApp.-Corpus Christi Apr 25, 1968) (NO. 371), writ refused n.r.e.

- <u>*NOT REMOVABLE*</u>
  shell houses - ***Irving Lumber Co. v. Alltex Mortgage Co.***, 446 S.W.2d 64 (Tex. Civ. App.—Dallas 1969), *aff'd on other grounds*, 468 S.W.2d 341 (Tex. 1971)

D. BRICK

- ***Not Removable***
  brick veneer for exterior of house and for fireplace and chimney ***Chamberlain v. Dollar Savings Bank***, 451 S.W.2d 518 (Tex. Civ. App.—Amarillo 1970, no writ).

  Glass brick partition - ***In re Orah Wall Financial Corp***, 84 B.R. 442 (Bankr. W.D. Tex. 1986)

E. BURGLAR ALARMS

- ***Removable***
  burglar alarms - ***Richard H. Sikes, Inc. v. L&N Consultants, Inc.***, 586 S.W.2d 950 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.)

F. CONCRETE / CEMENT WORK

NOT!!
concrete and cement work and improvements were not removable-
[***Hammann v. H.J. McMullen & Co.***, 62 S.W.2d 59](#) Tex.,1933

G. CABINETRY

- ***Removable***
  Cabinets - ***In re Orah Wall Financial Corp***, 84 B.R. 442 (Bankr. W.D. Tex. 1986)

- ***Not Removable***
  cabinets - ***Houk Air Conditioning, Inc. v. Mortgage & Trust, Inc.***, 517 S.W.2d 593 (Tex. Civ. App.—Waco 1974, no writ ("As to the appeal by E & E, the Stipulations are that the removal of merchandise, equipment and materials installed by E & E would materially injure the realty. Thus E & E has no lien on the cabinets installed by it superior to the prior Deed of Trust lien of Mortgage and Trust"[3])

H. CARPET

- ***Removable***
  Richard H. Sikes, Inc. v. L&N Consultants, Inc., 586 S.W.2d 950 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).];

I. DOORS

- ***Removable***
  door locks ***Richard H. Sikes, Inc. v. L&N Consultants, Inc.***, 586 S.W.2d 950 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.)

  doors that could be removed by temporarily displacing the brick and trim around them, materially undamaged ***First Continental Real Estate Investment Trust v. Continental Steel Co.***, 569 S.W.2d 42 (Tex. Civ. App.—Ft. Worth 1978, no writ).

  doors, metal door frames, door latches; ***In re Orah Wall Financial Corp***, 84 B.R. 442 (Bankr. W.D. Tex. 1986)

  interior doors ***In re Orah Wall Financial Corp***, 84 B.R. 442 (Bankr. W.D. Tex. 1986).

J. DRIVE-IN MOVIES

- ***Removable***
  ticket booth, a speaker stand, and a screen at a drive-in ***Freed v. Bozman***, 304 S.W.2d 235 (Tex. Civ. App.—Texarkana 1957, writ ref'd n.r.e.)[4]

K. ELECTRICAL

- ***Removable***
  wall switches and plugs, electrical cover plates, electrical control panels

  In re: Orah Wall Financial Corp, 84 B.R. 442 (Bankr. W.D. Tex. 1986).
  Copper and aluminum wiring [***Cornerstone Bank, N.A. v. J.N. Kent Const. Co.***](#) 1992 WL 86591, **No Publication**, Tex.App.-Dallas Apr 17, 1992[5]

- ***Not Removable***
  electrical conduit, wiring, and junction boxes ***In re Orah Wall Financial Corp***, 84 B.R. 442 (Bankr. W.D. Tex. 1986).

L. GLASS, MIRRORS, WINDOWS

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[3] The stipulations are undefined but were fatal. Probably the better authority is that the cabinetry IS removable . See the analysis in ***Orah Wall.***

[4] Stay away from my daughters.

[5] Citing *Exchange Sav. & Loan Ass'n v. Monocrete Pty. Ltd.*, 629 S.W.2d 34, 36 (Tex. 1982) and *Orah Wall*, the Court said, "Once the circuit breaker panels and the light fixtures have been removed, the copper and aluminum wiring can be removed by pulling on the wires in the conduit that attaches to the circuit breaker panels. Because the wiring is threaded through the conduit, the building can be rewired by threading the new wiring back through the conduit. Kent does not seek to have the conduit subjected to its **lien** . The power line from the power pole to the building can be disconnected and taken down from the pole. No damage would result either to the wiring or to the building by removing the wiring and the power line. The wiring is not an integral part of the building. We hold that the trial court did not err in finding the copper and aluminum **wiring** Termto be **removable**. "

- ***Removable***
  mirrors (expert estimated 6% breakage during the rip out process) ***Occidental Nebraska Federal Sav. Bank v. East End Glass Co.***, 773 S.W.2d 687 (Tex. App.—San Antonio 1989, no writ).

  interior windows ***In re Orah Wall Financial Corp***, 84 B.R. 442 (Bankr. W.D. Tex. 1986).

  WINDOWS THAT COULD BE REMOVED BY TEMPORARILY DISPLACING SURROUNDING BRICK AND TRIM IN ORDER TO REMOVE THEM FIRST CONTINENTAL REAL ESTATE INVESTMENT TRUST V. CONTINENTAL STEEL CO., *569 S.W.2D 42 (TEX. CIV.* APP.—FT. WORTH 1978, NO WRIT).[6]

- ***Not Removable***
  window frames ***McCallen v. Mogul Prod. & Ref. Co.***, 257 S.W. 918 (Tex. Civ. App.—Galveston 1923, writ dism'd)[7]

  glass panes and gaskets holding glass in place in building. ***Cornerstone Bank, N.A. v. J.N. Kent Const. Co.***, 1992 WL 86591, **No Publication**, Tex.App.-Dallas Apr 17, 1992[8]

M. HARDWARE

- ***Removable***
  bathroom hardware ***In re: Orah Wall Financial Corp***, 84 B.R. 442 (Bankr. W.D. Tex. 1986).

N. LIGHT FIXTURES

- ***Removable***
  Light fixtures ***Richard H. Sikes, Inc. v. L&N Consultants, Inc.***, 586 S.W.2d 950 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.

  light fixtures ***In re Orah Wall Financial Corp***, 84 B.R. 442 (Bankr. W.D. Tex. 1986).

O. LUMBER

- **Not Removable**
  lumber to build a house ***Cameron County Lumber Co. v. Al & Lloyd Parker, Inc.***, 122 Tex. 487, 62 S.W.2d 63 (1933)

P. MOVIE SCREENS

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6 "[9] However, we hold that the trial court had sufficient evidence before it to conclude that the materials furnished by Krestmark could be removed without material injury to the land and pre-existing improvements or to the improvements themselves. First National Bank in Dallas v. Whirlpool Corp., 517 S.W.2d 262 (Tex.1974). Testimony adduced reflected: windows and doors furnished by Krestmark could be removed by taking out the brick around them with no ultimate damage to the brick or windows; the trim around the doors could be removed without ultimate damage; both brick and trim could be replaced without material damage. We overrule point of error number 9, which, in effect, obviates our ruling on point of error number 8." First Continental Real Estate Investment Trust v. Continental Steel Co., 569 S.W.2d 42 @ 47 (Tex. Civ. App.—Ft. Worth 1978, no writ).

7 "The evidence failed to show any such identification of the materials it had furnished as made them at the time of the trial susceptible of segregation from those supplied by others, with the exception of some roofing and window frames, and these either so went into the repair and improvement of structures already on the premises when the lumber company made its contract, or otherwise were utilized in such manner thereon, that they could not be detached without injury to the freehold; at any rate, there was sufficient evidence to support a finding to that effect, and, if necessary to support the judgment rendered, one will be deemed to have been made by the court, which tried this feature of the cause without the aid of a jury. Under such a state of facts, as applied to the conditions otherwise shown to have prevailed here, a materialman's lien could not be enforced." McCallen supra @ page 923

8 Having reviewed the evidence, we conclude that, although the entire glass exterior may be easily removable, it is such a part of the finished structure that no party would ever contemplate removal of it in the ordinary operation and maintenance of the building. Therefore, the exterior glass walls are not separable but are an integral part of the structure. See Monocrete, 269 S.W.2d at 37 (holding that roof was integral part of building as a matter of law). On the other hand this same Court says – about the exterior doors – "Removal of the doors would not damage either the structure or the doors themselves. The only modification of the building necessitated by the removal of the doors would be the covering of the entrances to the building with plywood sheets or other material to protect the interior from the elements. Doors are separable because they are attached in such a manner that it is obvious that removal or replacement is always possible." And, "The elevator equipment and cab are not so integral to the building that we can hold that they are not separable as a matter of law. [FN2] Thus, the trial court did not err in designating the elevator equipment and cab as being removable."

- ***Removable***
  screen at a drive-in - ***Freed v. Bozman***, 304 S.W.2d 235 (Tex. Civ. App.—Texarkana 1957, writ ref'd n.r.e.)

Q. PAINT

- ***NOT!***
  painting ***R.B. Spencer & Co. v. Brown***, 198 S.W. 1179 (Tex. Civ. App.—El Paso 1917, writ ref'd)[9]

R. PLASTER

- ***Not Removable***
  Plastering ***R.B. Spencer & Co. v. Brown***, 198 S.W. 1179 (Tex. Civ. App.—El Paso 1917, writ ref'd)

S. PUMPS

- ***Removable***
  pumps were **removable** from their concrete base on the refinery's premises; ***Mogul Producing & Refining Co. v. Southern Engine & Pump Co.,*** 244 S.W. 212 (Tex.Civ.App.-Beaumont, 1922 no writ.

T. ROOFS

- ***Not Removable***
  concrete roofing tiles ***Exchange Savings & Loan Association v. Monocrete Pty. Ltd.***, 629 S.W.2d 34 (Tex. 1982)

U. SIGN

- ***Removable***
  neon sign - ; ***Freed v. Bozman, 304 S.W.2d 235*** (Tex.Civ.App., Texarkana, 1957, wr. ref. n.r.e.)

V. SINK

- ***Removable***
  wash-basins ***In re: Orah Wall Financial Corp***, 84 B.R. 442 (Bankr. W.D. Tex. 1986).

W. SPEAKER STANDS

- ***Removable***
  speaker stand, and a screen at a drive-in ***Freed v. Bozman***, 304 S.W.2d 235 (Tex. Civ. App.—Texarkana 1957, writ ref'd n.r.e.)

X. SHEET ROCK

- ***Not Removable***
  In re: Orah Wall Financial Corp, 84 B.R. 442 (Bankr. W.D. Tex. 1986)

Y. TOILETS

- ***Removable***
  toilets[10], urinals ***In re Orah Wall Financial Corp***, 84 B.R. 442 (Bankr. W.D. Tex. 1986).

9. DOES THE "REMOVABLES DOCTRINE" APPLY TO CONSTITUTIONAL LIENS OR ONLY STATUTORY LIENS?

Yes. Constitutional Lien claimants at least according to one Texas Court of Appeals may assert the doctrine.

See ***Hoarel Sign v. Dominion Equity Corporation;* 910 S.W.2d 140** Court of Appeals of Texas, Amarillo 1995 writ denied. In Hoarel, the lien claimant furnished and installed a new sign on a building. The work was done for the owner of the building who then lost it to foreclosure. The lender, Caprock Savings was placed in receivership and the good ole Resolution Trust Corporation (RTC), in its capacity as a receiver, was appointed. The owner filed Bankruptcy under Ch. 11, then converted to Ch. 7, and RTC moved the bankruptcy court for permission to foreclose the deed of trust. The court acquiesced and entered an order lifting stay. The RTC then conveyed to Dominion two years later, whereupon suit to foreclose the mechanic's lien was filed by Hoarel.

> "That the mechanic's lien arises from constitutional, as opposed to statutory fount, matters not. The doctrine of removables has historically been applied to both. *See, e.g.,* ***Federal Deposit Ins. Corp. v. Bodin Concrete Co., supra*** (involving a constitutional lien); ***Justice Mort. Inv. v. C.B. Thompson Constr. Co., supra*** (involving both**)**; ***Chamberlain v.***

[9] Duh

[10] Is this really true? Guys would say, "Go ahead, remove the urinals". But aren't women's toilets "integral"? See U.S. Postal Service v. Town of Greenwich, Conn. 901 F.Supp. 500 D.Conn. 1995 "The Town building official has reviewed and objected to certain aspects of the building plans, most notably.... the number of **women's toilets.** The Town has demanded that the design features be corrected, and that the building permit fee of $43,470 be paid before construction continued."

Dollar Sav. Bank of New York, 451 S.W.2d 518 (Tex.Civ.App.--Amarillo 1970, no writ) (involving both); ***Freed v. Bozman***, 304 S.W.2d 235 (Tex.Civ.App.--Texarkana 1957, writ ref'd n.r.e.)***Freed v. Bozman***, 304 S.W.2d 235 (Tex.Civ.App.--Texarkana 1957, writ ref'd n.r.e.) (involving both).

Hoarel Sign supra, *@ 142.*

10. CONCLUSION

As a practical matter you must approach each "removable" item on a case by case basis. Because of this approach, cases reach opposite conclusions over the same type of items. Expert trade-subcontractor, engineer, or contractor testimony will probably be required for opinion testimony about how the stuff in question either can or cannot be removed "without material injury to the land and pre-existing improvements, or to the improvements removed."

FORMS

FORM 1
NOTICE TO ORIGINAL CONTRACTOR BY SECOND TIER CLAIMANTS

[DATE]

[Original Contractor] Certified Mail No.
[Address] Return Receipt Requested
____

Re: Claims of ________________________("CLAIMANT"); for unpaid billings totaling $_______________; ___________________ construction project

Gentlemen:

This is to provide you with the required notice, in accordance with the Texas Property Code Section 53.056, that CLAIMANT has an unpaid balance of $__________ for its billings to __________________ *[Name of customer]* for _________________ *[labor and materials / materials]* furnished on the above-referenced construction project. Claimant's ________________ *[labor and materials / materials]* are generally described as: ______________________ *[description of work or materials furnished]*.

Enclosed are copies of our unpaid statements or billings. Please contact the undersigned regarding this notice. Thanking you for your attention to this matter, we remain,

Yours very truly,

[signature]

FORM 2
NOTICE OF CLAIM TO OWNER AND ORIGINAL CONTRACTOR

[DATE]

[Owner]	Certified Mail No.
[Owner's Address]	Return Receipt Requested
____________________	
[Original Contractor]	Certified Mail No.
[Address]	Return Receipt Requested
____________________	

Re: Claims of ________________________("CLAIMANT"), for unpaid billings totaling $___________; _________________________ construction project

Gentlemen:

This is to provide you with notice of _______________(CLAIMANT's) past due and unpaid billings totaling $____________ for ________________ *[labor and materials / materials]* furnished on the above referenced project. CLAIMANT furnished __________________________________*[description of work/materials furnished]* for the project pursuant to their agreement with ___________________________ *[Name of customer]*.

This notice is sent in compliance with the Texas Property Code mechanic's lien provisions, including Section 53.056. Accordingly, we must notify you that if this claim totaling $_________ remains unpaid, the owner of the premises may be personally liable and the owner's property may be subjected to a lien unless:

1. The owner withholds payment from the contractor for payment of the claim; or
2. The claim is otherwise paid or settled.

Also, further notice is given that all of the above-referenced claim has accrued and is past due. Accordingly, demand for payment of such claim in the amount of $___________ is hereby made.

Enclosed are copies of the statements or billings which constitute this claim.

This also constitutes notice pursuant to Texas Property Code, Section 162.001 et seq. (the "Trust Fund Statute") that the CLAIMANT has a priority interest in the construction funds for this project in your possession now, or released to you in the future. The Trust Fund Statute states that project owners and contractors are trustees of the construction funds they receive. Such funds must be used to pay for the labor and materials on the project and cannot be used elsewhere. The owner and contractor are deemed to be trustees of the project funds for the benefit of unpaid subcontractors and suppliers, (including CLAIMANT), to see to it that payment is made. Consequently, you are hereby directed to set aside such construction funds to cover the amount of CLAIMANT's claim. Diversion of construction trust funds constitutes violation of the referenced Trust Fund Statute.

Please contact the undersigned immediately regarding this notice.

Yours very truly,

[signature]

FORM 3
NOTICE TO OWNER REGARDING LIENS AGAINST HOMESTEAD PROPERTY

"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 construction, you fail to retain 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 10 percent retainage 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 retainage, you are not liable to a subcontractor or supplier for any amount paid to your contractor before you received written notice of the claim."

FORM 4
MECHANIC'S LIEN AFFIDAVIT

NOTICE: THIS IS NOT A LIEN.
THIS IS ONLY AN AFFIDAVIT CLAIMING A LIEN.

AFFIDAVIT CLAIMING MECHANIC'S AND MATERIALMAN'S LIEN

STATE OF TEXAS §
§
COUNTY OF _______ §

BEFORE ME, the undersigned authority, on this day personally appeared ____________________________, the undersigned Affiant, who swore on his/her oath that the following facts are true:

My name is _________________, I am the __________ *(title)* of _______________________ *(claimant)*. This Affidavit is made on behalf of claimant to perfect the Mechanic's and Materialman's Lien against the real property described below:

1. Claimant has an unpaid claim in the amount of $_______________ for *(labor and materials / materials)* ____________________ furnished on the construction of improvements generally known as the ______________________________________ construction project. The claimed amount of $______________ is, within my personal knowledge, just and true, the same is due and unpaid, and all just and lawful offsets, payments and credits have been allowed. The claim amount is for ______________ *(labor and materials / materials)* furnished and described below, on which a systematic record has been kept.

2. The name and last known address of the owner or reputed owner of the real property and improvements upon which this claim is made is: ___________________________ ____.

3. The claim amount of $_____________ represents the unpaid contract price due claimant, or in the alternative, is the reasonable value of the unpaid portion of claimant's ___________________ *(labor and materials / materials)* furnished, which are described below.

4. Claimant's __________________ *(labor and materials / materials)* furnished for construction of improvements on the real property described below are generally described as: ___________ __________________________________ *(description, i.e., specially fabricated and installed plumbing, heating, ventilating and air conditioning duct work, equipment and allied systems).* Payment is requested for work performed or materials furnished during each of the following months: ____.

5. Claimant furnished the above-described ______________________________*(labor and materials / materials)* under a __________________________________*(subcontract / contract / purchase order)* with _________________________ *(Customer)* whose last known address is __________________________*(address)* .

6. The name and last known address of the original contractor on the above-referenced project is ____________________________________.

7. The legal description of the real property improved by Claimant's above-described __________________________*(labor and materials / materials)*, and which real property and improvements thereon are sought to be charged with Claimant's lien, is: ____________________ ____, Bexar County, Texas.

8. Claimant claims a Mechanic's and Materialman's lien upon the above-described real property and improvements thereon to secure payment of its claim in the amount of $______________________ in accordance with the Texas Property Code.

9. Claimant's physical address is _________________________________. Claimant's mailing address is ____.

10. Claimant's notice(s) of mechanic's lien was/were sent to the Owner identified above by United States, certified mail, return receipt requested, on the following date(s): _________________________.

11. In compliance with the Texas Property Code, Claimant is sending one copy of this Affidavit to the above-referenced Owner, at its last known address, and also one copy to the above-referenced original contractor at its last known address. ____________________________

SUBSCRIBED AND SWORN TO BEFORE ME by the said ______________________ _____________________ this ____ day of _____________, _____, to certify which witness my hand and seal of office.

____
Notary Public for the State of Texas

[Insert individual, corporate or other appropriate acknowledgment. See §______.]

AFTER FILING RETURN TO:

FORM 5
COVER LETTER SENDING COPIES OF LIEN AFFIDAVIT

(Must be sent by the 5th day of filing lien affidavit)

[DATE]

[Owner] — Certified Mail No.
[Owner's Address] — Return Receipt Requested
____

[Original Contractor] — Certified Mail No.
[Address] — Return Receipt Requested
____

Re: Claims of ______________________*[Name of CLAIMANT]* ("CLAIMANT"); Mechanic's and Materialman's Lien

Gentlemen:

We are sending to you the enclosed copies of CLAIMANT's Affidavit Claiming Mechanic's and Materialmen's Lien.

In accordance with the Texas Property Code, we notify you again that if the claim described in the attached AFFIDAVIT remains unpaid, the owner of the property described may be liable, unless the owner withholds payment from the contractor for the amount of the claim, or it is otherwise settled or paid.

CLAIMANT was forced to proceed with securing its lien rights since we have not received payment from any source on the claim set forth in the Affidavits enclosed.

[OPTIONAL: Previous written demand by CLAIMANT for payment of this claim was made on ____________[date]. No notice of dispute regarding this claim was ever submitted. Therefore demand for payment of the claimed amount is hereby made in accordance with Texas Property Code Section 53.083. We enclose proof of service of the previous demands for payment of the claim.]

Please contact the undersigned on receipt of this letter so that we may discuss a prompt resolution to this matter.

Yours very truly,

[signature]

[For residential construction enclose notice – See Form 3.]

FORM 6
NOTICE REGARDING SPECIALLY FABRICATED MATERIALS

[DATE]

[Owner] Certified Mail No.
[Owner's Address] Return Receipt Requested
____

[Original Contractor] Certified Mail No.
[Address] Return Receipt Requested
____

Re: ___________________________ Construction Project

Gentlemen:

We have received and accepted an order from ______________*[Name of customer]* for specially fabricated ________________________________*[description]* to be delivered to your project after they are fabricated here in our shop. The price of the specially fabricated order is $______________. This notice is sent to you in compliance with the mandatory provisions of Texas law regarding receipt of orders for specially fabricated materials. This is not intended as a comment in any way upon our customer, ______________________*[Name of customer]*, but is merely sent in compliance with the State law.

We are pleased to be a participant in this construction project and look forward to working with ______________________*[Name of customer]* towards its successful conclusion.

Cordially,

[signature]

FORM 7
NOTICE OF AGREEMENT PROVIDING FOR RETAINAGE

(Must be sent by the 15th day of the second month following the FIRST DELIVERY of materials or performance of labor by CLAIMANT.)

[DATE]

[Owner] Certified Mail No.
[Owner's Address] Return Receipt Requested

[Original Contractor] Certified Mail No.
[Address] Return Receipt Requested

***(original contractor also must receive notice if Claimant's contract is not with the original contractor)*

Re: Notice for Contractual Retainage Claim -- ____________________________ *[Describe in detail the name and location of the construction project]*

Gentlemen:

We are pleased to have been selected as a subcontractor/supplier for the above-referenced construction project. Our contract with ________________________ provides that __________ per cent of the contract price may be withheld as retainage. We therefore respectfully submit our notice of contractual retainage agreement. This notice is required by Texas Law.

The general nature of the agreement is as follows:

____
____
____

[i.e., 10% of contract price as adjusted by the change orders; or 10% will be retained which amount will be reduced to 5% when the owner reduces the overall job retention to 5%, or as the case may be.]

The date or dates when retainage is payable (if known) are as follows: ________________________________ *[i.e., 30 days after final completion of our portion of the work on the project or upon completion of our work, and acceptance thereof by the owner, etc.]*

We believe the total sum to be retained under our contract will be $_____________. Also ____% of increases to our contract by change order(s) will be subject to retainage.

This notice is not in any way to be considered a negative comment regarding our customer, _______________________________, and we look forward to working with them for a successful completion of your project.

Sincerely yours,

[***signature***]

[For residential construction enclose Residential Notice Form 3.]

FORM 8
REQUEST FOR INFORMATION TO OWNER

[DATE]

[Owner] — Certified Mail No.
[Owner's Address] — Return Receipt Requested (optional)
____
____

Re: ________________________ construction project: Request for Information.

Gentlemen:

[CLAIMANT's name] ("CLAIMANT") is furnishing labor and materials on the above referenced project. This is to respectfully request that you, as owner of the project, furnish to us the following information not later than the 10th day after the date you receive this request, as required by Sections 53.106 and 53.159 of the Texas Property Code:

(1) A sufficient legal description of the real property being improved; and

(2) Whether there is a surety bond; and if there is a bond, the name and last known address of the surety, and a copy of such bond; and

(3) Whether there are any prior recorded liens or security interests on the project property being improved and if so, the name and address of the person or entity having the lien or security interest.

(4) Whether there is an Affidavit of Commencement or Affidavit of Completion filed, and if so, request for copies of same is hereby made.

Thank you for your cooperation and prompt attention.

Sincerely yours,

[signature]

FORM 9
REQUEST FOR INFORMATION TO ORIGINAL CONTRACTOR

[DATE]

[Owner]
[Owner's Address]
____

Certified Mail No.
Return Receipt Requested *[optional]*

Re: Request for information on ______________________ construction project,

Gentlemen:

[Name of CLAIMANT] ("CLAIMANT") is furnishing labor or materials on the above referenced construction project. We are respectfully submitting to you our request to furnish information as required by Texas Property Code, Section 53.159. Accordingly, the following information is requested not later than the 10th day after your receipt of this request:

(1) Name and last known address of the person or entity to whom your firm furnished labor and materials on the above-mentioned construction project; and

(2) Whether you have furnished, or have been furnished a payment bond for any work on the construction project, and if so the name and last known address of the surety or sureties and a copy of each of such bonds.

Thank you for your cooperation and prompt attention.

Sincerely yours,

[signature]

FORM 10
REQUEST FOR INFORMATION TO SUBCONTRACTOR

[DATE]

[Subcontractor] Certified Mail No.
[Address] Return Receipt Requested
____

Re: __________________ construction project: Request for Information.

Gentlemen:

[CLAIMANT's Name] ("CLAIMANT") has furnished labor and materials in the above referenced construction project under your subcontract on such project. Accordingly we are respectfully requesting the following information from you. We therefore request that you furnish the following information as required by Texas Property Code, Section 53.159, not later than the 10th day after your receipt of this request:

(1) The name and last known address of each person to whom you furnished labor and materials for the construction project; and

(2) Whether you furnished or have been furnished any payment bonds for any of the work on the construction project and if so, the name and last known address of the sureties (please also furnish us a copy of each of such bonds).

Thank you for your cooperation and prompt attention.

Yours very truly,

[signature]

FORM 11
REQUEST FOR COPY OF AFFIDAVIT OF COMPLETION

[DATE]

[Owner] ____________ Certified Mail No.
[Owner's Address] ____________ Return Receipt Requested*[optional]*
____

Re: ____________ construction project: Request for Copy of Affidavit of Completion

Gentlemen:

This is to respectfully request, on behalf of *[Name of CLAIMANT]* ("CLAIMANT"), a copy of the Affidavit of Completion, if any, on the above referenced construction project. This request is made in accordance with the provisions of Texas Property Code, Section 53.106.

Yours very truly,

[signature]

FORM 12
RELEASE OF LIEN

RELEASE OF MECHANIC'S AND MATERIALMAN'S LIEN

WHEREAS, ___________________ (hereinafter referred to as "CLAIMANT"), has heretofore on or about __________________________*(date)*, attempted to assert a Mechanic's and Materialmen's Lien on the property below (by Affidavit filed in Volume ___, Page ____, Real Estate Records of the County stated below):

***insert legal description of the property*;** (hereafter called "Property")

and,

WHEREAS, the owners of the Property, ________________________________ have reached agreement with CLAIMANT for the release of said lien against the Property:

NOW, THEREFORE, CLAIMANT hereby releases the described Property from its above referenced mechanic's lien in consideration for $10.00 and other valuable consideration, the receipt and sufficiency of same being hereby acknowledged.

EXECUTED this _______ day of _____________, 20____.

CLAIMANT:

____
By: _________________________________
Title: ________________________________

State of Texas §
§
County of ________________ §

BEFORE ME, the undersigned authority, on this day personally appeared _________________________, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he/she is the ______________ of ____________________________, and that he/she executed this instrument on behalf of said corporation as its act and deed, for the purposes and consideration therein expressed.

GIVEN under my hand and seal of office, this the ____ day of ____________, 20____.

____
Notary Public - State of Texas

AFTER FILING, RETURN TO:

FORM 13
PARTIAL RELEASE OF LIEN

PARTIAL RELEASE OF MECHANIC'S AND MATERIALMAN'S LIEN

State of Texas §
§
County of ______ §

WHEREAS, _________________________ (hereinafter referred to as "CLAIMANT"), has heretofore on _________________ *[date]* filed its Affidavit claiming a Mechanic's and Materialmen's Lien on the property below:

[Insert legal description of the property]; (hereinafter called "Property")

and,

WHEREAS, said lien was asserted by CLAIMANT for its ____________________ *[labor and materials/materials]* generally described as ____________________________ *[description, i.e., specially fabricated and installed plumbing, heating, ventilating and air conditioning duct work, equipment and allied systems]* furnished for the construction project generally known as ____________________________ *[description/name of project]* ("Project") located on the above-described real property in _______ County, Texas; and

WHEREAS, the described _______________ *[labor and materials/materials]* were furnished by CLAIMANT for construction of the Project under ________________ *[a contract/an agreement]* with ______________________ *[name of Original Contractor]*, as original contractor for the said Project; and

WHEREAS, agreement has been reached for a partial release of said lien claim against the described property:

NOW, THEREFORE, CLAIMANT hereby partially releases $____________________ *[dollar amount to be released]* of its mechanic's lien against the described property, but specifically preserves the balance of its lien in the amount of $____________________ *[balance of claim]*.

EXECUTED this _______ day of ____________________, 20_____.

____
[signature of Affiant]

State of _______________ §
§
County of _____________§

BEFORE ME, the undersigned authority, on this day personally appeared _________________________, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he/she is the _____________ of ____________________________, and that he/she executed this instrument on behalf of said corporation as its act and deed, for the purposes and consideration therein expressed.

GIVEN under my hand and seal of office, this the ____ day of ____________, 1998.

____
Notary Public - State of Texas

AFTER FILING, RETURN TO:

FORM 14

NOTICE OF TERMINATION OF WORK OR ABANDONMENT OF PERFORMANCE BY ORIGINAL CONTRACTOR OR OWNER

PROJECT: *(general description of the improvements)*

OWNER*: (name and address)*

ORIGINAL CONTRACTOR: *(name and address)*

LEGAL DESCRIPTION OF PROJECT: *(sufficient for identification of the project real property)*

THIS CONSTITUTES FORMAL NOTICE THAT THE ORIGINAL CONTRACT ON THE PROJECT HAS BEEN TERMINATED OR PERFORMANCE UNDER THE CONTRACT HAS BEEN ABANDONED.

DATE OF TERMINATION OR ABANDONMENT:

A MECHANICS LIEN CLAIMANT MAY NOT HAVE A LIEN ON RETAINED FUNDS FOR THE PROJECT UNLESS THE CLAIMANT FILES AN AFFIDAVIT CLAIMING A LIEN NOT LATER THAN THE 30TH DAY AFTER THE DATE OF THE TERMINATION OR ABANDONMENT.

Date of Notice:

Owner:

____

By: _______________________________
Printed Name: ______________________
Title: _____________________________