

Lien Priority and Subordination: Mitigating Risk in Commercial Lending

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Introduction

- Mechanics and materialmen are entitled to a lien for labor and/or materials provided.
- Entitlement is broad.
- Lien claimants are favored by the courts.
- Does not need to be properly perfected.
 - “Broken priority”: When construction has commenced prior to lender financing being in place.
 - May be more challenging to mitigate.

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What are Mechanic's Liens?

- Two types:
 - Constitutional lien is the original mechanic's lien, codified in Article 16, Section 37 of the Texas Constitution
 - Self-executing
 - Do not require compliance with the notice and filing provisions.
 - Statutory lien is governed by Chapter 53 of the Texas Property Code.
 - Requires strict adherence to the Property Code.
- Chapter 53 codified the public policy underlying constitutional lien and creating statutory lien, but did not supersede the constitutional lien.

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Function of a Mechanic's Liens

- Secures a debt owed by a property owner to a person or entity that has provided labor/materials in the construction/repair of improvements on privately owned real property
- When perfected, burden improvements and real property
- The portion of property subject to lien depends on the property:
 - Urban = entire land
 - Rural = up to fifty acres
- Best practices: obtain title reports

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