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CHAPTER 56 MINERAL LIENS: CORE CONCEPTS, UPDATES, AND PRACTICE TIPS

There simply are not many secondary sources available for those handling oil and gas construction liens. For my money, the best paper on such liens was by Vijay D'Cruz for the State Bar Construction Law Conference, a link to which is provided below.[2] Unfortunately, Vijay's paper was published over ten years ago. I thought an update was sorely needed, along with some practice tips for those handling these very complex liens.

This paper is broken into three sections: (I) Core Concepts: this will refresh readers on key components of these liens – governed by Texas Property Code Chapter 56 - with additional notes related thereto; (II) Updates: you guessed right, this section will focus on updates in the law, particularly within the last ten years; and (III) Practice Tips: I will attempt to throw pearls of wisdom from my many years of handling these liens, from the perspective of owners, mineral contractors, design professionals, and subcontractors of every tier. Let's begin.

I. CORE CONCEPTS

This first section by itself can easily take up an entire article. But I thought it would be much more useful to the reader to cover the high points below, refer you to Vijay's paper if more detail is needed for you on a particular issue, and then move next to the updates (Section II) and practice tips (Section III).

A. The Work Covered and Project Type

Chapter 56 applies to a limited set of construction work and project types. The chapter only applies to "mineral activities," which are defined as "digging, ***drilling***, torpedoing, ***operating***, ***completing***, ***maintaining*** or ***repairing*** an ***oil***, ***gas***, or ***water well***, an oil or gas ***pipeline***, or a ***mine or quarry***."[3] From the outset, mineral lien claimants must know the procedures for perfecting mineral lien claims are ***exclusively*** found in Chapter 56, e.g., *not* the perfection procedures for standard liens under Texas Property Code Chapter 53.[4] So a lawyer representing a potential lien claimant must assess upfront the type of work the client furnished and the project type to which the work was furnished. If the work and project type does not fall within the above definition of "mineral activities," the claimant must look to another statute - like maybe Chapter 53 – for a right to lien, if any such statute exists at all.[5]

What is defined as "mineral activities" is very fact dependent and can fall anywhere on a broad spectrum of caselaw discussing the issue.[6] On one end of the spectrum one federal court held catering services provided to an active offshore rig still constituted "mineral activities" and thus lienable work under Chapter 56. The court succinctly stated "[w]hile a caterer may not have the traditional oil business mystique of a well logger or mudman, it has men on the job site performing an essential function. When the caterer provides victuals and personnel on the well site, its receivable supports a lien."[7] On the other end of the spectrum, the Texas Supreme Court – in its frequently-cited 1950 *Big Three Welding* opinion, held that dismantling or removing a pipeline was not lienable work under Chapter 56, since the contractor in that case was not operating, completing, maintaining, or repairing the pipeline at issue.[8]

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2. Vijay A. D'Cruz, *There's a Whole Ocean of Liens Under Our Feet; An Overview of Chapter 56 of the Texas Property Code*, 26th Annual State Bar of Texas Construction Law Conference (2013) available at: http://www.constructionlawsection.org/
3. TEX. PROP. CODE § 56.001(1) (2023) (emphasis added).
4. Energy-Agri Prods., Inc. v. Eisenman Chem. Co., 717 S.W.2d 651, 652 (Tex. App.—Amarillo 1986, no writ)(citing Ball v. Davis, 18 S.W.2d 1065, 1065-66 (Tex. 1929)).
5. *See, e.g.,* Oil Field Salvage Co. v. Simon, 168 S.W.2d 848, 851 (Tex. 1943) (noting "[p]rior to the enactment of Article 5473 [predecessor to Chapter 56] in 1917, there was no statutory lien available to laborers and materialmen in the oil and gas industry.").
6. As just one example, regarding the type of labor is not considered a mineral activity, Eldon Youngblood noted: "One employed merely as a security watchman on lease hold premises was found not to be entitled to a lien under Chapter 56. [Bell Oil & Refining Co. v. Price, 251 S.W. 559 (Tex. Civ. App.-Fort Worth 1923, no writ).] A geologist who generates and evaluates prospects, or an attorney who examines title to the lease, is not likely to be held entitled to a mechanic's lien on mineral property. In the bankruptcy case of *In Re Anderson Resources Corp.*, 61 B.R. 583 (Bankr. D. Colo. 1986) Chapter 56 of the Texas Property Code was held not to permit a person who created business plans for a pipeline and who prepared gas contracts to enforce a lien. It has also been held that repairs to rental property are not covered by the mineral property lien. [Clayton v. Bridgeport Mach. Co., 32 S.W.2d 787 (Tex. Civ. App.-Eastland 1930, writ ref'd).]" Eldon Youngblood, YOUNGBLOOD ON TEXAS MECHANICS' LIENS § 302.3 (1999).
7. World Hosp. Ltd. v. Shell Offshore, Inc., 699 F.Supp. 111, 112-13 (S.D. Tex. 1988).
8. Big Three Welding Equip. Co. v. Crutcher, Rolfs, Cummings, Inc., 229 S.W.2d 600, 603 (Tex. 1950).

As for the project type that falls within Chapter 56, the focus must always be whether the project relates to "an ***oil***, ***gas***, or ***water well***, an oil or gas ***pipeline***, or a ***mine or quarry***."[9] Some projects recently heating up in light of the Inflation Reduction Act – e.g., carbon capture, wind, and solar – are taking up more space in the energy law space; nevertheless, odds are those projects will not fall under Chapter 56, since they are generally not related to an oil, gas, or water well, oil or gas pipeline, or a mine or quarry.[10] Further, fact-intensive analysis is often required to determine whether, e.g., a gas processing facilities with connecting pipelines falls under Chapter 56 or Chapter 53; that Chapter 53 versus Chapter 56 analysis is a subject that could, and in fact already did, take up an entire paper by itself.[11]

B. Project Parties

Chapter 56 also has unique definitions for the parties involved in a Chapter 56 project. The project owner is the "[m]ineral property owner," defined as an "owner of ***land***, an oil, gas, or other mineral ***leasehold***, an oil or gas ***pipeline***, or an oil or gas ***pipeline right-of-way***."[12] The mineral property owner contracts with a "[m]ineral contractor," defined as "a person who performs labor or furnishes or hauls material, machinery, or supplies used in mineral activities under an express or implied contract with a mineral property owner or with a trustee, agent, or receiver of a mineral property owner."[13]

The mineral contractor contracts with a "[m]ineral subcontractor," who "(A) furnishes or hauls material, machinery, or supplies used in mineral activities under contract with a mineral contractor or with a subcontractor; (B) performs labor used in mineral activities under contract with a mineral contractor; or (C) performs labor used in mineral activities as an artisan or day laborer employed by a subcontractor."[14] As Sections (A) and (C) indicate, a "mineral subcontractor" can be a subcontractor or sub-subcontractor. And given the statute's use of the word "under" here, the statute probably also applies to sub-subcontractors of any tier, so long as they can prove their labor / materials were for the project at issue.[15]

C. Procedures for Perfecting a Chapter 56 Claim

Again, the procedures for perfecting mineral lien claims are exclusively found in Chapter 56, not Chapter 53.[16] Further, and unfortunately for mineral contractors in direct privity with the owner, such mineral contractors do not have the potential fallback option of the automatic, "self-executing" constitutional lien (Texas Constitution article 16 section 37) that Chapter 53 original contractors sometimes have.[17] On first blush, the procedures for perfecting a Chapter 56 claim may seem easier than Chapter 53. But that is often not the case.

First, all mineral contractors (direct privity with the owner), as well as subcontractors of any tier, must file an affidavit with the county clerk of the county in which the property is located "not later than six months after the day the indebtedness accrues."[18] Indebtedness for "labor performed by the day or week" accrues at the end of each week during which the labor is performed.[19] The indebtedness for "material or services" accrues "on the date the material or services were last furnished." All material or services that a person furnishes for the same land, leasehold interest, oil or gas pipeline, or oil or gas pipeline right-of-way are considered to be furnished under a single contract unless more than six months elapse between the dates the material or services are furnished.[20]

What about calculating the six months for filing the affidavit? That is somewhat more nebulous than the "15th" of the month deadline under Chapter 53. I am aware of no specific Chapter 56 case law on this point, but the Code Construction Act and other non-Chapter 56 case law perhaps indicate that, e.g., if material or services were last furnished on May 3, then the last day to file the affidavit under the six month deadline would be November 3 of that same year (unless May 3 is Saturday,

9. Tex. Prop. Code § 56.001(1) (2023) (emphasis added).
10. *Id.*
11. *See, e.g.,* Jon Paul Hoelscher & Christian Dewhurst, *Mechanics Liens & Mineral Liens: Interplays and Traps for the Unwary* 30th Annual State Bar of Texas Construction Law Conference at 21-25 (2017).
12. Tex. Prop. Code § 56.001(3) (2023) (emphasis added).
13. *Id.* § 56.001(2) (2023).
14. *Id.* § 56.001(4) (2023).
15. *See, e.g.,* Bassett v. Mills, 34 S.W. 93, 94 (Tex. 1896) (analyzing the word "under" in predecessor to Chapter 53); Eldon L. Youngblood, Youngblood on Texas Mechanics' Liens § 202.2 (1999) (analysis of the word "under" in Chapter 53 context).
16. Energy-Agri Prods., Inc. v. Eisenman Chem. Co., 717 S.W.2d 651, 652 (Tex. App.—Amarillo 1986, no writ)(citing *Ball*, 18 S.W.2d at 1065-66).
17. Mid-America Petroleum, Inc. v. Adkins Supply, Inc., 83 B.R. 937, 943 (Bankr. N.D. Tex. 1988). For more on the Texas constitutional lien, see what is in my opinion the best paper on the subject by far, J. Paulo Flores, *The Texas Constitutional Lien Simplified*, State Bar of Texas 27th Annual Construction Law Conference (2014).
18. Tex. Prop. Code § 56.021(a).
19. *Id.* § 56.005(a).
20. *Id.* § 56.005(a).

Sunday, or holiday, in which case the deadline might be extended to the next day that isn't a Saturday, Sunday, or holiday).[21]

What must be in the affidavit? The affidavit filed by mineral contractors and all other subcontractors of any tier must state:

> (1) the name of the mineral property owner involved, if known;
>
> (2) the name and mailing address of the claimant;
>
> (3) the dates of performance or furnishing;
>
> (4) a description of the land, leasehold interest, pipeline, or pipeline right-of-way involved; and
>
> (5) an itemized list of amounts claimed.[22]

In addition to the above affidavit requirements, an affidavit for a subcontractor of any tier must also state: "(1) the name of the person for whom labor was performed or material was furnished or hauled; and (2) a statement that the subcontractor timely served written notice that the lien is claimed on the property owner or the owner's agent, representative, or receiver."[23] Each of these items will be discussed in more detail below.

What is the "written notice" referred to in the second item? A subcontractor of any tier has an additional notice requirement, not required of the mineral contractor in privity with the owner. Not later than "the 10th day before the day the affidavit is filed, a mineral subcontractor claiming the lien must serve on the property owner written notice that the lien is claimed."[24] The mineral subcontractor's notice to the owner must include at least three things: "the amount of the lien, the name of the person indebted to the subcontractor, and a description of the land, leasehold interest, pipeline, or pipeline right-of-way involved."[25] Out of an abundance of caution, I like to add a forth item, namely a statement that "a lien is claimed" in light of the language of Section 56.021 noted above in this paragraph that the "subcontractor claiming the lien must serve on the property owner written notice that the lien is claimed."[26]

This approximately six-month period to file a lien affidavit may appear like plenty of time to the lien claimant. But often it is not. First, often significantly more time – compared to a Chapter 53 claim – is required for a Chapter 56 lien claimant to investigate and determine just who the owner is, whether the claimant is a mineral contractor or subcontractor, a description of the property, an itemization of amounts for the lien affidavit, labor / services / material furnished to each particular lease, among other items. Second, while there isn't an express owner retainage provision like that found in Chapter 53, Chapter 56 provides:

> RETENTION OF PAYMENT.
> A property owner who is served with a mineral subcontractor's notice may withhold payment to the contractor in the amount claimed until the debt on which the lien is based is settled or determined to be not owed. ***The owner is not liable to the subcontractor for more than the amount that the owner owes the original contractor when the notice is received.***[27]

So, even a subcontractor who timely sends its notice – for example, within three months after its indebtedness has accrued – may be out of luck if the owner has paid the mineral contractor everything owed by the time the owner receives the subcontractor's notice. All the more reason not to wait nearly six months to perfect a subcontractor lien.

21. *E.g.,* TEX. GOV'T CODE § 311.014 ("Code Construction Act") ("Sec. 311.014. COMPUTATION OF TIME. (a) In computing a period of days, the first day is excluded and the last day is included. (b) If the last day of any period is a Saturday, Sunday, or legal holiday, the period is extended to include the next day that is not a Saturday, Sunday, or legal holiday. (c) ***If a number of months is to be computed by counting the months from a particular day, the period ends on the same numerical day in the concluding month as the day of the month from which the computation is begun***, unless there are not that many days in the concluding month, in which case the period ends on the last day of that month.") (emphasis added); Home Ins. Co., N.Y. v. Rose, 255 S.W.2d 861, 862 (Tex. 1953) (a period measured in years "from" or "after" a measuring date, therefore, ends on the anniversary of the measuring date, not on the day before the anniversary.); Apache v. Apollo, 670 S.W.3d 319, 321 (Tex. 2023) (A year "from" or "after" June 30 ends on June 30 of the following year, not June 29) (re: lease construction).
22. TEX. PROP. CODE § 56.022.
23. *Id.*
24. *Id.* § 56.021.
25. *Id.* § 56.023.
26. *Id.* § 56.021.
27. *Id.* § 56.043 (emphasis added). Note for some reason – perhaps late-night drafting at the Legislature – Section 56.043 uses the term "original contractor" here, presumably referring to a mineral contractor in privity with the owner. This is the only part of Chapter 56 that uses the term "original contractor"; Chapter 56 uses "mineral contactor" at all other times. The term "original contractor" of course is found throughout Chapter 53 to refer to a contractor in privity with the project owner.

One other limitation on the liability of the owner is worth noting. Chapter 56 provides: "LIABILITY OF OWNER. An owner of land or a leasehold may not be subjected to liability under this chapter ***greater than the amount agreed to be paid in the contract*** for furnishing material or performing labor."[28] This section raises at least two questions. First, since it seemingly only applies to an "owner of land or a leasehold," does the owner of an "oil or gas pipeline, or an oil or gas pipeline right-of-way" not get the benefit of this liability cap?[29] Second, how is "amount agreed to be paid in the contract" determined if there is no written contract? Chapter 56 clearly allows for such an unwritten contract, defining a mineral contractor as "a person who performs labor or furnishes or hauls material, machinery, or supplies used in mineral activities under an ***express or implied contract*** with a mineral property owner or with a trustee, agent, or receiver of a mineral property owner."[30] These ambiguities remain unanswered, but nevertheless the general limit of the owner's liability is there and something subcontractors must be aware of.

D. What Does Your Lien Get You and How Do You Enforce It?

With the above limits and deadlines in mind, what does the lien claimant get with its lien? First, the lien claimant must make the somewhat difficult assessment of what property can be subject to its lien claim and thus subject to foreclosure. Chapter 56 provides the following:

> Sec. 56.003. PROPERTY SUBJECT TO LIEN.
>
> (a) The following property is subject to the lien:
>
> (1) the material, machinery, and supplies furnished or hauled by the lien claimant;
>
> (2) the land, leasehold, oil or gas well, water well, oil or gas pipeline and its right-of-way, and lease for oil and gas purposes for which the labor was performed or material, machinery, or supplies were furnished or hauled, and the buildings and appurtenances on this property;
>
> (3) other material, machinery, and supplies used for mineral activities and owned by the owner of the property listed in Subdivision (2); and
>
> (4) other wells and pipelines used in operations related to oil, gas, and minerals and located on property listed in Subdivision (2).
>
> (b) A lien created by performing labor or furnishing or hauling material, machinery, or supplies for a leaseholder does not attach to the fee title to the property.[31]

Many of the above items will be discussed in more detail below.

In addition to foreclosure against the above property, the Houston Court of Appeals in *Abella v. Knight Oil Tools* affirmed a trial court's order appointing a receiver to collect the net working interest owner's proceeds from the sale of the oil/gas produced from the well at issue.[32] The *Abella* majority reasoned, among other things, that the receiver was necessary because "the value of plaintiffs' liens diminish as the wells are produced."[33] It is worth noting that not every legal commentator has agreed with the holding in *Abella*, but the case is there as a potential weapon for lien claimants who seek recovery in addition to a potentially limited foreclosure remedy.

Finally, how does the Chapter 56 lien claimant enforce its lien? By following Chapter 53. In a statutory provision that inherently opens itself up to a lot of court interpretation – much of which is discussed below – Section 56.041 provides: "ENFORCEMENT. (a) A claimant must enforce the [Chapter 56] lien within the same time and in the same manner as a mechanic's, contractor's, or materialman's lien under Chapter 53."[34] Among other things, as discussed in the next section, this means that the Chapter 53 statute of limitations will also apply to Chapter 56. We will also see how Section 56.041 has been used to potentially apply Chapter 53 concepts of attorney fee recovery and statutory payment bonds to Chapter 56, while Chapter 53 lien release concepts might not apply to Chapter 56.

28. *Id.* § 56.006.
29. *Compare Id.* § 56.001 ("Mineral property owner' means an owner of land, an oil, gas, or other mineral leasehold, ***an oil or gas pipeline, or an oil or gas pipeline right-of-way***.") (emphasis added).
30. *Id.* 56.001(2); Oil Field Salvage v. Simon, 168 S.W.2d 848, 852 (Tex. 1943) ("[It is] immaterial whether the contract for material was verbal or in writing.").
31. *Id.* § 56.003.
32. Abella v. Knight Oil Tools, 945 S.W.2d 847 (Tex. App.—Houston [1st Dist.] 1997, no writ).
33. *Id.* at 851.
34. *Id.* § 56.041(a).

With the above core concepts in mind, we next discuss key changes related to Chapter 56 in the last few years.

II. UPDATES

A. New Potential 1 Year Statute of Limitations

In 2021, the Legislature passed significant revisions to Chapter 53, including revisions that generally benefitted lien claimants, such allowing delivery of notices via Fed Ex, or extending certain deadlines that fall on weekends or holidays.[35] However, these 2021 also significantly shortened the lien claimant's statute of limitations from effectively two years to one year: the new language requires suit to be brought "not later than the first anniversary of the last day a claimant may file the lien affidavit under Section 53.052."[36] It appears Chapter 56 claimants will now have the burden of the shorter statute of limitations under the 2021 Legislation. This is because Chapter 56 has long expressly provided its statute of limitations is the same as Chapter 53.[37]

However, these same Chapter 56 claimants seemingly would not receive the other benefits of the 2021 Legislation, such as allowing delivery of notices via Fed Ex, or extending deadlines that fall on weekends or holidays. This is because the *procedures* for perfecting a Chapter 56 lien – i.e., pre-lien notice and filing an affidavit, as opposed to the statute of limitations to file suit – as noted above, have long been held to be the exclusive purview of Chapter 56.[38] Such Chapter 56 perfection procedures were not touched by the 2021 Legislation[39] and thus should still be followed by Chapter 56 claimants, without regard to the 2021 Legislation.

Since the 2021 Legislation did not touch Chapter 56 – only Chapter 53 – this shorter statute of limitations may come as a big surprise to unwary lien claimants.

B. Pre-project Contractual Lien Releases: Maybe Enforceable, Maybe Not?

In 2011, the Legislature promulgated statutory forms for lien releases in changes to Property Code Chapter 53.[40] Two of the key components of the 2011 Legislation added the following sections to Chapter 53:

> Sec. 53.286 PUBLIC POLICY. Notwithstanding any other law and except as provided by Section 53.282, ***any*** contract, ***agreement***, or understanding ***purporting to waive*** the right to file or enforce ***any lien or claim*** created under this chapter is ***void*** as against public policy."
>
> Sec. 53.287. CERTAIN AGREEMENTS EXEMPT. ***This subchapter does not apply to a written agreement to subordinate***, release, waive, or satisfy all or part of a lien or bond claim ***in***: (1) an accord and ***satisfaction of an identified dispute***; (2) an agreement concerning an action pending in any ***court or arbitration proceeding***; or (3) an agreement that is ***executed after an affidavit claiming the lien has been filed*** or the bond claim has been made.[41]

Thus, for Chapter 53 projects, the 2011 Legislation, among other things: 1) generally voided any lien release form signed before a lien affidavit is filed or otherwise resolving an already existing dispute; and (2) generally voided pre-construction lien subordination agreements frequently promulgated by project lenders.

The 2011 Legislation brought more certainty and clarity to Chapter 53 lien releases. But what about Chapter 56? There arguably remains uncertainty here, made better or worse by recent case law.

In *Mesa Southern CWS Acquisition, LP v. Deep Energy Exploration Partners, LLC*, Mesa furnished labor and materials pursuant to a master services agreement ("MSA") with operator Deep Operating, LLC.[42] After Deep Operating filed for bankruptcy, Mesa filed suit against Deep Operating's parent company, Deep Energy, seeking foreclosure under Chapter 56, along with Trust Fund Act claims.[43] The MSA's Payment of Claims clause stated Mesa "acknowledges that in entering into this Agreement [Mesa] is relying on the creditworthiness

35. Tex. H.B. 2237, 87th Leg., R.S. (2021). For more detail on the 2021 changes, see Brian R. Gaudet & Mason P. Hester, *Misconceptions, Potential Traps, and Practice Tips for the 2021 Changes to the Texas Lien Laws*, State Bar of Texas Construction Law Journal, Vol. 18, No. 1, 22-35 (Summer 2022).
36. Tex. Prop. Code § 53.158(a) (2023).
37. *Id.* § 56.041(a) (2023) ("ENFORCEMENT. (a) A claimant must enforce the [Chapter 56] lien within the same time and in the same manner as a mechanic's, contractor's, or materialman's lien under Chapter 53.").
38. Energy-Agri Prods., Inc. v. Eisenman Chem. Co., 717 S.W.2d 651, 653 (Tex. App.—Amarillo 1986, no writ) (citing *Ball,* 18 S.W.2d at 1065–66.
39. Tex. H.B. 2237, 87th Leg., R.S. (2021).
40. Tex. H.B. 1456, 82nd Leg., R.S. (2011).
41. *Id.* (emphasis added).
42. No. 14-18-00708-CV, 2019 WL 6210213 at *1 (Tex. App.—Houston [14th Dist.] Nov. 21, 2019, no pet.).
43. *Id.*

of [Deep Operating] and *shall look solely and exclusively* to [Deep Operating] for payment."[44] The Houston Court of Appeals found this language of the MSA to be "unambiguous" and noted "[i]n contractually limiting its recourse for payment solely to Deep Operating, Mesa cannot obtain satisfaction of the alleged debt from Deep Energy either by direct money judgment or through foreclosure and sale based on purported lien rights."[45]

In its appellate Brief, Mesa essentially argued the Chapter 53 lien release forms were incorporated into Chapter 56 via Section 56.041; thus, Mesa argued, the pre-project release at issue was void, per the Chapter 53 language voiding such forms.[46] But the court of appeals effectively punted on this in a footnote, stating:

> The parties dispute the validity of Mesa's liens. Deep Energy argues that Mesa contractually waived its right to assert a mineral lien under chapter 56 against Deep Operating's wells; Mesa argues that its agreement to waive the right to assert a mineral lien is void as against public policy. We need not decide and express no opinion whether Mesa's liens are valid because Mesa is not entitled to recover on the liens against Deep Energy. Thus, the portion of the judgment compelling Mesa to release the liens against Deep Energy is proper.[47]

There still appear to be no appellate court opinions addressing application of the 2011 lien release legislation to Chapter 56, whether through Section 56.041 or otherwise. At least one bankruptcy trial court appears to have rejected the application of the Chapter 53 lien waivers to Chapter 56. In *In Re: Energy & Exploration Partners, et. al v. Acid & Cementing Services*,[48] the trial court was presented a summary judgment with whether a pre-construction contractual lien waiver was enforceable for a Chapter 56 project. While no written opinion was issued, the hearing transcript reveals the court rejected the Section 56.041 / Chapter 53 arguments and held the Chapter 56 lien release was effective as a matter of law, noting:

> [A]t the end of the day, all I'm left with is the statute itself, and there's nothing in Chapter 56 that precludes waiver of these liens. And I think the Texas Supreme Court has expressed its preference that the parties are free to contract – Texas is a big freedom of contract state in contracting around what would otherwise by statutory or, in some cases, constitutional rights.[49]

While this has some value, nevertheless there remain no published appellate opinions (or even trial opinions, when one considers the above is a transcript of a hearing) on whether the 2011 Chapter 53 lien release requirements apply to Chapter 56, whether through Section 56.041 or otherwise, or, more broadly, whether contractual lien waivers are generally enforceable under Chapter 56.

Currently, the enforceability of a blanket contractual lien waiver under Chapter 56 remains a developing issue. Those arguing for enforcement of such waivers might look to support from the *Mesa* and *In Re: Energy* cases discussed above.

Lien claimants looking to void such Chapter 56 contractual lien waiver may look to Section 56.041, arguing it has been applied to incorporate several other provisions of Chapter 53, so why not Chapter 53's provisions regarding lien waivers? For example, allowing recovery of Chapter 53 attorney's fees for a Chapter 56 claim, one court noted ""Section 56.041 [former Articles 5475 and 5476] of the mineral lien statutes allows the claimants to enforce their liens in the same manner as a mechanic's or materialman's lien under Chapter 53 of the Property Code, and Section 53.156 [former Article 5453] authorizes the recovery of attorney's fees."[50] These lien claimants might also emphasize Texas courts' general presumption against lien waivers, particularly if the lien waiver is not clear, plain, or express: "[a] lien may be waived by express agreement, or by implication from acts inconsistent with its continued existence. But ***one will not be held to have intentionally***

44. *Id.* at *4 (emphasis added by court).
45. *Id.* at *5.
46. Appellant's Brief, No. 14-18-00708-CV, 2018 WL 7079154, at 18-19.
47. *Id.*
48. Case no. 15-44931-rfn-11, Advers No 16-4065 (U.S. Bkrpt Crt, Nrthn Dist. Tex., Ft. Wth Div.). The author would like to thank attorney Clark Donat at Reed Smith for generously providing material and insights regarding this case, in which Mr. Donat was involved. *See also* Brain C. Mitchell & Clark Donat, *Priority Pitfalls of Mineral Lien Waivers: A Recent Bankruptcy Ruling Has Far-Reaching Implications for Texas Mineral Lien Law*, 13 Tex. J. Oil Gas & Energy L. 179, 179-192 (2018) (discussing this case in more detail).
49. Case no. 15-44931-rfn-11, Advers No 16-4065 (U.S. Bkrpt Crt, Nrthn Dist. Tex., Ft. Wth Div.) (Doc. 252, p. 90)
50. McCarty v. Halliburton Co., 725 S.W.2d 817, 822 (Tex. App.-Eastland 1987, writ ref'd n.r.e.).

waived a lien unless the intent be expressed or very plain and clear; the presumption is always against it."[51] Further, such lien claimants might also couple the Section 56.041 argument with established Texas case law construing lien statutes "liberally" to protect lien claimants; as one court noted:

> "***Texas courts liberally construe the mechanics'/materialmen's lien statutes to protect*** the interests of laborers and materialmen, including ***mineral lien claimants***.... reading ***the provisions of § 56.041 that a mineral lien claim must be enforced 'in the same manner' as liens under Chapter 53 to include both the duties required of and the rights granted to mechanics'/materialmens' lien claimants*** gives those provisions their most comprehensive application without nullifying or conflicting with other statutory provisions. ... The Court thus finds McCarty probative of how the Texas Supreme Court would rule ...[Ch. 56] Plaintiffs are entitled to summary judgment that attorneys' fees for actions to foreclose a lien or to declare that any lien or claim is invalid ... are available under TEX. PROP.CODE § 56.041."[52]

Finally, perhaps lien claimants attempting to void a contractual Chapter lien release might argue that contractual clause has been rescinded by the non-payment, thus prior material breach, of the party seeking to enforce the lien release. For example, in a non-lien case, *Murry v. Crest Construction, Inc.*, a subcontractor and general contractor executed a settlement agreement wherein the subcontractor executed a waiver of lien in change for a promissory note of payment from the general contractor. Then general contractor did not make the promised payment. The Texas Supreme Court stated:

> "Once [the general contractor] repudiated the ... settlement agreement [the subcontractor] was under no obligation to honor the waiver of lien. ***When a claim is released for a promised consideration that is not given, the claimant may treat the release as rescinded and recover on the claim.*** 12 JAEGAR, WILLISTON ON CONTRACTS § 1457, at 49 (3d ed. 1970). [The general contractor's] breach gave [the subcontractor] an election of remedies to pursue a breach of contract claim on the promissory note or to reassert its original claim on the [settled] job."[53]

This remains an unsettled area of the law that will be interesting to watch develop in the coming years.

C. Availability of Chapter 53 Bond to Indemnify Against Chapter 56 Liens

In *Shell W. E&P, Inc. v. Pel-State Bulk Plant, LLC*, the mineral lease owner, Shell, contracted with Green Field as the mineral contractor to perform fracking on wells of Shell mineral leases. Green Field subcontracted with Pel-State to supply bulk fuel, fuel equipment, and other services.[54]

The mineral contractor, as so often happens, went bankrupt. Subcontractor Pel-State followed the Chapter 56 procedures to perfect its lien claim. Shell, however, disputed the amount of Pel-State's lien claim.[55] Later, Shell unencumbered its leasehold interest by filing a bond for "150% of the value of the lien claims." Because Shell had filed such bond, the San Antonio Court of Appeals held, Pel-State's remedy was to establish the validity of its lien in court and to obtain a judgment in its favor for the amount of its lien.[56] The court of appeals noted:

> Pel-State's summary judgment motion also asked the trial court to foreclose on its mineral lien. However, the trial court denied this part of Pel-State's motion because ***the lien had been discharged of record by the filing of a bond and notice as permitted by section 53.157(4)*** [Subchapter H Bond to Indemnify] of the Texas Property Code. *See TEX. PROP. CODE ANN. § 53.157(4)* (West 2014).[57]

Thus, the San Antonio Court of Appeals effectively gave

51. Milburn v. Athans, 190 S.W.2d 388, 392 (Tex. Civ. App.—Fort Worth 1945, writ dism'd) (emphasis added).
52. *In re Pearl Resources*, LLC, 2022 WL 4474131 (Bankr. S.D. Tex. Sept. 26, 2022) (citing *In re Cornerstone E&P Co., L.P.*, 435 B.R. 390, 416 (N.D. Tex. 2010)) (emphasis added).[Mason Hester note: this paper follows bluebook citation, so only the "In re" of the case should be italicized, the rest is not a italicized, unless short form citatation. Need to globally change that back.]
53. Murray v. Crest Constr., Inc., 900 S.W.2d 342 (Tex. 1995).
54. Shell W. E&P, Inc. v. Pel-State Bulk Plant, LLC, 509 S.W.3d 581, 584 (Tex: App.—San Antonio 2016, no pet.).
55. *Id.*
56. *Id.*
57. *Id.* at n.1 (emphasis added).

the mineral property owner the right to statutory bond to indemnify against the lien found in Texas Property Code Chapter 53, Subchapter H.

As far as the result of the *Shell* case, perhaps I like it. But I'm not quite sure how the *Shell* court got there. The bond made available under Chapter 53, Subchapter H, seems only to apply to Chapter 53 claims, perhaps not Chapter 56. Subchapter H provides: "If a lien, other than a lien granted by the owner in a written contract, is fixed or is attempted to be fixed by a recorded instrument under ***this chapter*** [Chapter 53, not Chapter 56], any person may file a bond to indemnify against the lien."[58]

Nevertheless, the *Shell* holding could be a good holding for lien claimants – who might much rather have a claim against a bond than an otherwise potentially limited foreclosure remedy, as discussed in Section I. D above – as well as owners, who want their property cleared of lien claims and who may find the alternate remedy of interpleading funds is not as attractive as it initially seems, as discussed in Section II. E below. Mineral owners, however, may still need to be cautious of their owner potential personal liability, despite the bond, in light of Chapter 53 cases like *Stolz v. Honeycutt*, whether we agree with such cases or not.[59] Nevertheless, at least the Chapter 56 owner in this situation – versus a Ch. 53 owner – potentially gets stronger protection from a bond to indemnify against a Chapter 56 mineral contractor lien, since Chapter 53 project owners potentially cannot bond around a constitutional lien.[60]

Outside of the payment bond issue, it is also worth noting the *Shell* court gave further clarity to Section 56.006, regarding the extent of mineral property owner's liability. The court of appeals noted Shell "could not be subjected to liability greater than the amount it agreed to pay Green Field in the contract or contracts for furnishing material or performing labor."[61] However, in this instance, Section 56.006 did not operate to limit Shell's liability because the summary judgment evidence established the amount Shell agreed to be paid in its mineral prime contract far exceeded $3,270,017.05, which was the amount of the lien claimed by the subcontractor, Pel-State.[62]

Relatedly, the *Shell* court clarified that, under Section 56.043, any limitation on the amount of Pel-State's lien must be determined by the state of the account between Shell and its mineral contractor (Green Field) at the time Shell received Pel-State's lien notice, not by amounts Shell owed Green Field on particular wells.[63] Shell's argument, that the trial court was required to consider the status of the invoices on individual wells, not supported by the plain language of Ch. 56, according to the *Shell* court.[64]

D. Mineral Lien Affidavit Property Description and Itemization of Amounts Claimed

In *PADCO Energy Servs., LLC v. Case Energy Servs., LLC*, the bankruptcy court for the Western District of Louisiana made it clear – yet again – that the perfection procedures for Chapter 56 are deceptively simple. Much of the opinion dealt with whether the Chapter 56 lien claimant had properly described the project property and itemized amounts claimed, as required by Chapter 56's affidavit requirements.

Recall the Chapter 56 lien affidavit must contain "a description of the land, leasehold interest, pipeline, or pipeline right-of-way involved"[65] and "an itemized list of amounts claimed,"[66] among other requirements. In *PADCO*, the bankruptcy court held all ten lien affidavits filed by the claimant did not sufficiently described the property by solely referencing to the well name at issue. The property description for each affidavit was typically as follows

> "COUNTY: Robertson County, Texas
> WELL: RL Dodds Jr. 03 Well, Robertson County, Texas
> API #: 42-395-31599
> 116 OPERATOR: COVEY PARK OPERATING, LLC"[67]

The *PADCO* court held the above was not sufficient, instead citing the frequently-cited In re Reichmann

58. Tex. Prop. Code § 53.171(a) (emphasis added).
59. Stolz v. Honeycutt, 42 S.W.3d 305, 312 (Tex. App.—Houston [14th Dist.] 2001, no pet.) ("A claimant on a properly filed mechanic's lien has a right to pursue a personal judgment against the property owner that continues even after the owner obtains and records an indemnity bond to remove the lien. Attacking the bond should certainly be the preferred method, as collection would generally be much easier and more assured, but the right to pursue personal judgment remains."). [potentially note Ch 53 basis for Stolz holding that might not exists under Chapter 56]
60. E.g., Eldon Youngblood, *Indemnity Bonds and the Self-Executing Mechanic's Lien*, State Bar of Texas Construction Law Journal, 38-39 (Winter 2008).
61. Shell W. E&P, Inc. v. Pel-State Bulk Plant, LLC, 509 S.W.3d 581, 585 (Tex. App.—San Antonio 2016, no pet.).
62. *Id.* at 590.
63. *Id.*
64. *Id.*
65. Tex. Prop. Code § 56.022(a)(4).
66. *Id.* § 56.022(a)(5).
67. PADCO Energy Servs., LLC v. Case Energy Servs., LLC (*In re PADCO Energy Servs., LLC*), 610 B.R. 96, 115-116 (Bankr. W.D. La. 2019).

Petroleum Corp opinion as to the following acceptable property descriptions: "(1) providing date and place of recording of the oil and gas lease in the county records, (2) providing the section, block, survey name, and county for the lease, and (3) providing survey descriptions of the lease."[68]

I get the basis for the *PADCO* opinion, but it seems courts have perhaps gotten carried away with their requirements for Chapter 56 property descriptions. The Fifth Circuit *Reichmann* court accurately noted, as many others have, that "the description needed to obtain a mineral's lien is even less [than that required by Chapter 53] by omitting the 'legally sufficient' language and by requiring only a description of the property involved with the mineral lien."[69] On that point, the Chapter 53 affidavit requires "***a description, legally sufficient for identification***, of the property sought to be charged with the lien,"[70] whereas Chapter 56 only requires "***a description*** of the land, leasehold interest, pipeline, or pipeline right-of-way involved"[71]

Another point of concern raised by PADCO, and opinions like it: whether the three *Reichmann* legal descriptions are now also required for the mineral subcontractor's lien notice. I am aware of no case deciding the issue but raise it in light of the exact same language used in Chapter 56 affidavit requirements ("a description of the land, leasehold interest, pipeline, or pipeline right-of-way involved")[72] and mineral subcontractor lien notice requirements ("CONTENTS OF MINERAL SUBCONTRACTOR'S NOTICE. A mineral subcontractor's notice to the property owner must include the amount of the lien, the name of the person indebted to the subcontractor, and ***a description of the land, leasehold interest, pipeline, or pipeline right-of-way involved.***").[73]

Rubbing salt in the wound, the *PADCO* court also held the lien claimant did not fulfill the itemization requirement of Chapter 56 lien affidavits, stating "[n]ot only did Case fail to include any itemization or other explanation, but the amount asserted in each lien affidavit, $1,200,000.00, included work relating to property unrelated to the liened property at issue"[74] and that "[t]here is simply no information provided from which a third party could determine the actual amount of the lien to which Case might be entitled, or what that work might have entailed to even determine whether Case was entitled to assert a lien at all."[75] The court concluding that "filing each lien in the amount of PADCO's total alleged liability to Case grossly overstated the amount of liability in the public record."[76]

Ok well what is itemization? All Chapter 56 says is "[a] lien claimant's affidavit must include:...an itemized list of amounts claimed"[77] Guidance must be found from other Texas cases, that provide: "[a]ll that is required of the itemization is that it show with reasonable certainty the ***character*** and ***amount*** of materials furnished, ***dates*** when, and ***places*** where furnished and the ***value*** of same."[78] Out of an abundance of caution, practitioners may want to ensure that each of these five components are expressly provided in the lien claim, preferably within the body of the affidavit itself, as noted in Section III below.

E. Interpleader of Funds Into Court Registry

Attorneys representing project owners when multiple liens are filed often get a question like this from the owner: "Can't I just deposit the remaining funds with the court and walk away?" The answer: it's complicated. And potentially not worth the effort. A 2014 Fifth Circuit case, *In re T.S.C. Seiber Servs., L.C.*, made this clear.

In *Seiber*, a gas pipeline owner, EnCana, interpleaded approximately $345,000 into the bankruptcy district court registry; Encana sought a declaration shielding EnCana from further liability for unpaid amounts owed by its mineral contractor, Seiber, to Seiber's subcontractor The Fifth circuit reversed the district court and held the district court erred in holding EnCana's interpleader and

68. *Id.* at 116 (citing *In re Reichmann Petroleum Corp.*, 2009 WL 915280 (S.D. Tex. 2009)).
69. *In re Reichmann Petroleum Corp.*, 373 Fed. App'x. 497, 501, 2010 WL 1563689, at **1 (5th Cir. Apr. 19, 2010).
70. Tex. Prop. Code § 53.054(a)(6).
71. *Id.* § 56.022(a)(4).
72. *Id.* § 56.022(a)(4).
73. *Id.* § 56.023.
74. *PADCO*, 610 B.R. at 115.
75. *Id.*
76. *Id.*
77. Tex. Prop. Code § 56.022(a)(5); Pac. Indem. Co. v. Bowles & Edens Supply, 290 S.W.2d 353 (Tex. App.—Dallas 1956, writ ref'd n.r.e.) ("Materialmen and laborers seeking to recover under the provisions of Art. 5160 [Ch. 56 predecessor] must establish by sworn itemized account that the material was furnished, and labor performed within the statutory period....").
78. *Id.* (quoting Houston Fire & Cas. V. Col-Tex Refining, 231 S.W.2d 468, 470 (Tex. Civ. App.—Eastland 1950, no writ)) (emphasis added). Those of us who have ever prepared an itemization know how difficult it is and that the court's "all that is required" comment is either comical, insulting, or both.

its deposited funds automatically satisfied its liability to Seiber, thus transferring legal possession of the funds to Seiber and the bankruptcy estate.[79]

The Fifth Circuit noted the district and bankruptcy courts erred in failing to draw the distinction between the act of depositing funds into the district court registry and the judicial act of discharging the depositor of any further liability.[80] The Fifth Circuit stated that simply depositing interpleader funds "does not automatically mean that the funds have been legally accepted, ownership thereof transferred, and the interpleader relieved of further duty to the court or further obligation to the parties of the dispute."[80] According to the *Seiber* court, "[i]f this were so, the interpleader would be the final judge … washing its hands of any relationship to the dispute and walking away whistling Yankee Doodle."[82]

Instead, the *Seiber* court made clear that "[a] party filing an interpleader is at least required to obtain court approval before it can disclaim interest in the deposited sum as satisfaction for any liability it may have had in the dispute."[83] It is not true that merely depositing the funds in the court registry prevents the attachment of liens or extinguishes liens already attached against the owner's property." Instead, the *Seiber* court noted that an owner in another case – *Adobe Oilfield Services, Ltd. v. Trilogy Operating, Inc.* – properly followed interpleader procedures where the owner "deposited the funds, and then judicially established its entitlement to a TRO by demonstrating that it was likely to be discharged from further liability in the dispute, and second, that the filing of the liens would result in irreparable harm to its interests."[84]

F. Attorney's Fees

As noted above, courts have used Property Code Section 56.041 as a means for allowing mineral lien claimants recovery of attorney's fees and costs under Property Code Section 53.156.[85] The 2018 Southern District Bankruptcy Court opinion in *In re Northstar Offshore Group, LLC*, while mostly focusing on bankruptcy issues, did offer some further insight regarding the burden of proof for claimants to recover such fees and costs, particularly in the summary judgment context. While recognizing a right to attorney's fees for mineral lien claimants pursuant to Section 53.156, the bankruptcy court nevertheless denied the mineral lien claimants' summary judgment motion for attorney's fees, noting

> The provisions of the Texas Property Code, which the M & M Lien Claimants cite to justify their interest and attorney's fees, limit a lease owner's damages to the contractual amount for materials provided and work performed. See TEX. PROP. CODE § 56.006. The M & M Lien Claimants then conclude that this justifies their award of interest and attorney's fees because these 'arise under the Defendants' contracts with the Debtor.' However, the M & M Lien Claimants' summary judgment motion does not cite such contracts, nor do they quote any contractual language entitling them such an award. The sole evidence they present consists of a single 163-page document which consolidates invoices, lien affidavits, service agreements, and return receipts.... Furthermore, ***the provisions of the Texas Property Code which allow an award of attorney's fees also require the Court to consider whether those fees are "equitable and just." See TEX. PROP. CODE § 53.156. The M & M Lien Claimants have provided no evidence regarding the equities of this award and whether they are appropriate***.[86]

Mineral lien claimants seeking to recover their attorney's fees – which should be almost all mineral lien claimants, in light of the time and expense of such claims – should keep in mind the additional guidance provided by *In re Northstore*, including the lien claimant's burden to proffer evidence regarding the equities and appropriateness of attorney's fees.[87]

79. *In re T.S.C. Seiber Servs., L.C.*, 771 F.3d 246, 252 (5th Cir. 2014).
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* (discussing Adobe Oilfield Srvs. v. Trilogy Op., 305 S.W.3d 402,(Tex. App.—Eastland 2010, no pet.)).
85. McCarty v. Halliburton Co., 725 S.W.2d 817, 822 (Tex. App.-Eastland 1987, writ ref'd n.r.e.) ("Section 56.041 [former Articles 5475 and 5476] of the mineral lien statutes allows the claimants to enforce their liens in the same manner as a mechanic's or materialman's lien under Chapter 53 of the Property Code, and Section 53.156 [former Article 5453] authorizes the recovery of attorney's fees.").
86. Case no. 16-34028, 2018 WL 5880949 *8 (Bankr. S.D. Tex. 2018) (emphasis added).
87. *Id.*

G. Lien Claimant's Substantial Compliance

For decades, Texas courts have generally applied a "substantial compliance" standard regarding the contents of both mineral lien notices and affidavits. That does not mean the claimant will always win,[88] but the standard is there and available to claimants. In an unpublished 2014 opinion, *Seven N. Holdings, L.P. v. Mathis & Sons, Inc.* the Eastland Court of Appeals ruled in favor of a mineral subcontractor, holding its lien affidavit substantially complied with the affidavit requirements of Chapter 56.[89] This was so, even though the affidavit listed the property owner as "Seven Holdings," rather than its affiliated entity "7N Oil & Gas."

It seems what may have also helped the mineral contractor is evidence showing it had researched the property records, as well contacting a primary contract person for the owner, who never responded.[90] Regardless, *Seven N* makes clear the substantial compliance standard is alive and well for lien claimants and perhaps is an indicator that lien claimants demonstrating diligence in their lien claim might get a more favorable ruling.

III. PRACTICE TIPS

A. For Lien Claimant Subcontractors & Contractors:

1. Managing expectations for significant time and expense. Attorneys representing Chapter 56 lien claimants should, from the outset and then repeatedly thereafter, manage client expectations for the time and costs required to prepare such liens. It is often significantly more than is required for a Chapter 53 lien, so an attorney is often wise to require payment up front via a substantial attorney and potentially have a personal guarantee in their engagement letter. Why are Chapter 56 lien claims so much more expensive and time consuming? First, the attorney may need time to refresh herself / himself on the nuances of Chapter 56 claims, since months, even years, can go by in between Chapter 56 claimants coming in the door (usually depending on how well, or bad, the oil and gas industry is doing. Time and expense will also need to be devoted to researching the complex property records, to determine the property owner and property description, among other things. Texas oil / gas property records have gotten so complicated over the years, that I often engage an experienced oil / gas "landman" to help with the property record research and analysis, in addition to an experienced lien paralegal. Sometimes a title company might also be engaged to assist with the property description. Time will be needed also to figure out, for example, to which wells the client furnished labor / materials (often multiple) and property related thereto. Sometimes, for example for gas processing facilities, as noted above, additional analysis may be required to determine whether Chapter 53 or Chapter 56 applies. Further time and expense will be required to personally serve subcontractor pre-lien notices on the mineral contractor(s) and owner(s), after spending time determining who that is. For pipeline claimants, such claims can cover multiple counties, thus time and expense again goes up. Finally, as we will touch on more below, the six month deadline to file the lien affidavit often seems like a long time, but in reality, after dealing with all the above, trying to also trap funds in the hands of the owner, and the fact that many clients do not come to you until several months have already run, six months can often be an illusion.

2. Subcontractor's pre-lien notice. Subcontractors need to keep in mind also that their six month "deadline" (minus 10 days minimum) to deliver the pre-lien notices may be significantly less if they want to trap funds in the hand of the owner. Such subcontractors must keep in mind Texas Property Code Sections 56.006 and 56.043 limits on owner liability and case law related thereto, discussed above (e.g., the 2014 *Seiber* case 771 F.3d at 251: 'the liability of a mineral property owner, as defined in chapter 56 and including EnCana, is limited to the total "amount agreed to be paid in the contract" and "the amount that the owner owes the original contractor when the notice [of nonpayment to subcontractors] is received.' *Id.* §§ 56.006 & 56.043.")

3. Mineral contractor or subcontractor? Sometimes it is hard to tell if your client is a subcontractor or mineral contractor. When in doubt, assume you are a mineral subcontractor and deliver the 10 day pre-lien notice to the owner out of an abundance of caution.

88. *E.g., Ball*, 18 S.W.2d at 1064 (Tex. 1929) (mineral lien deemed invalid, despite substantial compliance analysis).
89. No. 11-12-00008-CV, 2014 WL 272462, at *15 (Tex. App.—Eastland Jan. 24, 2014, no pet.) (mem. op) (not designated for publication).
90. *Id.* at *2-3.

4. Subcontractor notice contents: Though not necessarily required by Chapter 56 on its face, I like to include the following in my subcontractor pre-lien notices, in addition to the statutorily required language: (a) a Property Code Section 53.159 request for further project information from the owner and contractor (I'm aware no case law on this issue, but an additional benefit maybe showing diligence by the lien claimant, which seemed to help the claimant in *Seven N. Holdings*, among other things); (b) put conspicuous fund-trapping warning language in your subcontractor notice to owner, since technically the owner is not required to maintain any retainage throughout the project; and (c) if possible, out of an abundance of caution, include a detailed property description meeting the three possible requirements detailed in the *PADCO* and *In re Reichmann* opinions above

5. Affidavit. Regarding the lien claimant's affidavit: (a) out of an abundance of caution, put the itemization in the body of your affidavit, as detailed above, and of course a detailed property description as detailed in the *PADCO* and *In re Reichmann* opinions above. Who signs the affidavit? I generally prefer an experienced project manager who knows the project well and will do well in a deposition and generally not a lower level, less experienced employee, with no project knowledge, and / or a wildcard temperament, who will thus not do well in a deposition. I generally also avoid, unless the client is ok with it, allowing a major company officer or in house lawyer to sign the affidavit; those who sign the affidavit need to know they may be subject to a deposition and potentially even an individual Fraudulent Lien claim under Texas Civil Practices and Remedies Code Chapter 12.

6. Property description for the affidavit and pre-lien notice: as noted above, the requirements for these may be the same, though no case law on point. A good idea with either one is, among other things, to attach the Texas Railroad Commission Form W-1 related to the work. These are usually easily accessible on TRC website and can go a long way in helping with the property description.

7. Send a copy of the filed affidavit to the owner(s) and (if a subcontractor claimant) the mineral contractor. Unlike Chapter 53, Chapter 56 has no requirement regarding sending a copy of the filed mineral lien affidavit to the owner or contractor. Nevertheless, of course sending a copy to the owner and / or contractor, practically speaking, may get discussions moving and perhaps moving closer to resolution.

8. Timing strategies: for a lien on an oil / gas well, where the well is not active, the lien claimant have potentially less leverage and *may* in some instances want to wait until the well is active. But if the well is active, the claimant may need to act quickly and (a) request a court appointed receiver for oil / gas being depleted as in the *Abella* opinion discussed above (that is, *if* trial court agrees to follow *Abella*); (b) potentially seek an injunction to prevent depletion, if the trial court agrees that is a viable remedy (the *Abella* dissent maybe suggests this) (c) of course keep in mind the new, shorter one year statute of limitations, under the 2021 changes to Chapter 53 discussed above; and (d) consider contacting a local landman or sometimes the local district Texas Railroad Commission agent, who *might* be able to provide good information regarding the current and potential future status of production at the well(s)

9. Litigation: (a) if the claimant is seeking a receiver, like in the *Abella* case, good forms for such procedure, like the proposed court Order and pleadings are in the *Abella* opinion; (b) for any litigation, always consider adding local counsel, particularly of course where the lawsuit would be located in a lower-population jurisdiction, as is often the case; (c) though not certain, it seems the lawsuit venue should (probably?) be in county where project is located (see Tex. Prop. Code § 56.041; § 53.157(2)) ("A mechanic's lien... may be discharged of record by...failing to institute suit to foreclose the lien in the county in which the property is located....") (d) Attorney's fees may be recoverable for the lien claimant, but the claimant must keep in mind from the outset that it proffer evidence such fees meet the "equitable and just" standard of Property Code Section 53.156 (as noted in *In re Northstar*)

10. Fraudulent Lien Statute Considerations: (a) Chapter 56 claimants should take note that the extra "intent to defraud" element added to the Fraudulent Lien Statute in 2009 (Tex. Civ.

PRAC. & REM. CODE § 12.002(c)) might not apply Chapter 56 claimant, since Chapter 12 indicates that element only applies to Chapter 53 claims (but maybe Section 56.041 can save the claimant?; (b) be aware that for multiple wells, there are often multiple affidavits, and potential Fraudulent Lien liability attaching each affidavit (*Id* § 12.002(a),(refs to "a document"); (c) diligence must be exercised in determining owners named in the affidavit and which owners to sue, in light of Section 12.002(b)'s statement that a claimant may be "liable to each injured person."

B. For Owners

1. Protecting against subcontractor liens: Attorneys would be wise to at least advise their owner clients of the potential option of a bond to indemnify against liens, in light of the 2016 *Shell* case discussed above. If such bond is utilized, the attorney will need to ensure that the county meticulously follows each of the substance requirements and procedures of Chapter 53, Subchapter H, otherwise the owner will have paid for a bond of more limited value. Before having the bond executed / filed, the owner may want to have the claimant sign a full release of the owner personally, to avoid a situation like that discussed in the *Stolz* opinion above; often a reasonable claimant will agree to this, in exchange for the right to make a claim against a bond, which is often more attractive than a right to foreclosure or seeking other remedies like seeking a receiver as in *Abella*. The owner would also be wise to include in its contracts with its mineral contractors / operators the contractual requirement that the mineral contractor / operator obtain a Chapter 53, Subchapter H bond to indemnify against any lien that is filed. The owner does need to be made aware that if it is the owner – and not the mineral contractor / operator – who obtains the bond as the principal, sureties will often require full collateralization from the owner; so the bond could get pricey, so the owner needs to be thinking about how it can recover those funds, if at all.

2. Pre-project contractual waivers. The owner should first expressly state in its contract that claims by the mineral contractor / operator can only be made against the owner entity who signs the contract, as was done in the *Mesa* case discussed above. The owner might also try to include a broad waiver of any lien claims by the contractor, but the owner needs to be made aware that is not a settled legal issue at this time. The owner might also contractually require the operator / mineral contractor to obtain such waivers from each of its subcontractors. Again, not a settled legal issue, but potentially worth the effort.

3. Interpleading funds. Interpleading funds is still an option to be discussed with the owner, particularly where the liability of the owner and the universe of claimants are clear. But the owner must be advised by their attorney of the additional procedures and other interpleader burdens, as covered in the 2014 *Seiber* opinion above, and of course the potential bond to indemnify option under *Shell.*

C. For Mineral Contractors/Operators:

1. Waivers in owner contracts. In addition to the advice to mineral contractor / subcontractors in Section III. A above, mineral contractors / operators in particular must be wary of owner contract clauses limiting the contractor's claim to one owner entity (as in the *Mesa* case discussed above) and language waiving the contractor's right to any mineral lien claim, though it is not clear whether the latter is enforceable.

2. Waivers in subcontracts. At the same time – recognizing it borders on hypocrisy, mineral contractors may try to add such waivers to their subcontracts, particularly since the contractor might have a duty to indemnify and defend the owner from lien lawsuits under Texas Property Code Section 53.153, though I am aware of no case law specifically applying that section to Chapter 56 claims.