Analysis of Missouri's New Lien Law

On Friday, May 14, 2010, the Missouri House of Representatives and Senate passed a Bill substantially revising Missouri's Mechanic's Lien Law. The changes will make it extremely difficult for subcontractors and material suppliers to assert Mechanic's liens. Governor Nixon just recently signed the Bill into law. The changes become effective August 28, 2010 and apply to real estate closings scheduled on or after November 1, 2010.

The New Law Is Unfair, Hostile and Burdensome to Subcontractors and Suppliers

This law purports to be "corrective" or "minor." It makes major changes to the detriment of material suppliers and subcontractors. Here are some of the major changes:

A. Overview of the Bill

Mechanic's liens are favorites of the law. Every state has its own lien law. Lien laws vary from state to state. In our experience, Missouri had the fairest lien law of all of which we are familiar. The former law balanced the rights of property owners, general contractors, subcontractors and material suppliers with a methodology that addressed all parties' concerns. Lien laws are meant to provide a forum and an expeditious method of resolving these disputes. In Missouri, once courts are convinced that lien claimants timely complied with the Notice requirements, deadlines and other technicalities, courts are instructed to construe the lien law as favorably to the lien claimants as possible. This new law abrogates public policy and makes it openly hostile to lien claimants getting paid.

Two New "Notices" Are Created: A *"Notice of Sale"* and a *"Notice of Rights"*

This 15 page Bill will become the longest section of Chapter 429, which is Missouri's lien law. Unlike existing law which permits a subcontractor to give a 10 day Notice and file a Lien Claim within six months **after** a job ends, this law requires lien claimants to file something new – a "Notice of Rights" which can be required as soon as within 40 days of a "residential" property owner filing a "Notice of Sale" – also a new concept in Lien Law. Once the property owner files the "Notice of Sale," which can happen at any time during the construction process, even if the job is not finished, a subcontractor or material supplier must find our about it and then file a "Notice of Rights" or the lien claim is lost. If a "Notice of Sale" is filed, the lien claimant must file a "Notice of Rights", even if the lien claimant is still working, even if the six month to file has not expired, or be forever barred.

Suppliers and Subcontractors Should File "Notice of Rights" Claims At the Beginning of Every (Broadly Defined) "Residential" Job.

How can a potential lien claimant discover that a property owner has posted a "Notice of Sale" and that its lien rights are in jeopardy? One way a lien claimant may protect itself is to examine the records on file with the Recorder of Deeds Office in the county where the work is being done on a regular basis. A better way is for the supplier or subcontractor to file its own Notice of Rights at the beginning of each job.

The Lien Claimant still must file a Lien Claim, too, but within the existing six month law. If subcontractors and material suppliers file a Notice of Rights at the beginning of each job, as we recommend, then those material suppliers and subcontractors who do so are protected from having to monitor Recorder of Deeds offices throughout all jobs, good or bad. That is because if a Notice of Sale is filed, the time for perfecting liens is accelerated and can be as short as 40 days thereafter because of the new "Notice of Rights" filing requirement.

The Term *"Residential Property"* is Broadly Defined to the Detriment of Subcontractors and Suppliers (§429.016. 2)

The "Notice of Sale" and "Notice of Rights" requirements in the new lien law apply only for Mechanic's Liens on *"residential property."* However, the new law redefines "residential property" far more expansively than ever before. Whereas existing law defined "residential property" as "four units or less" and occupied by the owner, the new statute considers *"residential property"* to include condominiums, townhouses or cooperatives, regardless of the number of units and regardless of whether they are occupied by the owner and regardless of whether the record owner is a person or an artificial entity like a corporation or LLC. *"Residential property* under the new law now also includes streets, sidewalks, utility services, common areas *"or other facilities"* associated with the newly redefined *"residential property."*

As a result of the new law, subcontractors and material suppliers seeking liens against those types of property must continually monitor the state of the property owners' title because once the property owner files a "Notice of Sale," the lien claimant must file a "Notice of Rights" at least five days before the intended sale. No lien claims are allowed at all unless a "Notice of Rights" has been filed. Lien rights are lost forever and for no good reason other than failure to monitor the Recorder of Deeds filings. To avoid losing lien rights, subcontractors and suppliers should file "Notice of Rights" claims at the beginning of each job.

If a subcontractor or material supplier loses its lien rights, the former lien claimant will have recourse only against the party with whom it contracted.

B. Under the Guise of Protecting *"Residential Real Property"*
This Law Protects Title Insurance Companies and General Contractors
At the Expense of Subcontractors and Suppliers
Who Lose The Six Months from Furnishing Last Labor and Material
To As Short As 40 Days from a Notice of Sale
(§429.016. 3. and 11)

Most people with a slight familiarity to lien law know that in the absence of securing lien waivers from subcontractors and material suppliers, that a property owner who pays a general contractor may be vulnerable to an unpaid subcontractor's or material suppliers' claim of lien. Many people wonder – why should a dispute between a material supplier and its subcontractor affect the property owner? Missouri Courts consistently hold that it is the property owner, who controls all of the money and is responsible to make sure that others in the construction pyramid are paid. As the law stands, general contractors are statutorily bound to defend property owners from lien claims. A property owner compelled to pay a lien claim has recourse back against the general contractor. Because this new law makes it so difficult for a subcontractor or material supplier to perfect a lien claim, it protects general contractors and title insurance companies at the expense of subcontractors and material suppliers.

General contractors can avoid this result by requiring subcontractors to produce lien waivers from material suppliers before paying subcontractors. Unsophisticated property owners may also hire title companies to protect their interests and can purchase title insurance as well. Title insurance is always required from commercial lenders. Before these changes, the lien law was working just fine.

Owner Occupiers of Residential Real Estate of Four Units or Less
Are Already Protected Now From Having to Pay Twice

In the late 1980s the Missouri legislature slightly amended the lien law for a specific class of property owners. Section 429.013 RSMo. immunized "owner occupiers" of residential property of "four units or less," essentially "consumers" who paid the general contractor in full, from the lien claims of subcontractors and material suppliers. So long as a "consumer" could prove payment in full to the general contractor, then there was no lien liability to others in the construction pyramid. Consumers had to pay once, but were protected from paying twice. Section 429.013 exempted new home construction where there was a policy of title insurance. (§429.013. 1.) This traditional definition of residential property is now expanded in the law to mean apartments, condominiums, streets and sidewalks and *"other facilities which are constructed within the defined residential use structures or located on or within the separate and identifiable parcels identified as residential use."*

The Property Owner's *"Notice of Sale"* Accelerates the Deadline for Taking Action to Perfect Lien Claims Or Lien Rights Are Waived Forever

Most subcontractors and suppliers are paid in full by their customers according to their terms most of the time. For most businesses, relatively few unpaid accounts turn into mechanic's liens. Most businesses try to collect their accounts "in house" until the indebtedness approaches six months. At that time, a business might examine its documentation to determine whether or not its "slow pay" customer should be referred to an attorney for lien work. But now, under the new law, lien claimants must monitor all job accounts, good or bad, all the time because a good account can go bad and if a "Notice of Sale" is filed, the lien claimant must act promptly or lose its lien rights forever. Practically speaking, a subcontractor or material supplier must either (1) regularly review Recorder of Deeds of filings in all counties where work is ongoing or (2) file a "Notice of Rights" at the beginning of every arguably "residential" job.

The Three Methods By Which a Lien Claimant Is Expected to Learn of a "Notice of Sale" Are Inadequate

Section 11 of the Bill requires that if the owner contracted for work and materials to facilitate a sale of the now broadly defined "residential property" then the owner must announce the sale and date of closing in three ways at least 45 days prior to the sale. A property owner's recording the *"Notice of Sale"* is a condition precedent to the Lien Claimant's duty to record its *"Notice of Rights."* The *"Notice of Sale"* must (a) be filed with the Recorder of Deeds (11(1)), (b) be posted on the jobsite (11(2)) and (c) be available upon written request (11(3)).

Although posting on the jobsite and mailing on request appear to be mandatory, they really are not. All of these alternatives have problems for the Lien Claimant. Once the Lien Claimant learns that a *"Notice of Sale"* has been filed, the Lien Claimant must record a "Notice of Rights" at least five days before the contemplated closing specified in the Notice of Sale or lien rights are forever lost, according to Section 6 of the Bill:

> *"6 Any claimant that fails to record such notice of rights shall be deemed to waive and forfeit any right to assert a mechanic's lien against such property."*

While some Recorder of Deeds documents are available on line, *"Notices of Sale,"* are not. A lien claimant must hire an attorney or title company to monitor the Recorder of Deeds filings in countless different counties on a regular basis for all jobs, good or bad, because even a good job can go bad and because a property owner can file a "Notice of Sale" at any time, and a lien claim can then be precluded in as short a period as 45 days. Posting a "Notice of Sale"

on a job site *"at the entrance to the subject property"* is also not likely to come to the lien claimant's attention, particularly for material suppliers who deliver to the jobsite either with their own driver or who use a delivery service. The new law contemplates someone regularly checking the job site for a "Notice of Sale." The third method of learning of a "Notice of Sale" – is for the potential lien claimant to ask the property owner in writing for it.

What if the property owner fails to post the "Notice of Sale" on the jobsite or ignores the lien claimant's request for a copy of a "Notice of Sale?" Section 11(4) explains that the lien claimant's *"sole and exclusive remedy"* against the property owner is the lien claimant's cost of acquiring the information – roughly $1.00 per page from the Recorder of Deeds. The lien claimant is expressly precluded from recovering attorney's fees as damages. If the property owner refuses to provide the lien claimant with the *"Notice of Sale,"* the lien claimant still must file its Notice of Rights on time. The law reads:

11(4) "The owner's . . . failure to post or mail or transmit the information contemplated in this section shall not relieve, and is not a condition precedent to a claimant's obligation to record its notice of right in order to retain mechanic's liens rights as to such property."

If the property owner does respond and sends a Notice of Sale to the lien claimant, the property owner has no liability for erroneous information sent to a Lien Claimant. Section 11(5): *"The owner, . . . shall not be liable to any claimant or other person for any error, omission, or inaccuracy in the content of the information provided. . . ."*

In order to maintain lien rights, new section 3 requires a lien claimant who wishes to assert a lien claim against the greatly expanded definition of "residential real estate," to file a newly created *"Notice of Rights,"* in the office of the Recorder of Deeds where the real estate is situated. This Notice of Rights must be recorded at least five days prior to the intended sale of the property. The Lien Claimant may therefore have as little as 40 days from the posting of the Notice of Sale to file its "Notice of Rights" or they are lost. The Lien Claim still must be filed within six months of the last furnishing of labor or materials irrespective of when the claimant filed its "Notice of Rights."

To avoid all of these technical pitfalls, our office recommends material suppliers and subcontractors file their "*Notice of Rights* at the beginning of each job – even if the property has not filed a "*Notice of Sale*."

C. The New Law Codifies "Slander of Title"
Which Will have a Chilling Effect on the
Recording of *"Notices of Rights"* by Subcontractors and Suppliers
(§429.016. 30)

"Slander of title" is a tort claim filed by a property owner against a lien claimant. It is a penalty statute. "Slander of Title" has never been in the Missouri lien statutes before. There are very few "slander of title" cases reported in the appellate court decisions. It is just not a big problem. A lien claimant's nightmare is that the property owner turns the tables and instead of the subcontractor or material supplier filing a lien claim and being paid by the property owner, a successful slander of title counterclaim means the lien claimant, instead of being paid by the property owner, now owes the property owner money! Slander of title counterclaims in lien litigation are few and far between.

Paragraph 30 introduces the concept of "slander of title" into Chapter 429 statutory law for the first time ever. Few *"Notices of Rights"* will be filed if the Lien Claimant faces a potential "slander of title" claim. Codifying "slander of title" will have a chilling effect on lien claimants. Opening up the lien claimant to these potential dangers of slander of title, including punitive damages, means why bother?

Section 30 of the Bill requires a lien claimant who has recorded a *"Notice of Rights"* and thereafter been paid *"to execute an unconditional final mechanic's lien waiver . . . within five days after request from the property owner."* A lien claimant who fails to do so "*shall be presumed liable for slander of title and for any damages sustained as a result thereof, together with a statutory penalty of $500.00."*

Whereas a property owner faces little potential damage from its failure to comply with a lien claimant's request for *"Notice of Sale,"* (cost of copying documents only), a lien claimant who fails to execute a final lien waiver within five days of a written request to do so is "*presumed liable for slander of title.*" There is no requirement that the property owner send the letter demanding the lien release by certified mail or otherwise prove delivery. There is no requirement that the property owner's letter point out the penalty for failure to comply with the request.

This statute is a trap for the lien claimant. The nearest legal example is a paid in full home owner's deed of trust. When a home owner pays his home deed of trust, he has the right to demand the Bank file a Release within 10 days. The homeowner has to send a certified letter to the Bank and specifically cite the statute that imposes a penalty for the Bank failing to do so. After being advised of the penalty, if the Bank fails to act, it may be liable for a penalty. This new lien statute cuts the time in half, to five days. It does not require a certified letter or other proof of receipt from the property owner to the lien claimant and does not

require the property owner to point out the statute to the lien claimant that imposes a penalty. Lien law already requires releases upon request.

D. The new "Just and True Account" Required of A Lien Claimant is Burdensome. (§429.016. 15)

Paragraph 15 of the new statute wrongly attempts to define a "just and true" account for new claims against newly defined "residential property." As the law stands now, not every lien claim is a "winner." Among other policy considerations, the former law required a lien claimant to file a "just and true account." The prior standard was: Can a person interested in the real estate, by examining the lien claim, form an opinion as to the kind of work done, the reasonableness of the prices charged and whether or not the claimed work is lienable at all? Different standards applied depending on who was claiming the lien: A general contractor has an easier standard than a sub or material supplier. For instance a lien from a sub that read only "Balance due $100.00," would lose the lien for lack of detail. A lien for "$100.00 - $50.00 for curtain roads and $50.00 for bed spreads" would win on curtain rods (they are permanently affixed and lienable) and lose on bedspreads (they are removable and not lienable).

Every business keeps records differently. Before the change in the law, Courts were instructed that there was no hard and fast standard for a "just and true account" other than as described. Each Lien Claim must be individually analyzed. This new Law puts an onerous burden on all lien claimants whose records may not lend themselves to these particulars, but whose liens satisfied the existing standards.

For example paragraph 15(1) requires a Lien Claimant to attach its file stamped "Notice of Rights" to its Lien Claim. Paragraph 15(3) requires copies of all contracts, purchase orders, change orders and modifications be attached, even if those bills have been paid. Not all of that documentation has ever been required before, especially documentation of paid invoices. Section (5) requires that all invoices, paid or unpaid, be attached. Imagine a four year job in which the first three years are paid in full, but the lien claimant keeps working the fourth year based on the property owner's insistence that payment will be forthcoming. If the fourth year is not paid for, the lien claimant must list all four years of invoices on the Lien Claim even though only the last year is at issue or the Lien is not "just and true."

E. Unqualified Lien Waivers Which Were Sometimes Fatal to a Lien Claimant in the Past Are Now Absolutely Fatal to a Lien Claimant

Existing case law recognized two kinds of Lien Waivers – Qualified and Unqualified. Qualified lien waivers were given to pay particular invoices while

other remained unpaid or recognized payment in full through a date certain or otherwise advised third parties that despite a payment, the lien claimant was reserving some right to file a Lien Claim. Absolute, unqualified lien waivers expressly waived all rights to lien. However, sometimes mistakes were made, lien claimants inadvertently signed unqualified lien waivers when they did not intend to do so. Under that scenario a lien claimant might still assert a lien claim notwithstanding a fully executed unqualified lien waiver so long as no third party relied upon it to its detriment. Instead of having a judge or jury hear the circumstances surrounding the execution of a lien waiver, paragraph 28 codifies the rule in favor of total lien waiver irrespective of whatever special circumstances there might be. Judges and juries have dealt with the issue just fine for years before this change in the law.

Conclusion

Subcontractors and materials suppliers have relied upon Missouri's mechanic's lien law for years in making decisions about selling labor and material in the construction trade. Being able to count on filing a Mechanic's Lien as security for a debt is a powerful incentive for material suppliers and subcontractors to do business. Material suppliers and subcontractors can best protect their mechanic's lien rights by promptly asserting them at the beginning of each new job by filing a *"Notice of Rights."*