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## Changes in Missouri's Mechanic's Lien Law

Helen M. Cripps

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# CHANGES IN MISSOURI'S MECHANIC'S LIEN LAW

The General Assembly has recently enacted substantial revisions to Missouri's mechanic's lien law.<sup>1</sup> This revision was brought about, in part, as a result of the criticism of prior law by both contractors and property owners.<sup>2</sup>

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1. This Note will discuss the statutory changes made by House Bills 942, 1116, and 1369. These Bills were the result of several bills introduced in both the Missouri House and Senate during 1985 and 1986.

H. R. 85, 83d Cong., 1st Sess., 1985 Mo., which was denied in committee and was replaced with a compromise bill, provided that no *materialman* could obtain a lien on residential property unless the owner had consented in writing to pay for any material in the event the original contractor did not pay for the supplies. The bill was criticized because it gave the homeowner an opportunity to avoid any lien by a materialman or supplier (who is in substantially the same position as the original contractor) simply by refusing to sign the agreement with the materialman. Comment, *Suggested Modifications to Missouri's Mechanic's Lien Law as it Applies to Homeowners*, 54 UMKC L. REV. 109, 113-14 (1985).

S. 381, 83d Cong., 1st Sess., 1985 Mo., required an expanded notice from the original contractor to the homeowner. The original contractors would have been required to provide the name and address of the owner of the property to the subcontractors and materialmen. The subcontractors and materialmen were then required to furnish to the homeowner their names, addresses, a statement showing what supplies or labor they had provided, and a notice that a lien may be filed if the charges were not paid. Specific time requirements were advocated and the crime of lien fraud was also created. This bill was recommended by some commentators because it would not destroy Missouri's Pennsylvania System of mechanic's liens. Comment, *supra*, at 115. For a complete discussion of the Pennsylvania System, see *infra* notes 51-54 and accompanying text.

H. R. 487, 83d Cong., 1st Sess., 1985 Mo., which passed the House in late April, 1985, proposed making full payment to the original contractor a complete defense, and partial payments a pro rata defense to a lien claim filed by any subcontractor or materialman. This Bill also would have amended the requirements of the original contractor's notice to owners to include a statement notifying the owners of the classes of persons who may file the lien, why these persons may file a lien, and what options were available to avoid the possibility of a mechanic's lien such as waivers and bonding. House Bill 487 also proposed that any contractor or subcontractor who willfully refused or failed to pay an unchallenged debt to his subcontractors or suppliers would be guilty of the crime of lien fraud. Comment, *supra* at 114.

House Bills 942, 1116, and 1369 were approved on June 26, 1986, and became effective as of August 13, 1986. 1986 Mo. Legis. Serv. VII (Vernon). The Bills amend Mo Rev. Stat. §§ 429.010, 429.012 and 429.080 and substitute in lieu thereof new sections 429.010, 429.012, 429.013 and 429.080 (subsequently numbered and hereinafter referred to as 429.014). For the text of these statutes, see *infra* notes 5, 21,

Often, the law did not provide adequate protection for owners who were diligent in paying their debts to the general contractor because subcontractors who were not paid by the general contractors were allowed to file a lien against the owner's property.<sup>3</sup> The owner would then have no choice but to pay a second time for the same materials and labor, or face the possibility of an execution sale for the enforcement of the subcontractor's lien. On the other hand, materialmen and subcontractors are usually not familiar with the specific requirements of the law, often making it difficult for them to comply with the requirements in order to perfect their lien. Following a brief overview of Missouri's mechanic's lien law under the prior statutory scheme, this Note will examine the three major areas of change made by the new law and the impact they will have on the various parties involved.

A mechanic's lien is a statutorily created lien in favor of one who has furnished materials or labor for the construction, improvement, or repairs of the property subject to the lien.<sup>4</sup> A lien may be secured against property, whether land or buildings, where the work was performed pursuant to a contract.<sup>5</sup> Liens cannot be secured against governmental units because the

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33, 42, 72 and accompanying text.

For a complete history of Missouri's Mechanic's liens statutes, see Mo. Ann. Stat. § 429 commentary (Vernon 1978).

2. See, e.g., Comment, *supra* note 1; Comment, *The Missouri mechanic's Lien Statute — Is it Adequate?*, 26 Mo. L. Rev. 53 (1961).

3. Mo. REV. STAT. § 429.010 (1978).

4. 57 C.J.S. *Mechanics' Liens* § 1 (1948) [hereinafter *Liens*]; see also *Herbert & Brooner Constr. Co. v. Golden*, 499 S.W.2d 541, 545 (Mo. Ct. App. 1973) (right to enforce lien is derived solely from legislative enactment and did not exist at common law); *Maran-Cooke, Inc. v. Purler Excavating, Inc.*, 585 S.W.2d 38, 41 (Mo. 1979) (en banc) (equitable principles would not aid professional engineering service who had not complied with statutory requirements for perfection of their lien).

5. Missouri law provides:

Any person who shall do or perform any work or labor upon, or furnish any material, fixtures, engine boiler, or machinery for any building, erection or improvements upon land, or for repairing the same, under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor or subcontractor, upon complying with the provisions of sections 429.010 to 429.340, shall have for his work or labor done, or materials, fixtures, engine, boiler or machinery furnished, a lien upon such building, erection or improvements, and upon the land belonging to such owner or proprietor on which the same are situated, to the extent of three acres; or if such building, erection or improvements be upon any lot of land in any town, city or village, or if such building, erection or improvements be for manufacturing, industrial or commercial purposes and not within any city, town or village, then such lien shall be upon such building, erection or improvements, and the lot, tract or parcel of land upon which the same are situated, and not limited to the extent of three acres, to secure the payment of such work or labor done, or materials, fixtures, engine, boiler or machinery furnished as aforesaid; except that if such building, erection or

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liens do not attach to public lands.<sup>6</sup> With residential property that is not within the city limits, the building (if any) and three acres surrounding it is subject to the lien.<sup>7</sup> If the property is within the city limits or if it is manufacturing, industrial, or commercial property then the building and all the surrounding land is subject to a lien.<sup>8</sup> The property is subject to the lien to the extent of the right, title and interest of the owner or proprietor in the property.<sup>9</sup>

The right to a lien<sup>10</sup> runs not only to a contractor or subcontractor, but also to a subcontractor of a subcontractor or to the materialman of a subcontractor,<sup>11</sup> provided, of course, that the party claiming the lien follows the appropriate procedures as set out in the statutes.<sup>12</sup>

In order for an original contractor, or any claimant who contracted directly with the owner of the residence, to have a valid lien, he or she must have provided a disclosure notice pursuant to section 429.012.<sup>13</sup> This notice to the owner must be in ten point bold type setting forth the language specified in the statute.<sup>14</sup> Such notice is to be given to the person with whom the contract is made before receiving any payment, either at the time the contract is executed, when the materials are delivered, at the commencement

improvements be not within the limits of any city, town or village, then such lien shall be also upon the land to the extent necessary to provide a roadway for ingress to and egress from the lot, tract or parcel of land upon which such building, erection or improvements are situated, not to exceed forty feet in width, to the nearest public road or highway.

Mo. REV. STAT. § 429.010 (1986); see also *Liens*, *supra* note 4, §§ 8, 15-16.

6. Union Reddi Mix v. Specialty Concrete Contractors, 476 S.W.2d 160 (Mo. Ct. App. 1972).

7. Twin Bridges Constr. Co. v. Ferner, 700 S.W.2d 534, 537 (Mo. Ct. App. 1985).

8. Mo. REV. STAT. § 429.010 (1986). For the full text of section 429.010 (1986), see *supra* note 5.

9. Mo. Rev. Stat. § 429.010 (1986).

10. The new law did not substantively change who may obtain a lien. Mo. REV. STAT. § 429.010 (1978) was amended by House Bills 942, 1116, and 1369, but the changes were only of a technical nature. For example, "Any person" was substituted in lieu of "Every Mechanic or other person." See *supra* note 5 for the complete text; see also Leonard v. Bennett, 674 S.W.2d 123 (Mo. Ct. App. 1984) (every mechanic, etc., who performs any work or furnishes any material under any contract with the owner, or his proprietor, agent, contractor, or subcontractor qualifies for a mechanic's lien).

11. General Plywood Corp. v. S.R. Brunn Constr. Co., 511 S.W.2d 905 (Mo. Ct. App. 1974).

12. See *infra* notes 13-24, 33-50 and accompanying text.

13. Mo. REV. STAT. § 429.012 (1986). The language to be contained in the disclosure notice has not been changed. See *infra* note 34 and accompanying text.

14. Mo. REV. STAT. § 429.012 (1986).

of the work, or it may be given with the first invoice.<sup>15</sup> Failure to give such notice results in an invalid lien and was considered a misdemeanor with a fine of \$500 to \$1,000.<sup>16</sup>

In order for an individual who furnished labor or materials to the contractor instead of to the owner to have a valid lien, he or she must provide a subcontractor's notice.<sup>17</sup> This notice is to be given "to the owner, owners or agent, or either of them" at least ten days prior to filing the lien.<sup>18</sup> It is to contain a statement that the claimant is holding a claim against the building or improvement, the amount of such claim, and from whom the amount is due.<sup>19</sup> For a materialman's lien to attach, the building materials must be identified with the job, such as through actual use in construction.<sup>20</sup>

In order to obtain his lien, the claimant files a lien statement with the clerk of the circuit court of the county in which the property is located.<sup>21</sup>

15. It is recommended however, that this disclosure notice be given to the other party, if there is a contract, at the time the contract is executed and that it be printed on each invoice. Blond, *Mechanic's Liens*, 1 MO. REAL EST. PRAC. § 11.14 (3d ed. 1986). Because of the confusion surrounding the interpretation of the word, "owner" it is recommended that:

[N]otice should be given to the person or persons who are the owners at the time the lien claimant makes his subcontract, at the time that the prime contract is made and at the time the lien claimant commences his or her work. Where there is more than one owner, careful practice dictates that each owner should be served with a separate copy of the notice.

*Id.* § 11.16.

16. MO. REV. STAT. § 429.012(3) (1986).

17. MO. REV. STAT. § 429.100 (1986).

18. *Id.* See *R.L. Sweet Lumber Co. v. E.L. Lane, Inc.*, 513 S.W.2d 365 (Mo. 1974) (en banc), which states the purpose of section 429.100 is "to warn the *owner* of the property against paying the original contractor while outstanding claims exist in favor of laborers and materialmen; and to give him the opportunity to discharge the debt before the lien is filed. The notice is for the benefit of the *owner* alone." *Id.* at 370 (emphasis in original). *But see* *J.R. Meade Co. v. Forward Constr. Co.*, 526 S.W.2d 21, 26 (Mo. Ct. App. 1975) (original contractors were not required to serve "notice of their intention to file a lien on the trustee or *cestui que* trust under a deed of trust" or on subsequent owners of record of property).

19. MO. REV. STAT. § 429.100 (1986).

20. *Davidson v. Fisher*, 258 S.W.2d 297 (Mo. Ct. App. 1953); *Bruce v. Berg*, 8 Mo. App. 204 (1879).

21. Missouri law provides:

It shall be the duty of every original contractor, every journeyman and day laborer, and every other person seeking to obtain the benefit of the provisions of Sections 429.010 to 429.340, within six months after the indebtedness shall have accrued to file with the clerk of the circuit court of the proper county a just and true account of the demand due him or them after all just credits have been given, which is to be a lien upon such building or other improvements, and a true description of the property, or so near as to identify the same, upon which the lien is intended to apply, with the name of the owner or contractor, or both, if known to the person filing the

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Each such statement must be verified and contain an accounting of the amounts due, a description of the property involved, and the name of the owner or the contractor, or both if known by the claimant.<sup>22</sup> Under prior law, an original contractor had to file his lien in the court within six months after the last work or material was furnished. A subcontractor or materialman had four months to file his lien, and journeymen or day laborers had only sixty days in which to file.<sup>23</sup>

In determining the priority of liens, Missouri still follows the "first spade rule."<sup>24</sup> A mechanic's lien, properly filed, has priority over any subsequent encumbrances.<sup>25</sup> Difficulty in determining who has priority usually arises when there is both a mechanic's lien and a deed of trust on the property. If the effective date of the mechanic's lien is prior to the recording of the deed of trust, then the mechanic's lien is prior as to both the land and the building.<sup>26</sup> If the deed of trust is given prior to the effective date of the mechanic's lien, then the deed of trust has priority on the land, but the mechanic's lien is prior as to the building.<sup>27</sup> If the deed of trust is given on both the land and the existing building, then the deed of trust will have priority over any subsequent mechanic's lien.<sup>28</sup> If there is more than one mechanic's lien on

lien, which shall, in all cases, be verified by the oath of himself or some credible person for him.

Mo. REV. STAT. § 429.080 (1986).

22. Mo. REV. STAT. § 429.080 (1986).

23. *Id.*

24. The "first spade rule" basically provides that a mechanic's lien which has been properly filed dates from the visible commencement of the work. *See* H.B. Deal Constr. Co. v. Labor Discount Center, Inc., 418 S.W.2d 940 (Mo. 1967) (en banc); *see also* Drilling Serv. Co. v. Baebler, 484 S.W.2d 1, 9-10 (Mo. 1972) (mechanics' liens for work and materials were superior to four deeds of trust because permanent work on the ground was begun before the first loan was made and the first deed of trust was recorded); *Kranz v. Centropolis Crusher, Inc.*, 630 S.W.2d 140 (Mo. Ct. App. 1982) (stating that the basis of the first spade rule is that when a loan is made after any construction has started, the lender is on notice of existing or potential mechanic's liens and therefore its mortgage is properly inferior to the mechanic's liens).

25. Mo. REV. STAT. § 429.050-.060 (1986).

26. Comment, *Mechanic's Liens — Priority Over Mortgages and Deeds of Trust*, 42 Mo. L. REV. 53, 55 (1977).

27. *Id.*; *see* Union Elec. Co. v. Clayton Center Ltd., 634 S.W.2d 261 (Mo. Ct. App. 1982); *Kranz v. Centropolis Crusher, Inc.*, 630 S.W.2d 140 (Mo. Ct. App. 1982). Although the statutes allow the building to be sold separately from the land, in practice the holder of the mechanic's lien sells the land and the building subject to the prior mortgage. *See also* Comment, *supra* note 26. *But see* Trout's Invs., Inc. v. Davis, 482 S.W.2d 510 (Mo. Ct. App. 1972) (holding that sections 429.050-.060 (1969) applied only to new construction and were not applicable where repairs and improvements were made to an already mortgaged residence).

28. Comment, *supra* note 26.

the property, the mechanics' lienors share the proceeds of the sale on a pro-rata basis.<sup>29</sup>

Owners have traditionally protected themselves from mechanic's liens through the use of lien waivers and bonding. A lien waver may be obtained from a contractor or subcontractor and the lien will be waived if two requirements are met. The intent to waive the lien must clearly be shown, and the waiver must be supported by consideration or detrimental reliance.<sup>30</sup> Bonds are usually obtained by the owner or the original contractor. When the subcontractors or materialmen are not paid by the contractor, they can look to these bonds for payment.<sup>31</sup> There is no set rule in Missouri as to the value of such bonds, but the value is usually about fifty percent of the contract price.<sup>32</sup>

The enactment of House Bills 942, 1116, and 1369 effected changes in three areas of Missouri's mechanic's lien law. First, these bills made substantive changes in the procedures for obtaining a valid lien, including an owner's consent which must be obtained by a subcontractor. Second, they provided a defense of set-off for owners who had already paid the general contractor. Finally, they provided for criminal sanctions in certain situations. The remainder of this Note will analyze each of these provisions and discuss their effectiveness in providing owners further protection against liens while still allowing contractors to obtain valid liens.

Procedurally, original contractors will be affected very little by the new law. The new section 429.012<sup>33</sup> still requires every original contractor to give

29. Mo. Rev. Stat. § 429.260 (1986).

30. *Liens, supra* note 4, § 223; see *Zeller v. Janssen*, 569 S.W.2d 5, 6 (Mo. Ct. App. 1978) (lien waiver given by contractor did not apply to work for which there was no consideration, but rather applied only to that work for which consideration was given); *Herbert & Brooner Constr. Co. v. Golden*, 499 S.W.2d 541, 545 (Mo. Ct. App. 1973) (held lien waiver executed by builder was invalid for lack of consideration); *Mid-West Engineering & Constr. Co. v. Campagna*, 397 S.W.2d 616, 629 (Mo. 1965) (lien waiver valid if owner has paid money or otherwise changed his position to his detriment in reliance upon the waiver).

31. *Liens, supra* note 4, §§ 232-39; see also, Comment, *supra* note 2, at 57-58.

32. Comment, *supra* note 1, at 120.

33. The Missouri statute states:

1. Every original contractor, who shall do or perform any work or labor upon, or furnish any material, fixtures, engine, boiler or machinery for any building, erection or improvements upon land, or for repairing the same, under or by virtue of any contract, shall provide to the person with whom the contract is made prior to receiving payment in any form of any kind from such person, (a) either at the time of the execution of the contract, (b) when the materials are delivered, (c) when the work is commenced, or (d) delivered with first invoice, a written notice which shall include the following disclosure language in ten point bold type.

**NOTICE TO OWNER**

a Notice to Owner to the person with whom the contract is made<sup>34</sup> as a condition precedent to the "creation, existence or validity" of a mechanic's lien.<sup>35</sup> The notice may be given at any of the four times previously specified.<sup>36</sup> The language required for the notice remains exactly the same as that required by the prior section 429.012, and still must be printed in ten point bold type.<sup>37</sup> However, it is important to note that this section does *not* apply to new residences if the buyer has been furnished mechanics' and suppliers' lien protection through a title insurance company registered in the State of Missouri.<sup>38</sup>

One change the original contractor should keep in mind is that the new law requires the contractor to retain a copy of the notice given to the owner and any consent signed by the owner.<sup>39</sup> Upon request, he must furnish a copy of the notice and the owner's consent to any person performing work or labor, or furnishing material.<sup>40</sup>

Another procedural change in the new law is that the time for filing the lien has been changed. All parties now have six months after the last work

**FAILURE OF THIS CONTRACTOR TO PAY THOSE PERSONS SUPPLYING MATERIAL OR SERVICES TO COMPLETE THIS CONTRACT CAN RESULT IN THE FILING OF A MECHANIC'S LIEN ON THE PROPERTY WHICH IS THE SUBJECT OF THIS CONTRACT PURSUANT TO CHAPTER 429, RSMo. TO AVOID THIS RESULT YOU MAY ASK THIS CONTRACTOR FOR "LIEN WAIVERS" FROM ALL PERSONS SUPPLYING MATERIAL OR SERVICES FOR THE WORK DESCRIBED IN THIS CONTRACT. FAILURE TO SECURE LIEN WAIVERS MAY RESULT IN YOU PAYING FOR LABOR AND MATERIAL TWICE.**

2. Compliance with subsection 1 of this section shall be a condition precedent to the creation, existence or validity of any mechanic's lien in favor of such original contractor.

3. Any original contractor who fails to provide the written notice set out in subsection 1 of this section, with intent to defraud, shall be guilty of a class B misdemeanor and any contractor who knowingly issues a fraudulent lien waiver shall be guilty of a class C felony.

Mo. REV. STAT. § 429.012 (1986).

34. The original contractor is defined as "one who contracts to perform labor or supply materials with the then owner of the property." *J.R. Meade v. Forward Constr. Co.*, 526 S.W.2d 21, 25 (Mo. Ct. App. 1975).

35. Mo. REV. STAT. § 429.012(2) (1986); *see supra* note 33.

36. *See supra* note 15 and accompanying text.

37. Mo. REV. STAT. § 429.012(1) (1986); *see supra* note 33.

38. Mo. REV. STAT. § 429.012(4) (1986). However, it is recommended that such notice continue to be given. *Blond, supra* note 15, §§ 11-16.

39. For a discussion of owner's consent, *see infra* notes 42-47 and accompanying text.

40. Mo. REV. STAT. § 429.013(3) (1986); For the complete text of § 429.013, *see infra* note 42.

or material is furnished in which to file their lien.<sup>41</sup> This consistency will make it easier for all contractors because they will be better able to predict the deadline for filing their lien claims without regard to whether they are the general contractor or subcontractor on any given job.

The most significant procedural change is in the enactment of section 429.013.<sup>42</sup> This provision applies to any person, other than the original con-

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41. MO. REV. STAT. § 429.080 (1986); *see supra* note 21. For a thorough discussion of the interpretation of each of these requirements, see Blond, *supra* note 15, §§ 11.20-21.

42. MO. REV. STAT. § 429.013 (1986) states:

1. The provisions of this section shall apply only to the improvement, repair or remodeling of owner-occupied residential property of four units or less.

2. No person, other than an original contractor, who performs any work or labor or furnishes any material, fixtures, engine, boiler or machinery for any building or structure shall have a lien under this section on such building or structure for any work or labor performed or for any material, fixtures, engine, boiler, or machinery furnished unless an owner of the building or structure pursuant to a written contract has agreed to be liable for such costs in the event that the costs are not paid. Such consent shall be printed in ten point bold type and signed separately from the notice required by section 429.012 and shall contain the following words:

#### CONSENT OF OWNER

**CONSENT IS HEREBY GIVEN FOR FILING OF MECHANIC'S LIENS BY ANY PERSON WHO SUPPLIES MATERIALS OR SERVICES FOR THE WORK DESCRIBED IN THIS CONTRACT ON THE PROPERTY ON WHICH IT IS LOCATED IF THEY ARE NOT PAID.**

3. In addition to complying with the provisions of section 429.012, every original contractor shall retain a copy of the notice required by that section and any consent signed by an owner and shall furnish a copy to any person performing work or labor or furnishing material, fixtures, engines, boilers or machinery upon their request for such copy of the notice or consent. It shall be a condition precedent to the creation, existence or validity of any lien by anyone other than a original contractor that a copy of a consent in the form prescribed in subsection 2 of this section, signed by an owner, be attached to the recording of a claim of lien. The signature of one or more of the owners shall be binding upon all owners. Nothing in this section shall relieve the requirements of any original contractor under sections 429.010 and 429.012.

4. In the absence of a consent described in subsection 2 of this section, full payment of the amount due under a contract to the contractor shall be a complete defense to all liens filed by any person performing work or labor or furnishing material, fixtures, engines, boilers or machinery. Partial payment to the contractor shall only act as an offset to the extent of such payment.

5. Any person falsifying the signature of any owner, with intent to defraud, in the consent of owner provided in subsection 2 of this section shall be guilty of a class C felony. Any original contractor who knowingly

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tractor, who wishes to secure a lien for improvements, repair, or remodeling of the premises.<sup>43</sup> The consent of the owner is now required whenever there is work done on owner-occupied residences of four units or less.<sup>44</sup> It will have no effect on new homes under construction, larger residential projects or commercial property. This consent must be printed in ten point bold type and signed separately from the notice required to be given by the original contractor in the contract pursuant to section 429.012.<sup>45</sup> Section 429.013(3) also specifically provides that the signature of one or more of the owners shall be binding upon all of the owners.<sup>46</sup> This new provision may eliminate some of the cases that arose under the previous law when the property was held in some form of co-ownership and one owner alleged that the lien was not valid against him because he was not a party to the contract.<sup>47</sup>

The words to be contained in the owner's consent are set out in the statute.<sup>48</sup> However, the language does not specifically say *who* must pay for the materials or services in order for the owner to avoid the mechanic's lien. There is nothing to inform the owner that the property can still be subjected to a mechanic's lien if the original contractor does not pay the subcontractor, despite the owner's having signed the consent and having payed the original contractor for the materials or services. In addition, there is nothing in the consent that notifies the owner that if he does not sign the consent he has the right to offset any amount he has paid the original contractor against any amount still due and owing the subcontractor in the event the subcontractor does not get paid.<sup>49</sup> Notice such as this however, would probably result in few signed consents, and as a result few subcontractors would be able to obtain a mechanic's lien.

Closely related to the owner's consent provision is the second major change made by the new law—the provision for set off found in section

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issues a fraudulent consent of owner shall be guilty of a class C felony.

Mo. REV. STAT. § 429.013 (1986).

43. *Id.* § 429.013(1).

44. *Id.* § 429.013(2).

45. *Id.* § 429.013(3). For a discussion of the notice required to be given by the original contractor, see *supra* notes 13-15 and accompanying text.

46. Mo. REV. STAT. § 429.013(3) (1986).

47. See, e.g., *McCarthy v. Wahby*, 717 S.W.2d 571 (Mo. Ct. App. 1986) (the court held that although Mrs. Wahby had not signed the original contract, she approved and changed plans, chose colors and materials, filed her own counterclaim for damages, and had notified McCarthy that she and her husband were able to obtain a loan; therefore, she was bound by her husband's actions based on an implied agency theory); see also *Bryant v. Bryant Constr. Co.*, 425 S.W.2d 236 (Mo. Ct. App. 1968) (similar facts). *But cf.* *Kaufmann v. Krahling*, 519 S.W.2d 29 (Mo. Ct. App. 1975) (wife is not liable just because she knows of or acquiesces in construction work, compliments it, or makes suggestions as it proceeds).

48. Mo. REV. STAT. § 429.013(2) (1986); see *supra* note 42 for the specific language to be set out in the notice.

49. See *infra* notes 60-63 and accompanying text.

429.013(4).<sup>50</sup> A set off provision is one of the key concepts distinguishing a New York System of mechanics' liens from the Pennsylvania System which Missouri law has traditionally followed.<sup>51</sup> In a Pennsylvania System, a subcontractor or materialman is given a direct lien for the full amount of his claim regardless of any payments the owner has made to the original contractor or another subcontractor.<sup>52</sup> The lien is sometimes said to result from an agency created by statute, or from an implied agency vested in the original contractor.<sup>53</sup> Under most statutes of the Pennsylvania type, there is unlimited liability on the owner's property irrespective of the amount due to the general contractor. Other statutes limit liability to the amount of a bond posted by the owner, or directly limiting the liability to the contract price.<sup>54</sup>

Under the New York System, the subcontractor or materialman cannot recover more than is due from the owner to the original contractor.<sup>55</sup> Thus, the subcontractor's or materialman's lien is said to be a derivative lien as their rights are substituted for the rights of the original contractor.<sup>56</sup> However the lien given to the materialman is a direct lien; it is not by way of subrogation because it extends only to the balance due.<sup>57</sup> The value or amount of the lien will depend upon how much the owner has paid the original contractor. Any partial payment by the owner to the general contractor is used as a set-off against the value or amount of the lien.<sup>58</sup>

Under section 429.013,<sup>59</sup> if the property owner has not signed an owner's consent he will not be subject to a lien by a subcontractor or materialman if he has made full payment to the original contractor.<sup>60</sup> The property owner who has not signed the consent and makes a partial payment to the contractor

50. For the complete text of § 429.013, see *supra* note 42.

51. For a discussion of the differences between the New York System and the Pennsylvania System, see Comment, *Mechanics' Liens and Surety Bonds in the Building Trades*, 68 YALE L.J. 138, 142-46 (1958); Comment, *supra* note 2, at 54-57 (discussed in terms of subcontractor having a direct lien [Pennsylvania System] versus a derivative lien [New York System]).

52. G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW § 12.4 (1985); 53 AM. JUR. 2D *Mechanics' Liens* § 8 (1970).

53. Comment, *Mechanics' Liens and Surety Bonds in the Building Trades*, 68 YALE L.J. 138, 144 (1958); 53 AM JUR. 2D *Mechanics' Liens* § 8 (1970) [hereinafter *Mechanics' Liens*].

54. Comment, *supra* note 53, at 144; *Mechanics Liens*, *supra* note 53, § 8.

55. G. NELSON & D. WHITMAN, *supra* note 52, § 12.4; *Mechanics' Liens*, *supra* note 53, § 8.

56. G. NELSON & D. WHITMAN, *supra* note 52, § 12.4; *Mechanics' Liens*, *supra* note 53, § 8.

57. See generally Comment, *supra* note 53, at 142-43; *Mechanics' Liens*, *supra* note 53, § 8.

58. Comment, *supra* note 53, at 142-43; *Mechanics' Liens*, *supra* note 53, § 8.

59. Comment, *supra* note 53, at 142-43.

60. MO. REV. STAT. §§ 429.013(2), (4) (1986).

will be able to offset this partial payment against any amount remaining unpaid to the subcontractors or materialmen.<sup>61</sup> This section appears to give the homeowner additional protection to that under prior law, however, Missouri caselaw had reached substantially the same result by denying subcontractors any recovery in quasi-contract when they failed to perfect their lien.<sup>62</sup> It is important to note that the setoff provision will only be applicable in limited circumstances where the owner has not signed the owner's consent.<sup>63</sup>

These new statutes may have a serious effect on transactions between owners and any subcontractors or materialmen. It is questionable whether an owner will ever sign the consent that any subcontractor or materialman must obtain in order to have a valid lien. It is plausible that an owner, knowing the law, will refuse to sign the consent of owner because should he *not* sign it, any payment he makes to the general contractor will be set off against the value of the subcontractor's lien.<sup>64</sup> In addition, section 429.013(3) specifically states that it is a "condition precedent to the creation, existence or validity of any lien . . . that a copy of a consent . . . , signed by an owner, be attached to the recording of a claim of lien."<sup>65</sup> Therefore, the statute provides that there will be no valid lien if the owner refuses to sign the consent. If the set-off provision is only triggered when there is no signed consent, in which case the subcontractor has no valid lien, what added protection does the set-off afford an owner? Refusing to sign the consent then is one way the owner could be sure of invalidating the subcontractor's lien claim, thereby depriving him of any payment from the owner in the event the owner has paid the original contractor who has failed to pay the subcontractor.<sup>66</sup> If the owner *does* sign the consent, then any payments he makes

61. See *id.* § 429.013(4).

62. *Green Quarries, Inc. v. Raasch*, 676 S.W.2d 261, 263 (Mo. Ct. App. 1984) (subcontractor who failed to perfect his mechanic's lien could not get restitution in the form of a personal judgment on a quasi-contractual theory where the homeowner had already paid the general contractor because the owner had not been unjustly enriched) (Nugent, J. with two judges concurring and one judge concurring only in the result). Judge Lowenstein dissented, disagreeing with the majority's prediction that allowing subcontractors to collect in quasi-contract would be an incentive for them to disregard the mechanic's lien and pursue only the personal judgment. His contention was that only "the truly reckless" would intentionally forego the priority given a mechanic's lien. *Id.* at 268; see also *Ray A. Sheperle Constr. Co. v. Seiferts, Inc.*, 687 S.W.2d 222, 223 (Mo. Ct. App. 1984) (agreeing with the decision reached in *Green Quarries* in the context of a subcontractor attempting to recover from a business which had already paid the full contract price to the general contractor).

63. MO. REV. STAT. § 429.013(4) (1986).

64. *Id.*

65. *Id.*

66. *But cf. R.J. Stephens Drywall & Painting Co. v. Taylor-Morley-Simon, Inc.*, 628 S.W.2d 374, 376 (Mo. Ct. App. 1982) (general contractor who failed to perfect his mechanic's lien was allowed to attempt recovery on the underlying personal debt); *Esser v. Fowler*, 638 S.W.2d 327, 329 (Mo. Ct. App. 1982) (underlying debt

to the general contractor will *not* act as a set-off and the owner may be subject to paying for materials and labor twice, just as the notice to owner recites.<sup>67</sup>

Subcontractors may not supply their labor or materials on credit unless the owner signs the consent. The statute expressly provides that any lien is invalid if there is no signed owner's consent attached.<sup>68</sup> The subcontractor or materialman may, of course, refuse to do any work or deliver any material until such time as the owner does sign the consent. The owner may ultimately sign the consent, but during this bargaining process the owner may still request that he be furnished with lien waivers from the individual contractors as he makes payments. This may still be one of the best measures of protection an owner has in order to avoid having to pay for labor and materials twice or from having their home sold in satisfaction of a mechanic's lien.

The third major change in the law provides that criminal charges may be brought against contractors who intentionally fail to comply with the required procedures. Section 429.013 provides for criminal charges in two circumstances.<sup>69</sup> Any person who, with the intent to defraud, falsifies the owner's signature in the consent of the owner shall be guilty of a class C felony.<sup>70</sup> Further, if an original contractor knowingly issues a fraudulent consent of owner to subcontractors or materialmen, that contractor will be guilty of a class C felony.<sup>71</sup>

The crime of lien fraud has also been created in the enactment of section 429.014.<sup>72</sup> The original contractor or a subcontractor commits the crime of

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was not extinguished by original contractor's failure to perfect their lien; suit on the personal judgment allowed).

67. For the text of the notice to owner, see *supra* note 33.

68. MO. REV. STAT. § 429.013(3). (1986).

69. For the text of MO. REV. STAT. § 429.013 (1986), see *supra* note 42.

70. MO. REV. STAT. § 429.013 (1986).

71. See *id.* § 429.013(5).

72. MO. REV. STAT. Section 429.014 (1986) states:

1. Any original contractor, subcontractor or supplier who fails or refuses to pay any subcontractor, materialman, supplier or laborer for any services or materials provided pursuant to any contract referred to in section 429.010, 429.012 or 429.013 for which the original contractor or subcontractor has been paid, with the intent to defraud, commits the crime of lien fraud.

2. A property owner or lessee who pays a subcontractor, materialman, supplier or laborer for the services or goods claimed pursuant to a lien, for which the original contractor or subcontractor has been paid, shall have a claim against the original contractor, subcontractor, or supplier who failed or refused to pay the subcontractor, materialman, supplier or laborer.

3. Lien fraud is a class C felony if the amount of the lien filed or the aggregate amount of all liens filed on the subject property as a result of the conduct described in subsection 1 of this section is in excess of five hundred dollars, otherwise lien fraud is a class A misdemeanor.

MO. REV. STAT. § 429.014 (1986).

lien fraud if he has been paid and, with the intent to defraud, fails or refuses to pay any subcontractor or materialman.<sup>73</sup> If the aggregated amount of the claims exceed \$500.00, the crime is classified as a class C felony; lesser amounts give rise to a class A misdemeanor.<sup>74</sup> While these provisions may appear to discourage contractors who seek to get around the strict requirements of the law, it is questionable whether these criminal charges will really afford the homeowner any additional protection.<sup>75</sup> Subcontractors and materialmen may be in a better position to use these provisions in trying to obtain payment from general contractors.

Property owners are given some measure of relief in the enactment of subsection 2 of section 429.080.<sup>76</sup> This section establishes a cause of action by an owner against a contractor or subcontractor whose failure or refusal to pay his subcontractor or materialman resulted in the owner having to pay the subcontractor or materialman pursuant to a lien.<sup>77</sup> While this section seems to offer the owner a ray of hope, in reality, general contractors who have not paid subcontractors are usually insolvent or have skipped town. A personal judgment is of little value to a homeowner if the judgment debtor has no assets on which to execute.

As a result of the legislature's attempt to revise Missouri's mechanic's lien law, some helpful procedural changes have been made. However, perhaps greater burdens have been imposed on subcontractors by requiring the owner's consent for a valid lien, which may prove to be a source of contention between subcontractors and owners. Owners have been afforded very little additional practical protection from contractors who do not pay their suppliers and laborers. It has been said, and may still be true, that perhaps the best protection an owner has against a mechanic's lien is to choose a reliable contractor.<sup>78</sup>

HELEN M. CRIPPS

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73. See *id.* § 429.014(1).

74. See *id.* § 429.014(3).

75. See generally Annotation, *Validity and Construction of Statutes Providing Criminal Penalties for Failure of Contractor Who Has Received Payment From Owner to Pay Laborers or Materialmen*, 78 A.L.R. 3d 563 (1977).

76. See *supra* note 21.

77. MO. REV. STAT. § 429.080 (1986); see *supra* note 21.

78. See Comment, *supra* note 2 (citing Note, *Mechanic's Lien — Missouri: Application of Contractor's Payments by Materialman Where Source of Money Should Be Known*, 24 Mo. L. REV. 387 (1959)).

