

## Chapter 5

# MECHANIC'S LIENS

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This chapter is an updated version of Chapter 9, "Mechanic's Liens," written by Mr. Botts's partner, Irwin E. Blond, who had previously authored the updated version of "Mechanic's Liens" written by James P. Tierney and Terry W. Raney, which was published in MISSOURI REAL ESTATE PRACTICE (2<sup>nd</sup> ed. 1972).

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## I. Introduction

### A. (§5.1) Scope of Chapter

Mechanic's liens may be the most effective tool in the contractor's tool box if increased leverage is required to recover payment from an owner or another contracting party. Mechanic's liens by subcontractors or suppliers can present an owner with the unenviable choice of paying off the liens or subjecting the property to foreclosure sale so that the proceeds can satisfy the liens. In many instances, the owner faces the prospect of paying twice for labor or materials provided to a construction project even though the owner may have already paid the general contractor in full.

The constitutionality of the Missouri mechanic's lien statute was confirmed in *Home Building Corp. v. Ventura Corp.*, 568 S.W.2d 769 (Mo. banc 1978). See also *McKenney v. Joplin Union Station, Inc.*, 867 S.W.2d 245, 248 (Mo. App. S.D. 1993).

While the lien laws provide substantial leverage to the contractor, subcontractor, or supplier, the procedure to preserve a lien can be confusing. The contractor, subcontractor, or supplier must take great care in the preparation and timely filing of a lien claim, together with any applicable notice. Any error may render the claimant's lien invalid and leave the claimant with only a breach of contract or *quantum meruit* claim against a defaulting contracting party that, in many instances, is insolvent or protected by bankruptcy laws.

The mechanic's lien laws of Missouri and the supporting caselaw can be a trap for the unwary, particularly when the lien claimant has waited until the last minute to gather the necessary information for a lien filing. A claimant should plan ahead and, when available, have the lien claim reviewed by an experienced lawyer before filing.

To alleviate some of the anxiety associated with lien claims, this chapter is intended to discuss the creation of the lien for the furnishing of labor, material, or design for the improvement or repair of real property, as provided by §§ 429.010–429.360, RSMo 2000 and Supp. 2008.

This chapter discusses lien claims by the general contractor (often referred to in the lien statutes as the "original contractor"), subcontractor, or supplier in the construction project setting, along with claims by:

- architects and engineers;
- landscapers;
- well drillers;
- demolition contractors; and
- even commercial real estate brokers.

Liens for street, sidewalk, sewer, or pipeline work adjacent to land are also discussed.

This chapter does not deal with mechanic's liens against railroads, which are covered in §§ 429.440–429.550, RSMo 2000. This chapter does not deal with liens on personal property such as liens for storing vehicles, for work on animals and vehicles, or for repair bills on chattels. Also, it does not deal with liens on keeping, training, and breeding animals; factor's liens; or attorney's liens.

This chapter first intends to inform counsel regarding whether there is a lienable claim, to what extent it is lienable, and whether that lien will have priority over other claims against the property. It then examines the procedural requirements to enforce a lien.

Because there are so many pitfalls and questionable areas of the law, reliance on forms may easily cause a serious mistake. The forms provided in this chapter are for the purpose of illustrating certain concepts in this chapter. The forms should not be relied on for lien or lawsuit preparation because each lien or lawsuit must be carefully drafted to fit the circumstances that are unique to each claim.

#### **B. (§5.2) Outline of Step-by-Step Procedure**

The rules associated with preserving and filing a mechanic's lien will vary depending on various factors outlined below.

Step 1. Answer the following:

- Is your work or material considered lienable under the mechanic's lien laws? *See* §5.3, *infra*.
- Is the claimant an “original contractor”—i.e., a claimant providing work or materials under a direct contract with the owner? *See* §5.17, *infra*. If so, has the claimant provided the requisite notice to the owner? *Id.* If the claimant provided work or material to an “original” contractor or subcontractor or supplier, the claimant will need to give a “ten-day notice” to the owner before filing its lien. *See* §5.18, *infra*.

- What was the last day on which the claimant provided labor or materials to the property that is the subject of the lien? *Id.*

Step 2. Obtain information pertaining to the subject real estate—most likely from the title company—necessary for the preparation of the lien (and preparation of the notice by subcontractors and suppliers), including the identity of the owner of record and the legal description of the subject property. *See §§5.17 and 5.21, infra.*

Step 3. If the claimant is a subcontractor or supplier (or any person other than the original contractor), prepare a notice of intent to file a mechanic's lien statement and serve it on the owner. These notices required by § 429.100, RSMo 2000, are to be served within six months less ten days.

Step 4. Prepare and file a statement of lien with the clerk of the circuit court within six months after the last date on which labor or materials were provided by the claimant.

Step 5. Check the records of the clerk of the circuit court to determine whether any equitable suit for the enforcement of liens is pending against the property against which a lien is claimed; if such a suit is pending, the claimant must join in that suit. *See §§5.31 and 5.38, infra.*

Step 6. Within six months of filing the statement of lien, the claimant must file a petition in the circuit or associate circuit division to foreclose the mechanic's lien. But if there is a pending equitable lawsuit against the property, the claimant must either file a cross-claim or motion to intervene accompanied by an intervening petition in the equitable suit. *See §§5.30–5.43, infra.*

Step 7. Be certain that process is served as soon as possible. *See §5.36, infra.*

Step 8. After judgment, have the property sold at an execution sale if the judgment remains unsatisfied.

## II. Creation and Extent of Lien

### A. (§5.3) What Creates a Right to a Lien

In general, § 429.010.1, RSMo Supp. 2008, confers a right to a lien on every person:

who shall do or perform any work or labor upon land, rent any machinery or equipment, or use any rental machinery or equipment, or furnish any material, fixtures, engine, boiler or machinery for any building, erection or improvements upon land, or for repairing, grading, excavating, or filling of the same, or furnish and plant trees, shrubs, bushes or other plants or provides any type of landscaping goods or services or who installs outdoor irrigation systems . . . .

Section 429.020, RSMo 2000, extends this coverage to “the construction of any street, curb, sidewalk, sewerline, waterline, or other pipeline in front of, adjacent to, along or adjoining any lot, tract or parcel of land in any town, city or village.” *See* §5.10, *infra*. Section 429.015, RSMo 2000, also provides that professional corporations or persons registered to practice architecture, engineering, or land surveying shall have lien rights. The corporation is deemed registered if the corporation itself is registered to practice architecture, engineering, or land surveying or if one of its officers is so registered and owns more than 50% of the capital stock of the corporation. The architect, however, cannot retroactively register to comply with the statute after performing services. *In re Branson Mall, Inc.*, 970 F.2d 456 (8<sup>th</sup> Cir. 1992).

Notwithstanding the foregoing statutes, mechanic's liens may not be asserted against publicly owned property. If the property is owned by the state, a local government or agency, or a district of one of those, it is the duty of the governing body to require the contractor to obtain and provide a payment bond under § 107.170, RSMo 2000, for the protection of the suppliers of labor and materials. Although § 107.170 does not contain a time limitation for instituting a suit under such a bond, the bond often contains such a provision, which may or may not be enforceable. In addition, the time in which such an action may be brought may be limited by local ordinances or city charter provisions. A federally owned improvement must be bonded in accordance with the Miller Act, 40 U.S.C. §§ 3131 *et seq.* (formerly 40 U.S.C. §§ 270a *et seq.*). A lawsuit on a Miller Act bond must be filed within one year after the last labor or materials were furnished by the subcontractor/supplier. If the subcontractor/supplier claimant did not have a contract with the original contractor, the claimant

must give written notice to the original contractor within 90 days after the last labor or materials were furnished. 40 U.S.C. § 3133(b)(2). See §5.52 below for a form of notice under the Miller Act.

To advance its remedial purpose of affording effective security to persons furnishing labor and materials used in making improvements on others' property, the courts construe the scope of improvements protected by the mechanic's lien laws as favorably to mechanics and material suppliers as the law's terms will legitimately permit. *R.L. Sweet Lumber Co. v. E.L. Lane, Inc.*, 513 S.W.2d 365 (Mo. banc 1974); see also *Leonard v. Bennett*, 674 S.W.2d 123, 130 (Mo. App. E.D. 1984); Dale R. Agthe, Annotation, *Delivery of Material to Building Site as Sustaining Mechanic's Lien—Modern Cases*, 32 A.L.R. 4TH 1130 (1984). Most types of work, whether in the nature of repairs, alterations, or new construction, are lienable. But property of a quasi-public corporation, e.g., a development agency involved in the construction of a garage for public transportation vehicles, is not subject to a mechanic's lien. *River's Bend Red-E-Mix, Inc. v. Parade Park Homes, Inc.*, 919 S.W.2d 1, 3 (Mo. App. W.D. 1996); see also *Redbird Eng'g Sales, Inc. v. Bi-State Dev. Agency of Mo.-Ill. Metro. Dist.*, 806 S.W.2d 695, 698 (Mo. App. E.D. 1991).

A contractor has a lien for superintendent charges, *Fagan v. Brock Motor Car Co.*, 282 S.W. 135 (Mo. App. E.D. 1926), as does a subcontractor, *Fuhler v. Gohman & Levine Const. Co.*, 142 S.W.2d 482 (Mo. 1940). See also *Peerless Supply Co. v. Indus. Plumbing & Heating Co.*, 460 S.W.2d 651, 662 (Mo. 1970).

Money loaned or advanced to a contractor or other person to enable the contractor to purchase material for, or pay for labor on, an improvement is not lienable. *Summit Lumber Co. v. Higginbotham*, 586 S.W.2d 799, 801 (Mo. App. W.D. 1979); *Putnam v. Heathman*, 367 S.W.2d 823 (Mo. App. W.D. 1963).

For the installation of personalty to give rise to a lien, the personalty installed must become a fixture and not remain a chattel. See *Sears, Roebuck & Co. v. Seven Palms Motor Inn, Inc.*, 530 S.W.2d 695 (Mo. banc 1975), in which the Court held that wall-to-wall carpeting is lienable, and *J.R. Meade Co. v. Forward Constr. Co.*, 526 S.W.2d 21 (Mo. App. E.D. 1975), in which the court held that drapes supplied to a new motel are lienable.

Grading and excavation work is lienable when it is performed as an integral part of a total plan to construct buildings on the land; it does

not need to be a part of the contract for the construction of the building. *H.B. Deal Constr. Co. v. Labor Disc. Ctr., Inc.*, 418 S.W.2d 940 (Mo. 1967); *Vasquez v. Vill. Ctr., Inc.*, 362 S.W.2d 588 (Mo. 1962); *Landmark Sys., Inc. v. Delmar Redevelopment Corp.*, 900 S.W.2d 258 (Mo. App. E.D. 1995).

A material supplier must prove that the materials for which the lien is claimed were actually used in the improvement against which the lien is asserted. *George F. Robertson Plastering Co. v. Magidson*, 271 S.W.2d 538 (Mo. 1954); *Hill-Behan Lumber Co. v. Flegle*, 183 S.W.2d 862 (Mo. App. E.D. 1944). Supplies and materials sold for or delivered for a particular building but not actually used in making improvements are not lienable. *Davidson v. Fisher*, 258 S.W.2d 297 (Mo. App. S.D. 1953). The materials do not need to become a part of the structure; it is sufficient that they were necessarily used or consumed in making the improvement. *Brownstein v. Rhomberg-Haglin & Assocs., Inc.*, 824 S.W.2d 13, 17 (Mo. banc 1992); *Oliver L. Taetz, Inc. v. Groff*, 253 S.W.2d 824 (Mo. 1953); *Boyer Lumber, Inc. v. Blair*, 510 S.W.2d 738 (Mo. App. E.D. 1974).

Despite the material supplier's burden of proving that its materials were used in the construction of the improvement that is the subject of the lien, in *Bates County Redi-Mix, Inc. v. Windler*, 162 S.W.3d 98 (Mo. App. W.D. 2005), the court held that a concrete supplier's lien was not defective even though all of its concrete materials had been removed from the property. The concrete materials were used in the foundation for a home and were removed completely because of defective installation by a subcontractor. The supplier/lien claimant was not involved in the installation of the concrete materials. The owner contended that the lien was defective because the materials were not used in the construction of the improvement. Because the supplier was not at fault, the court applied a "familiar legal principle that, when one of two innocent parties must suffer a loss by reason of the fault of a third, that loss should be borne by him who gave the third person power to commit the fault." *Bates*, 162 S.W.3d at 107–08. The court found that the owner was in a better position to make sure that the general contractor performs properly than one who supplies the materials. *Id.* at 108.

A subcontractor is not entitled to a lien unless there is a contract between the owner and the contractor. *Mound City Supply Co. v. Woodland Dev. Corp.*, 414 S.W.2d 805 (Mo. App. E.D. 1967).

See Joe Amick, Note, *Mechanic's Lien—Intentional Inclusion of Nonlienable Items—Forfeits*, 32 UMKC L. REV. 330 (1964).

The right to assert a mechanic's lien claim may be waived for work previously provided, but the intent to waive that right must be clearly manifested. *Landvatter Ready Mix, Inc. v. Buckey*, 963 S.W.2d 298, 302 (Mo. App. E.D. 1997) (citing *Herbert & Brooner Constr. Co. v. Golden*, 499 S.W.2d 541, 545 (Mo. App. W.D. 1973); *Lee v. Hassett*, 39 Mo. App. 67, 71 (E.D. 1890); *Keller v. Home Life Ins. Co.*, 69 S.W. 612, 615 (Mo. App. E.D. 1902)). But any agreement to waive a lien for future work is unenforceable and against public policy. Section 429.005, RSMo 2000, specifically states that a contractor may not waive its right to enforce or claim any lien in an agreement that "is in anticipation of and in consideration for the awarding of a contract . . . to perform work or supply materials for an improvement upon real property."

#### **B. (§5.4) Privity of Contract and Remote Tiers**

Many states extend lien rights to only those claimants that are in direct privity with the owner or to claimants that provide labor or materials to the original contractor or a subcontractor. *See, e.g.*, 40 U.S.C. §§ 3131 *et seq.*; KAN. STAT. ANN. § 60-1103 (Westlaw through 2008 legislation). Missouri lien law does not provide this limitation. Instead, lien rights extend to all persons who provide labor or material on the project, no matter how far removed from the owner. *Fruin-Bambrick Constr. Co. v. Jones*, 60 Mo. App. 1, 7-9 (E.D. 1894); II MO. CONSTRUCTION LAW ch. 9 (MoBar 2<sup>nd</sup> ed. 2004).

#### **C. (§5.5) Tenancy by the Entirety**

A mechanic's lien can be established against a tenancy by the entirety only if both the husband and wife made the contract for the improvement. *Morgan Wightman Supply Co. v. Smith*, 764 S.W.2d 485 (Mo. App. E.D. 1989).

A contractor is charged with constructive knowledge that property that is sought to be charged with a mechanic's lien was held by the owners as tenants by the entirety at the time the contract was entered into, and the individual act of one spouse cannot subject the property to a mechanic's lien. *Crewse v. Shelter Mut. Ins. Co.*, 706 S.W.2d 35, 43 (Mo. App. W.D. 1985); *Freeman Contracting Co. v. Lefferdink*, 419 S.W.2d 266 (Mo. App. E.D. 1967).

Mere acquiescence in the building operation by the noncontracting spouse is not sufficient to constitute a contract or agency, *La Crosse Lumber Co. v. Goddard*, 151 S.W.2d 455 (Mo. App. W.D. 1941);

*I.R. Goldberg Plumbing Supply Co. v. Taylor*, 237 S.W. 900 (Mo. App. E.D. 1922), even when a noncontracting spouse daily and without objection observed the work being performed, *Allied Pools, Inc. v. Sowash*, 735 S.W.2d 421 (Mo. App. W.D. 1987); *Wilson v. Fower*, 155 S.W.2d 502 (Mo. App. W.D. 1941).

But if a noncontracting spouse executes a deed of trust to provide construction funds or otherwise approves the work, a valid lien may be asserted. *Stockman v. Estate of Shelton*, 526 S.W.2d 349 (Mo. App. W.D. 1975); *E.C. Robinson Lumber Co. v. Lowrey*, 276 S.W.2d 636 (Mo. App. S.D. 1955); *Magidson v. Stern*, 148 S.W.2d 144 (Mo. App. E.D. 1941).

#### **D. (§5.6) Amount of Land Subject to Lien**

In cities, towns, and villages, the lien extends to the lot or lots shown on the subdivision plan on which the improvement is situated or to the lot or lots in front or alongside of which the street, curb, sidewalk, sewerline, waterline, or other pipeline has been built. Liens on properties within cities, towns, and villages are not subject to the three-acre limitation that applies to rural areas, discussed immediately below. Section 429.010, RSMo Supp. 2008; § 429.020, RSMo 2000.

If the property is located outside the city, town, or village, the lien is subject to a three-acre limitation. But if the improvement is for manufacturing, industrial, or commercial purposes in a rural area, the lien on the improvement may extend beyond the three-acre limit and may also include the owner's land containing a roadway for ingress and egress from the parcel of land on which the improvement is situated to the nearest public road or highway. Section 429.010.1.

In *Killian Construction Co. v. Frontier Town-Missouri, Inc.*, 161 S.W.3d 408 (Mo. App. S.D. 2005), an architect sought to enforce its lien for design it provided to a 250-acre tract. The court ruled that, by virtue of § 429.015.1, RSMo 2000, the architect's lien was limited to one acre because the land was not within a municipality. *Killian*, 161 S.W.3d at 411.

#### **E. (§5.7) Extent of Interest Subject to Lien**

In general, the lien applies only to the extent of the right, title, and interest in the land owned by the owner of the improvement and for whose immediate use or benefit the labor was done or the materials furnished. Section 429.010.1, RSMo Supp. 2008.

Regarding leaseholds, § 429.070, RSMo 2000, provides for a lien under certain circumstances for an improvement erected by the claimant at the lessee's order. But the scope and value of the lien is somewhat limited. Specifically, a lien claimant cannot, merely by proving the erection, alteration, or repair of improvements under a contract with the lessee of land, obtain a lien on the lessor's or fee owner's interest in the property. This appears to be true even if the lessor or fee owner consented to the erection or alteration. *Mundet Cork Corp. v. Three Flowers Ice Cream Co.*, 146 S.W.2d 678 (Mo. App. W.D. 1940). The lien is then applicable only to the lessee's interest. *Miners Lumber Co. v. Miller*, 117 S.W.2d 711 (Mo. App. E.D. 1938). The lessor/fee owner's interest may be subject to a lien, however, for work contracted by the lessee, particularly when the lessee is considered an agent of the lessor. It is often difficult to define what acts by the lessor/fee owner give rise to an agency relationship with the tenant to cause a lien to attach. See *Messina Brothers Construction Co. v. Williford*, 630 S.W.2d 201 (Mo. App. W.D. 1982), for a detailed discussion of the factors at which the courts look. See also *Bates v. McKay*, 724 S.W.2d 565, 571 (Mo. App. W.D. 1986).

In addition to the common type of agency grounds—see *Dean & Hancock v. O'Bryan*, 290 S.W. 641 (Mo. App. W.D. 1927); *Ehrhardt Bros. Decorating Co. v. Columbia Candy Co.*, 186 S.W. 1113 (Mo. App. E.D. 1916)—the courts recognize a special type of agency that subjects the lessor/fee owner's interest to the lien. This occurs when:

- the lessor/fee owner expressly requires in the lease that the lessee make an improvement that is at least more than the ordinary type of repair, *Allen Estate Ass'n v. Fred Boeke & Son*, 254 S.W. 858 (Mo. 1923); or
- the premises are leased for a specific purpose and they are not in a condition to be used for that purpose so that substantial remodeling is necessarily imposed on the lessee if the lessee desires to use the leased premises.

*Masterson v. Roberts*, 78 S.W.2d 856 (Mo. 1934); *Branick Constr. Co. v. Taylor*, 585 S.W.2d 282 (Mo. App. W.D. 1979); see also *Utlely v. Wear*, 333 S.W.2d 787 (Mo. App. S.D. 1960).

For example, in *Newport v. Hedges*, 358 S.W.2d 441 (Mo. App. S.D. 1962), the lease specified that vacant land was to be used for a restaurant that would revert to the owner's interest at the termination of the lease. The owner knew of, and did not object to, the

the work that was the subject of the lien. Under these circumstances, the owner's interest in the land was subject to a lien.

Thus, there must be some compulsion on the lessee—express or necessarily implied—to make improvements. If so, the interest of the lessor/fee owner may be subject to a lien even though the lease states that the lessee has no authority to contract on behalf of the lessor. *Allen Estate Ass'n*, 254 S.W. 858; *Concrete Eng'g Co. v. Grande Bldg. Co.*, 86 S.W.2d 595 (Mo. App. W.D. 1935).

The rights of a lien claimant that are against the leasehold only are restricted. Section 429.070 does not permit a person having a lien against a leasehold interest to remove improvements that have been merely reconstructed, altered, or repaired. *Masterson*, 78 S.W.2d 856. An addition may not be removed if that will cause irreparable injury to the original building. *Orear v. Dierks Lumber Co.*, 176 S.W. 467 (Mo. App. W.D. 1915).

On the other hand, a person who installs a fixture, such as machinery, that can easily be removed can do so even though the person's lien only affects the leasehold. If the fixture can be removed and remain in a resalable condition, this is one of the few instances when a lien against a leasehold only has some value. In most instances, a lien right against a leasehold interest only will be of little value.

In reviewing a lien claimant's claim of unjust enrichment against a landlord for work provided by the claimant to the tenant, the court of appeals, in *Graves v. Berkowitz*, 15 S.W.3d 59 (Mo. App. W.D. 2000), reaffirmed the concept that a lessor is not responsible for payment for the work if it is no more than a passive beneficiary of the work provided to the tenant. The court identified certain factors that precluded recovery under unjust enrichment in the case. First, even though the lease required the landlord's approval of the design for the tenant's improvement, in reality the landlord was passive as to the design. Second, during the course of the project, the claimant never looked to the landlord for payment; in fact, the claimant never made a formal demand for payment before filing suit. As a result, the court concluded that it was not unjust for the landlord to retain the benefit of the work without paying for it. *Id.* at 64; *see also Kujawa v. Billboard Café at Lucas Plaza, Inc.*, 10 S.W.3d 584 (Mo. App. E.D. 2000) (despite a \$75,000 tenant finish allowance, which was paid, the landlord's retention of benefits was not unjust); *Webcon Group, Inc. v. S.M. Props.*, 1 S.W.3d 538, 538 (Mo. App. E.D. 1999).

**F. (§5.8) Nursery and Landscaper's Lien**

A landscaper is entitled to a lien for “trees, shrubs, bushes or . . . outdoor irrigation systems installed.” Section 429.010.1, RSMo Supp. 2008. The landscaper must comply with all laws applicable to other lien claimants identified in § 429.010, such as notice requirements. But there is one significant difference—a landscaper's lien will only be enforceable against the original purchaser of the landscaping services if the lien is filed against the property of the original purchaser *before* the property is conveyed to a third person.

**G. (§5.9) Lien Rights for Architects, Engineers, Landscape Architects, and Land Surveyors**

A separate statute was enacted for the creation of lien rights for design professionals. Under § 429.015.1, RSMo 2000, an engineer or architect, landscape architect, or land surveyor is entitled to a lien for services rendered. There are some important distinctions between the treatment of design professional liens under § 429.015 and the treatment of all other construction liens. To have a lien right, a design professional must be properly licensed with the state of Missouri. If the design professional or the design professional's corporation is not properly licensed, the contract for these services is invalid *ab initio*, and the design professional will therefore not be entitled to a lien. *In re Branson Mall, Inc.*, 970 F.2d 456 (8<sup>th</sup> Cir. 1992); *see* § 327.461, RSMo 2000. Further, failure to be properly licensed at the time the contract is executed is fatal and cannot be cured by a subsequent license. *See In re Branson Mall*, 970 F.2d 456.

In *Space Planners Architects, Inc. v. Frontier Town-Missouri, Inc.*, 107 S.W.3d 398 (Mo. App. S.D. 2003), an architect/lien claimant was not registered with what is now the Missouri Board for Architects, Professional Engineers, Professional Land Surveyors and Landscape Architects (the Board) at the time it entered into a contract with the owner to provide design services in connection with a theme park. The court recognized that § 429.015 creates a lien right for architectural or engineering corporations or individuals “registered” with the Board. “An architectural or engineering corporation that fails to register with Board simply has no lien to claim.” *Space Planners*, 107 S.W.3d at 403. Also, the court highlighted a rule for pleading practice. Specifically, the court ruled that an architect must affirmatively plead that it is registered with the Board. “Without that essential element being pleaded and proven, neither Architect nor Engineer showed themselves to be entitled to a judgment as a matter of law.” *Id.* at 404.

A distinguishing feature of the design professional's lien is that the notice requirements in §§ 429.012 and 429.013, RSMo 2000, do not apply. Instead, § 429.015.4 provides that design professionals only need to comply with the procedural requirements set forth in §§ 429.030–429.060, RSMo 2000, and §§ 429.080–429.360, RSMo 2000 and Supp. 2008. *See* II MO. CONSTRUCTION LAW ch. 9 (MoBar 2<sup>nd</sup> ed. 2004).

#### **H. (§5.10) Street, Sidewalk, Sewer, or Pipeline**

Section 429.020, RSMo 2000, provides a lien right for labor and materials furnished for the “construction of any street, curb, sidewalk, sewerline, waterline, or other pipeline in front of, adjacent to, along or adjoining” any land located in a “town, city or village, under or by virtue of any contract with the owner or proprietor of such” land or “his agent, trustee, contractor or subcontractor.”

In *Ladue Contracting Co. v. Land Development Co.*, 337 S.W.2d 578 (Mo. App. E.D. 1960), the court held that labor and materials for grading and paving a street and its circular turnaround, curbs, gutters, and sanitary sewer jutting were lienable under § 429.010, now RSMo Supp. 2008, when the work was performed under one contract for the construction of dwellings, the construction was essential to the use of the premises, and the work was performed on private property.

A lien right does not exist against adjacent property if the contract for construction of the street, curb, sidewalk, sewerline, waterline, or other pipeline is not under or by virtue of a contract with the owner of the adjacent lot. *J&H Gibbar Constr. Co. v. Adams*, 750 S.W.2d 580 (Mo. App. E.D. 1988). As a result, § 429.020 cannot be construed as authorizing a lien on private property under a public works contract. *Id.* at 586.

#### **I. (§5.11) Lien Rights for Commercial Real Estate Brokers and Appraisers**

The Commercial Real Estate Brokers' and State Certified Real Estate Appraisers' Lien Act grants certain lien rights to commercial real estate brokers and appraisers. *See* §§ 429.600–429.630, RSMo 2000 and Supp. 2008. By statute, a real estate broker is entitled to a lien for services provided in connection with “commercial real estate,” § 429.605, RSMo 2000, which, by statutory definition, involves any land other than:

- property with one to four residential units;
- unincorporated land; and
- agricultural property.

Section 429.603(1), RSMo Supp. 2008.

Lien rights are limited to *licensed* real estate brokers. Further, the agent must act as the “broker” for the buyer or seller in accordance with a written contract.

The lien statement by the commercial real estate broker must contain the following items:

- The name of the claimant
- The name of the owner
- A description of the subject property
- The lien claim amount
- The real estate license number of the real estate broker

Section 429.607, RSMo 2000. The lien must be executed by the broker. *Id.*

Section 429.609, RSMo 2000, provides several rules regarding the important timing for recording a lien in order for the lien to attach to the property. The rules should be followed closely. In general, the broker lien attaches to the subject property upon the occurrence of two events:

1. When the broker is entitled to a fee or commission, the broker produces a ready and willing buyer or licensee, a conveyance is accepted under a contract, or a conveyance is made
2. When the broker's notice of lien is recorded with the recorder of deeds before the transfer of the property

Section 429.609. In the case of a lease, the lien must be recorded within 90 days after the lessee takes possession of the subject premises. Section 429.609(2)(b). If the broker has a written agreement, the lien will attach upon the transfer of the property, and when the notice of lien is filed with the recorder of deeds, it attaches within 90 days of the transfer. Section 429.609(2)(c). In addition, the broker must mail a copy of the notice of lien to the owner via certified mail. Section 429.614, RSMo 2000. Also, as a condition precedent to a lien, a broker or appraiser must provide a written notice to the buyer

of commercial real estate that the broker's or appraiser's fee is due. Section 429.630, RSMo 2000. This notice must be provided at the time of the closing. *Id.* Failure to do so will bar any lien rights. *Id.* After the lien attaches, the broker must file suit within six months after recording the lien; otherwise, the lien is extinguished. Section 429.616, RSMo 2000.

The petition must be verified by the broker. *Id.* Further, the petition must:

- state the terms of the written broker agreement upon which the lien is based;
- state the date when the contract was made;
- describe services that were performed;
- state the claim amount;
- provide a description of the subject real estate; and
- state any other facts relevant to a full understanding of the claim.

Section 429.618.1, RSMo 2000.

To shorten the filing period for the lawsuit, the owner may serve, by registered or certified mail, a written demand on the lien claimant to file suit. Section 429.620, RSMo 2000. After this demand, if the lien claimant fails to file suit within 30 days, the lien is extinguished. *Id.*

Significantly, and unlike other lien claims by contractors or subcontractors, the prevailing party in a broker's lien lawsuit is entitled to recover reasonable attorney fees. Section 429.625, RSMo 2000.

Under § 429.629, RSMo 2000, appraisers are also entitled to a lien as long as they comply with the same procedures applicable to brokers.

#### **J. (§5.12) Mechanic's Liens on Multiple Lots**

*Contiguous Lots.* Section 429.040, RSMo 2000, provides, in part, that when the improvements involve "two or more buildings, united together and situated upon the same lot or contiguous lots, or separate

buildings upon contiguous lots . . . and erected under one general contract, it shall not be necessary to file a separate lien upon each building or lot. . . .” But it is important to emphasize that, to file one lien against all of the contiguous lots, the work must be done under one general contract. *Mansfield Lumber Co. v. Johnson*, 91 S.W.2d 239 (Mo. App. S.D. 1935).

The phrase “one general contract” may include a contract with a material supplier or a contract involving a general contractor. For example, an owner contracts with a general contractor to build certain improvements on Lot X. The owner then makes a separate contract with the same general contractor to build on Lot Z, an adjoining lot. The general contractor contracts with a material supplier to supply lumber to both Lots X and Z under a single contract. The material supplier has contiguous lien rights under the supplier’s single general contract. See *Stewart Concrete & Material Co. v. James H. Stanton Constr. Co.*, 433 S.W.2d 76 (Mo. App. W.D. 1968).

The work by the lien claimant must be provided to both contiguous properties. It is insufficient for one lot to merely provide access to the other lot. See *Schroeter Bros. Hardware Co. v. Croatian “Sokol” Gymnastic Ass’n*, 58 S.W.2d 995 (Mo. 1932).

The question of whether the property is “contiguous” under the meaning of § 429.040 often presents a problem. For example, lots separated by a public alley are deemed contiguous. *Roy F. Stamm Elec. Co. v. Hamilton-Brown Shoe Co.*, 171 S.W.2d 580 (Mo. banc 1943). Likewise, lots separated by a public street are deemed contiguous. *Schwartz v. Shelby Constr. Co.*, 338 S.W.2d 781 (Mo. 1960). But lots separated by a private road are contiguous only if the lot owners have adjacent fee simple interests in the private road. *United Lumber Co. v. Minmar Inv. Co.*, 472 S.W.2d 630 (Mo. App. E.D. 1971).

Lots must share a common side to be deemed contiguous, and they are not considered contiguous when they only have a touching corner in common. *Stewart Concrete & Material Co.*, 433 S.W.2d 76.

Significantly, the time within which a lien on all contiguous lots under one general contract must be filed is computed from the day that work was completed on the last lot. *Walden v. Robertson*, 25 S.W. 349 (Mo. 1894). When a contiguous lien statement apportioned the work, one or more lots may be released without jeopardizing the portion of the lien claim attributable to the remaining lots. *Id.*

*Blanket Liens.* Blanket liens may be asserted under two separate statutes. Section 429.010.1, RSMo Supp. 2008, provides that anyone who performs any work on or furnishes materials for any building, erection, or improvements on land shall have a lien and that, if the building, erection, or improvement is on any lot or land, the lien shall be on the building, erection, or improvements and the lot, tract, or parcel of land on which they are situated. The use of the word “improvements” indicates that work done on an entire subdivision may be the proper subject of a single lien on all the property in the subdivision if the work has been done under one general contract. This section is sometimes invoked in a lien claim for subdivision grading.

In addition, § 429.020, RSMo 2000, specifically grants lien rights against adjoining tracts to those who put in streets, sidewalks, sewerlines, waterlines, or any other pipeline.

Serious problems arise under §§ 429.010 and 429.020 when a contractor performs work on an entire subdivision—perhaps over a period of many months—under one general contract. It may not be feasible in this situation for a homeowner or title examiner to determine when the six-month limitation period for filing liens has expired.

For example, construction work may be undertaken under one general contract in a large subdivision project that will take two to three years to complete. In that portion of the subdivision first completed, a person may purchase a home and reside in it for well over six months without any work having been performed on or adjoining or affecting the homeowner’s premises during that period. Perhaps as long as one year later, a company doing the sewer work in the subdivision may assert a lien against the entire subdivision because it has not been fully paid. This lien could attach to the premises of the person who had all work completed on that person’s particular property a year or more earlier.

A homeowner in this situation who knows that the sewer contractor is in a position to assert this lien against the homeowner’s property may insist on a lien waiver from the sewer contractor. But the sewer contractor may well be very reluctant to give a lien waiver on one lot because doing so is similar to releasing one lot from a blanket lien already on file, creating a risk of losing the lien as to the remaining property. To date, there is no Missouri case on the question of whether a release of a part of the property covered by a blanket lien effectuates a release of the entire blanket lien.

In *Concrete Co. of Ozarks v. Catamount Ridge North, L.L.C.*,

63 S.W.3d 260 (Mo. App. S.D. 2001), the court of appeals reviewed one lien that covered 20 separate lots that the lien claimant admitted were not contiguous. The lien claimant asserted that the lien was still proper because the work was performed under one continuous contract. In essence, the claimant argued that the lien should still stand because it complied with § 429.010 rather than the contiguous lot statute, § 429.040. The court rejected the argument and ruled that “§ 429.040 is the exclusive statute under which to file one lien on more than one lot.” *Catamount Ridge N.*, 63 S.W.3d at 264.

#### **K. (§5.13) Application of Payments Received**

The debtor has the right to specify the account to which the payment will be applied; if the debtor fails to specify, the creditor may make the application. If neither the debtor nor the creditor exercises this prerogative, the law will apply the credit on the debt that is older or is unsecured. *A.E. Birk & Son Plumbing & Heating, Inc. v. Malan Constr. Co.*, 548 S.W.2d 611 (Mo. App. E.D. 1977).