



## CSI AND THE LAW

## TENNESSEE LIEN LAW

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I appreciate having had the opportunity to speak with you in August during the CSI lunch meeting. I had quite a few questions after the presentation concerning the new lien law. In this article, and the next one, I will cover a few of the main topics from my presentation and the questions I received afterwards. The lien law may be found in Section 66-11-101 *et. seq.* of the Tennessee Code Annotated.

The initial step to take before asserting a lien claim is to understand the terminology used in the new statute. The 2007 Amendments introduced some new terms while redefining others. Many terms and/or concepts that were found in the case law have been incorporated into the statute itself.

Any person, which is defined as an “individual, corporation, limited liability company, partnership, limited partnership, sole proprietorship, joint venture, association, trust, estate, or other legal or commercial entity” who supervises or performs work or labor or who furnishes material, services, equipment or machinery in furtherance of any improvement to private real property has a lien against that property to secure payment for the work, labor, materials, services, equipment or machinery provided. An “improvement” is “the result of any action or any activity in furtherance of constructing, erecting, altering, repairing, demolishing, removing, or furnishing materials or labor for any building, structure, appurtenance to the building or structure, fixture, bridge, driveway, private roadway, sidewalk, walkway, wharf, sewer, utility, watering system, or other similar enhancement, or any part thereof, on, connected with, or beneath the surface.”

Particular types of activities are clearly set forth as an “improvement”. These are:

1. Building and finishing of a well other than for gas or oil;
2. Installing drain tile;
3. Clean up or removal of hazardous and non-hazardous materials;
4. Landscaping, including sowing seeds, plant material of all types and decorative materials of any kind;
5. The clean up and removal of all plant and decorative materials;
6. Grading or filling to establish a grade;
7. Land surveying and
8. Architectural or engineering work, “with respect to an improvement actually made to the real estate.”

The statute now clarifies that to “furnish materials” includes specially fabricated materials and tools, equipment or machinery. The lien for furnishing tools, equipment or machinery is restricted to the reasonable rental value or the purchase price, but only if the tools, equipment or machinery were purchased for use on the particular project and have no substantial value to the lienor after the project is complete. A lien for specially fabricated materials exists even though the materials had never been delivered to the job site. This is an exception to the general rule that in order for a lien to arise the materials must have been incorporated into the improvement.

The old terminology of contractor, subcontractor, furnisher, materialman, mechanic, laborer, founder or machinist have essentially been eliminated from the statute. Each person who has a right to a lien is now defined as either a “prime contractor” or a “remote contractor”. A prime contractor is any person that has a direct contract with the owner or the owner’s agent. A remote contractor is any person whose contract is with a person other than the owner. Whether one is a prime contractor or a remote contractor is an important distinction. It affects not only the type of property that may be liened, but also the procedures by which one asserts or perfects a lien.

The term “prime contractor” is not synonymous with the term “general contractor”. Any person in direct contractual privity with the owner or the owners’ agent is defined as a prime contractor regardless of whether they are a general contractor, a subcontractor or a supplier. In essence, a prime contractor may assert lien rights against all real property (except for publicly owned property), no matter its character. This is true even if the intended use of the property is to be commercial, industrial, educational, religious or residential. Simply stated, if a person has a contract with the owner or the owner’s agent, then there are lien rights. As it concerns the owner of real property, the prime contractor’s lien once it attaches “shall continue for one (1) year after the date the improvement is complete or is abandoned.”

Unlike prime contractors, there are restrictions on the types of property against which a remote contractor may assert a lien. There are also additional requirements that the remote contractor must meet in order to preserve and perfect their lien rights. A remote contractor may assert a lien against any type of property except for what the statute defines as “residential real property,” which consists of one-, two-, three- or four-family residential units.

It is the experience of the author that many remote contractors lose their right to assert a lien by failing to properly give Notice of Nonpayment in accordance with the statute. Although this section was added to the lien statute in 1990, it is still often misunderstood and misapplied. In order for a remote contractor to preserve the right to assert a lien claim against properties that are not one-, two-, three- or four-family residential units, a Notice of Nonpayment must be sent to the owner and prime contractor within 90 days of the last day of every month in which work, services and/or materials were provided. For example, if work, materials and/or services were provided on June 1, the Notice of

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## HISTORY LESSON

### C. MILLER EULER, CSI: CHARTER MEMBER & PRESIDENT, EAST TENNESSEE-KNOXVILLE CHAPTER

BY KATHY PROCTOR, FCSI, CDT, AIA

Miller Euler was a Knoxville architect who worked at TVA in the 1950s. He was very interested in specification writing and had the opportunity to write specifications for a number of Knoxville architectural firms in his spare time. He encouraged a number of architects who were interested in specifications to join the National organization of CSI, as there was no local chapter. In 1958 Euler organized the local architects who were CSI members and in 1959 chartered the East Tennessee-Knoxville Chapter of the Construction Specifications Institute.



Euler served as the first president of the Knoxville chapter from 1959-1960. He created the chapter newsletter and served many years as the editor of the Speck. At that time, the Speck was published on green paper, the colors of CSI. The green and white is used to this day in the ribbon adorning the Fellowship medal.

The Miller Euler Award is given annually at the Knoxville Chapter awards banquet. The award is named after our first president of the Knoxville Chapter to honor the work that he did on our behalf. "This award is given to a person who has rendered outstanding and significant service to the chapter over a long period of time". This statement personifies Miller Euler, a specification writer, an organizer, a communicator, and the catalyst that made the Knoxville Chapter come into being.



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Nonpayment must be served within 90 days of June 30, which would be September 28, since July and August both have 31 days. The Notice of Nonpayment must be served on both the prime contractor and the owner within that 90-day window.

If work, services and/or materials were provided over a successive number of months, the statute requires that Notices of Nonpayment be continually sent. For example, if work, services and/or materials are provided in the months of June, July, August, September and October, one cannot wait until 90 days from the last day of October to send the Notice of Nonpayment. The first Notice of Nonpayment that has to be served by September 28<sup>th</sup> could cover all unpaid invoices for June, July, August and September till the date of the Notice. The next Notice of Nonpayment must be served within 90 days of the last day of September, which notice can then include all of the unpaid invoices after September 28<sup>th</sup> thru October. If a Notice of Nonpayment is not timely and properly served, then the right to assert a lien is lost. When in doubt, a Notice of Nonpayment should be sent. There is no legal harm in sending a Notice of Nonpayment too early or too often.

There may, however, be practical business reasons for not sending a Notice of Nonpayment. The giving of a Notice of Nonpayment may cause unnecessary angst on the part of the owner, which then may result in some strained business relations between the party giving the Notice of Nonpayment and prime contractor. For example, a building material supplier may have a lucrative contract to furnish all the cabinets and vanities for the kitchen and bathrooms. These items may not be scheduled to be delivered to or installed in the project until the ninth month after construction began. The same building material supplier may also have supplied the block for the foundation in the month during which there was visible commencement of operation. If that building material supplier had not been paid for the block and wishes to preserve their lien, then they are required during month four of the construction to give a Notice of Nonpayment. If the amount due for the block is significantly less than the contract amount for the cabinets and vanities, then the supplier may think twice before giving the Notice of Nonpayment if serving that Notice will upset the owner and/or prime contractor. That is a business decision, not a legal one.

The intent in requiring a Notice of Nonpayment is to make sure that owners are aware early in the construction process (while they are hopefully still holding construction funds), that there may be a problem with remote contractors being paid. At that point the owner still has some control and measures may be instituted to assure that remote contractors are getting paid so as to avoid liens. The form for a Notice of Nonpayment is provided in the statute.

To be continued next month.

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Lewis, King, Krieg & Waldrop, P.C.*



## OCTOBER TABLETOP PRESENTATION



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