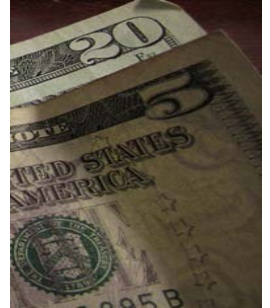


To be Paid or Not to be Paid: A Notice of Furnishing Can Make the Difference

by Bryan L. Jeffries



Sometimes doing the work is easy. But getting paid can be the hardest part of a construction project. The punchlist is finished, you are ready to go on to the next job, but the owner or general contractor is refusing to pay the final draw, or, as is often the case, the retainage owed on the project is still not paid.

Ohio's Mechanics' Lien Law was designed to provide that those who performed labor or provided materials on a project got paid, by requiring the owner to address a mechanics' lien against the project as leverage for that payment. But the Ohio's Lien Law, like any other law, only provides relief when the provisions of that law are being followed by those it was designed to help.

One provision of the Ohio's Lien Law that is all too often overlooked is the duty to serve a Notice of Furnishing. Many subcontractors and material suppliers all too often lose their lien rights by not following this fairly simple step necessary to preserve a lien claim.

When Ohio's Lien Law was significantly overhauled in 1991, that law imposed a new requirement upon subcontractors and material suppliers. Starting in 1991, subcontractors and material suppliers, under certain circumstances, would need to serve a Notice of Furnishing on the owner of the project (or the general contractor if there was no contract with that contractor) to let that party know who is on the project, and to avoid the filing of "hidden liens." Although this new requirement has been in place for over 24 years, many subcontractors and material suppliers still fail to serve Notices of Furnishing, and by doing so, unwittingly give up their lien rights on a project.

Because it takes very little effort, subcontractors and material suppliers should be able to serve a Notice of Furnishing on each and every project. Despite the ease with which a Notice of Furnishing can be served on each project, however, many subcontractors and material suppliers still fail to serve a Notice of Furnishing for one reason or another.

Offices

Toledo Office:

One Seagate, 24th Floor
P.O. Box 10032
Toledo, Ohio 43699
Phone: 419-241-6000
Fax: 419-247-1777

Columbus Office:

100 East Broad St.
Ste. 2100
Columbus, Ohio 43215
Phone: 614-564-1445
Fax: 614-280-1777

Findlay Office:

510 South Main St.
Findlay, Ohio 45840
Phone: 419-424-5847
Fax: 419-424-9860

Detroit Office:

615 Griswold, Ste. 1305
Detroit, Michigan 48226
Phone: 313-818-3040
Fax: 313-285-9282

Some argue they do not have time. But making sure not to lose your lien rights is certainly NOT a waste of time. Others worry that it might look like they are trying to "rock the boat" and cause tension with the owner or general contractor at the beginning of the project. That is simply not true anymore with all the e-mails and other documents going back and forth on a project. Regardless, it is never a good reason for failing to serve a Notice of Furnishing.

And still others feel they do not want to add to their "paperwork" on projects. Owners and general contractors, however, generally understand and expect that a Notice of Furnishing will be served. In fact, the Notice of Furnishing Form required by Ohio's Lien Law contains a specific warning that "this Notice is required by the Ohio Mechanics' Lien Law." So, it does not make any sense, economic or otherwise, not to serve a Notice of Furnishing. The bottom line is that if you do not preserve your lien rights by serving a Notice of Furnishing at the beginning of the project, you may not get paid at the end of the project.

The requirements for having to serve a Notice of Furnishing on a project are easy to follow. On private projects where a Notice of Commencement ("NOC") has been filed with the County Recorder, subcontractors and material suppliers **must** serve a Notice of Furnishing in order to preserve their lien rights. If a NOC has not been filed with the County Recorder, then there is no requirement to serve a Notice of Furnishing. Therefore, the County Recorder's site should be reviewed on every private project to see if a NOC has been filed.

The Notice of Furnishing must be served within 21 days AFTER performing work or providing materials. Often a Notice of Furnishing may be served later than the requisite 21 days, but "better late than never" certainly applies in that instance. The late serving of a Notice of Furnishing will preserve lien rights for amounts owed for work performed and/or materials furnished within the immediately preceding 21 days and thereafter. If the subcontractor or material supplier has a contract with the general contractor, however, only the owner needs to be served with a Notice of Furnishing.

A subcontractor or material supplier that fails to serve its Notice of Furnishing on a project loses its mechanics' lien rights, unless either (1) a NOC has not been filed, or (2) a proper request from the subcontractor or material supplier for a copy of the NOC has been ignored. The Notice of Commencement and Notice of Furnishing procedures apply to both commercial and to residential projects, except residential projects where the owner uses or intends to use the property as a personal residence or the property is a one or two family dwelling or a condominium unit.

In order to preserve a lien claim against funds on a public project, any subcontractor or material supplier that does not have a contract directly with a principal contractor must serve a Notice of Furnishing on the principal contractor. The same 21-day rule for private projects also applies to public projects. In addition, any subcontractor or material supplier that wants to preserve its right to file a bond claim on a public project must serve a Notice of Furnishing if its contract exceeds \$30,000.

What should the subcontractor or material supplier do on every project to ensure that a Notice of Furnishing gets served? Each subcontractor and material supplier should designate someone within their companies to be responsible for serving a Notice of Furnishing on each project. On a private project, that person would determine if a NOC has been filed and obtain a copy so that the Notice of Furnishing can be properly served. On a public project, that person would obtain the NOC from the public authority since the NOC is not recorded with the County Recorder on public projects.

A better and safer practice would be a *request* a copy of the NOC from the general contractor and owner by certified mail. Under Ohio's Lien Law, there is no requirement to serve a Notice of Furnishing after requesting a copy of the NOC, until that copy is provided. If a copy of the NOC is not provided as requested, a NOF does not need to be served *at all*. Requesting a NOC at the beginning of each project is the safest procedure.

Using a little diligence to make sure a Notice of Furnishing is served may make the difference between getting paid and not getting paid. Wouldn't you rather get paid?

For questions on Ohio's Mechanics' Lien Law, or advice on other construction law issues, please feel free to contact [Bryan L. Jeffries](#), chair, Construction Law Practice Group, at 614.564.1449, or bljeffries@eastmansmith.com. You also can read more about mechanics' liens on our web site in the two part article, "Ohio Mechanics' Liens: Perfecting a Mechanic's Lien" ([part one](#), [part two](#)).

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