

## CHAPTER 13

# MECHANIC'S LIENS IN THE DISTRICT OF COLUMBIA

## EXECUTIVE SUMMARY

### Distinctive Features of the Law in the District of Columbia

The mechanic's lien provided by the District of Columbia (DC) Code is generally protective of, and favorable to, contractors. There is relatively little case law on the DC mechanic's lien statute, so answers to many questions must be found in the code itself. The Recorder of Deeds (land records) has drafted a required form. The claimant must fill in the blanks on the form and file it in the land records. An attachment can be used to supplement the form for including additional information.

The mechanic's lien form must be filed in the land records within 90 days after the earlier of the completion or termination of the project. This can create a very generous time limit in the case of subcontractors who supplied labor and materials long before completion of the rest of the project. Subcontractors are also entitled to request information from the owner concerning the contract and status of accounts between the owner and general contractor.

The priority of DC mechanic's liens is better than the priority of the Maryland mechanic's liens but not quite as good as Virginia's. A DC lien is inchoate. Once filed, the lien relates back to the day work commenced on the project. This super-priority nature of DC mechanic's liens provides a powerful weapon to the contractor. The lien should survive bankruptcy or a sale of the property.

The owner does have a "defense of payment" to a DC mechanic's lien. All subcontractor liens will fail if the owner has paid the general contractor in full. This provision is similar to the Virginia system, but differs from that of Maryland, which places the burden of ensuring payment of all subcontractors on the owner.

The DC mechanic's lien law does not seem to have as many technical requirements as some other states. There are few cases that have held liens invalid for technical reasons. This may be because DC mechanic's lien law is more liberal and favors the claimant. It may also be because few technical questions have been put before DC courts. A claimant should be careful to strictly comply with the mechanic's lien code.

### Deadline Summary

**Prefiling before Construction.** No prefiling requirement.

**Lien Filing and/or Service after Labor or Materials Supplied.** All *contractors* must file a Notice of Mechanic's Lien in land records within 90 days after the earlier of the completion or termination of the project and serve a copy of the Notice on the owner by certified mail or posting within five business days after filing.

**Enforcement.** All contractors must enforce by filing a lawsuit within 180 days after the Notice of Mechanic's Lien was filed in the land records. In addition, contractors must file a notice in the land records that the lawsuit is pending within 10 days of filing the lawsuit.

### Defense of Payment: Owner's Responsibility for Payment to Subcontractors

The owner of a construction project must pay for the project only once. If an owner can prove that it has paid for the project in full, then all subcontractor liens will fail.<sup>1</sup> Until the owner has received a notice of mechanic's lien, the owner can continue to freely make payments to the general contractor, eroding the subs' ability to lien. **THIS IS THE TRUE DEADLINE FOR FILING** a subcontractor mechanic's lien and serving notice on the owner: before the general contractor has been paid. For this reason, a sub or supplier wants to file its lien and provide notice as soon as problems are apparent.

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<sup>1</sup> DC Code Section 40-303.02.

A sub or supplier also wants to be aware of the status of account between the owner and general contractor at all times. If the owner is about to release all retention, then the subcontractor's right to lien the project is about to disappear. In DC, subcontractors are entitled to request information from the owner concerning the contract and status of accounts between the owner and general contractor. If the owner fails to respond, the owner may lose its defense of payment.

### Remote Subcontractor and Supplier Liens

Mechanic's lien rights are restricted to the general contractor and its subcontractors. No sub-subcontractors have lien rights. Contractors and suppliers have no lien rights, unless they deal directly with the owner or the general contractor.

### Priority

The timing of various liens on a property usually determine their priority. The first in time filed in the land records will be the "first mortgage," with the first priority to any proceeds from a foreclosure or sale of the property. If another mortgage is filed in the land records later in time, it will be a "second mortgage." If the property is foreclosed, this second mortgage will not receive any proceeds until after the first mortgage has been paid in full.

There are very few exceptions to this "first in time, first in right" general rule. One exception is county real estate tax liens, which will always have priority over other liens no matter when they are filed. Another exception are mechanic's liens that are "inchoate," such as liens in the District of Columbia and Virginia. If a mechanic's lien is inchoate, the lien "relates back" to and exists from the moment labor or material is supplied to the property, as long as the claimant eventually perfects the lien by filing and enforcing the mechanic's lien.

Generally, a DC mechanic's lien has priority over all liens and mortgages that attach to the property *after work was commenced*. A DC mechanic's lien does have priority over construction loan advances made after the claimant filed its Notice of Mechanic's Lien.<sup>2</sup> The mechanic's lien priority is only to *post-notice* advances, regardless of when the construction loan was recorded. If a claimant started work before the construction lender recorded its loan on the property, the claimant's lien still only has priority over advances made after the claimant's notice was filed.<sup>3</sup> A mechanic's lien in DC does not have priority over a mortgage on the property used to pay the purchase price.

Subcontractors have priority over general contractors. If there are several subcontractors and there is not enough money to satisfy all of the claims, each subcontractor is paid a pro rata share. If a subcontractor gave notice to the owner before the owner paid the general contractor, however, that subcontractor has priority to the extent of those payments.<sup>4</sup>

### Sale or Foreclosure of Property

The DC mechanic's lien should generally survive foreclosure or any other sale of a property, since it is inchoate and superior to most other liens recorded after commencement of work. If a property is sold, the lien claimant would have to identify the new current owner on the Notice of Mechanic's Lien, but lien rights would otherwise be unaffected. If a foreclosure of an inferior lien takes place, the purchaser at foreclosure will take the property subject to the mechanic's lien. If a lender with superior priority forecloses, however, the foreclosure purchaser will take the property free of the mechanic's lien. *See* the section on Priority below for more information.

### Bankruptcy

The "automatic stay" of the United States Bankruptcy Code should not stay the perfection (filing in the land records) of the mechanic's lien.<sup>5</sup> This is because the lien is inchoate. The claimant already had the lien, so the filing does not change anything and is not a preference. In fact, it is important to keep in mind that the mechanic's lien *must* still be filed within the normal time limits.

<sup>2</sup> DC Code Section 40-303.07.

<sup>3</sup> *Waco Scaffold & Shor. Co., Inc. v. 425 Eye St. Assoc.*, 355 A.2d 780 (1976).

<sup>4</sup> DC Code Section 40-303.11.

<sup>5</sup> *Woodward & Lothrop v. Union Trust Co.*, 262 F. 627 (D.C. Cir. 1920).

The bankruptcy of an owner or upstream contractor should delay enforcement of a mechanic's lien, however.<sup>6</sup> It is not permissible to enforce a mechanic's lien without permission of the Bankruptcy Court, but the claimant is provided additional time later to enforce the mechanic's lien.

### Tenant Work

A contractor who does work for a tenant can obtain a lien on the leasehold interest. The claimant may not be able to lien the "fee simple" property of the owner, but it will be able to lien the tenant's interest in the property.

### Lien Waivers

A contractor may waive its mechanic's lien rights in the construction contract. However, under the DC statute, a waiver of liens in a general contract is not effective against a subcontractor.<sup>7</sup>

## TIME LIMITS FOR NOTICE OF MECHANIC'S LIEN

In DC, a claimant has a right to a mechanic's lien as soon as labor and materials are furnished to a project. However, the mechanic's lien is not perfected until the claimant files a Notice of Mechanic's Lien.

### Completion of the Building or Improvement

The Notice of Mechanic's Lien must be filed in the Recorder of Deeds office within "90 days after the earlier of the completion or termination of the project."<sup>8</sup> This almost certainly means within 90 days after *all* contractors have completed all work on the project.<sup>9</sup> The time for filing, therefore, is probably much longer than 90 days after the claimant finished its particular portion of the work.

Substantial completion is probably not enough to start running the time deadline to file a lien. However, trivial items may not be enough to extend the time, especially if long periods of time have elapsed with no work.<sup>10</sup>

There is an element of doubt whether a claimant must file its Notice within 90 days after the claimant's last work or within 90 days after completion of the entire building. This wording is similar, however, to the wording found in many state codes for a mechanic's lien deadline. The statute in Virginia, for example, formerly had similar deadline wording. The case law in most other states is clear that the deadline runs from the last work performed by all contractors and from completion of the entire project.

In any event, it may be safer to count the deadline from the claimant's last work. A claimant should have hard evidence to prove its own last work, but he may have difficulty establishing the last date other contractors supplied substantial new work included within this project.

There is also an element of doubt as to how a project is defined. There are no recorded cases defining a project. If a framing contractor is hired by the owner to build new partition walls and a plumbing contractor is hired by the owner to add a bathroom on a different floor of the building, these are probably independent projects and each would run its own mechanic's lien deadline. If both projects are in the same area of the building, however, and the framing contractor built the partitions for the bathroom plumbing fixtures, then this might be the same project. The framing contractor may still be able to file a lien long after the framing was complete if the plumbing contractor is still on the project.

If a general contractor abandons a project before it is complete, that general contractor's 90-day deadline for filing a Notice will start running when the project is abandoned.<sup>11</sup> Subcontractors who contracted with the abandoning general contractor must also file a mechanic's lien within 90 days after the general contractor abandons the project. This is true even if the owner later hires another contractor to finish the project.<sup>12</sup>

<sup>6</sup> *But see Woodward & Lothrop v. Union Trust Co.*, 262 F. 627 (D.C. Cir. 1920).

<sup>7</sup> DC Code Section 40-303.02.

<sup>8</sup> DC Code Section 40-301.02.

<sup>9</sup> *Riggs Fire Ins. Co. v. Shedd*, 16 App. D.C. 150 (D.C. Cir. 1900).

<sup>10</sup> *Riggs Fire Ins. Co. v. Shedd*, 16 App. D.C. 150 (D.C. Cir. 1900) [the question of completion or non-completion should be determined by what common intelligence and common usage regard as completion, with reference to the provisions of the building contract].

<sup>11</sup> *Malcolm Price, Inc. v. Sloane*, 308 A.2d 779, 780 (D.C. 1973); *aff'd* 339 A.2d 43, 45 (D.C. App. 1975).

<sup>12</sup> *Harper v. Galliher & Huguely*, 29 F.2d 452 (D.C. App. 1928).

## How Soon Notice Can Be Filed

DC Code Section 40-301.02 states that the contractor shall file the Notice of Lien stating “the amount due or to become due... within 90 days after the earlier of the completion or termination of the project.” Again, there is no case law, but the words of the statute seem clear. Construction must have already begun before the Notice can be filed, but it can be filed before payment is due to the claimant. This presumably means that the Notice can be filed before the claimant has completed work. It is clear that the Notice of Lien can be filed before the entire project is complete.

## THE NOTICE OF MECHANIC’S LIEN

### Form of Notice

The Notice of Mechanic’s Lien must be filed in the Office of the Recorder of Deeds. This is the land records of the District of Columbia located at 1101 4th Street, SW, 5th Floor, Washington, DC 20024, adjacent to the Green Line Metrorail (Waterfront-SEU).<sup>13</sup> In addition to filing the Notice in the land records, all claimants must serve a copy of the Notice on the owner as discussed below.

The Recorder of Deeds provides a form to be used for the Notice of Mechanic’s Lien, which is now available on the Internet in Acrobat Adobe, shown as District of Columbia Mechanic’s Lien Notice in the Appendices.<sup>14</sup> This form can also be filled out online at our website ([www.FullertonLaw.com](http://www.FullertonLaw.com)). It is possible to electronically file documents at the Recorder of Deeds office, including a Notice of Mechanic’s Lien. However, the electronic filing is done through a separate service provider, which is generally used by title companies and law firms. It would not be cost efficient for an individual claimant to pay for this service. As discussed below, the Recorder of Deeds requires a long list of supporting documentation.

In the past, the Recorder of Deeds would usually not accept the Notice of Lien at all unless it was on the Recorder’s form. At this point the Recorder’s office will usually take any form that meets the statutory requirements. However, the Recorder’s office has advised using the Recorder’s form and to use an attachment to supplement information required under the code.

The Recorder’s form is helpful to the public and does simplify the procedure in many ways, but it can also create problems. Some mechanic’s lien claims cannot be adequately described in the blanks on the form. Under the DC Code, the Notice must include:<sup>15</sup>

- (1) The name and address of the contractor or the contractor’s registered agent (and specify whose address);
- (2) The name and address of the owner or the owner’s registered agent (and specify whose address);
- (3) The name of the party against whose interest a lien is claimed (owner or tenant) and the amount claimed, less any credit for payments received up to and including the date of the notice of intent;
- (4) A description of the work done, including the dates that work was commenced and completed;
- (5) A description of the material furnished, including the dates that material was first and last delivered;
- (6) A legal description and, to the extent available, a street address of the real property;
- (7) (A) To the extent available under applicable law, if the contractor is an entity organized under the laws of the District of Columbia or is doing business in the District of Columbia within the meaning of applicable District law:
  - (i) A copy of the contractor’s current license to do business in the District issued by the Department of Consumer and Regulatory Affairs; and
  - (ii) A certificate of good standing from the Department of Consumer and Regulatory Affairs issued within 180 days prior to the date of the filing of the notice of intent; or

<sup>13</sup> Information on the Recorder of Deeds Office is available on the District of Columbia, Office of Tax and Revenue website <http://otr.cfo.dc.gov/service/otr-recorder-deeds>.

<sup>14</sup> The Notice of Mechanic’s Lien is also currently located on the District of Columbia, Office of Tax and Revenue website [http://otr.cfo.dc.gov/sites/default/files/dc/sites/otr/publication/attachments/2012\\_NOTICE\\_OF\\_MECHANICS\\_LIEN\\_FORM.pdf](http://otr.cfo.dc.gov/sites/default/files/dc/sites/otr/publication/attachments/2012_NOTICE_OF_MECHANICS_LIEN_FORM.pdf). Go to the Office of Tax Revenue website at <http://otr.cfo.dc.gov/book/recorder-deeds-tax-forms/rod-tax-forms-page-1> for a number of helpful real estate forms, including the Notice of Mechanic’s Lien, Mechanic’s Lien Undertaking (to bond off a mechanic’s lien) and a Release of Mechanic’s Lien.

<sup>15</sup> DC Code Section 40-301.02.

- (7) (B) To the extent available under applicable law, if the contractor is an individual or an entity organized under laws other than those of the District of Columbia, and is not doing business in the District of Columbia within the meaning of applicable District laws but is required to be licensed by a governmental entity:
- (i) A copy of the contractor's current license to do business issued by the government of the other jurisdiction; and
  - (ii) A certificate evidencing the contractor's good standing in its place of business or state of incorporation issued by the other jurisdiction;
- (8) If the project is provided under a home improvement contract, a copy of the home improvement contract; and
- (9) (A) A sworn, notarized statement affirming under penalty of perjury and upon personal knowledge that:
- (i) The contents of the notice of intent are true and correct to the best of the contractor's information and belief; and
  - (ii) The contractor has a right to recover the amount claimed.
- (9) (B) If a notice of intent is executed by an authorized representative or counsel of the contractor, he or she shall attach a Letter of Authorization from the contractor as evidence of his or her authority to execute the notice of intent on behalf the contractor and shall affirm that the notice of intent is true and correct to the best of the affiant's knowledge and belief. The Letter of Authorization is included in the preprinted Notice of Mechanic's Lien form.

The DC Code states, "The notice of intention to hold a lien on the property *shall include* copies of licenses to do business, certificates of good standing and copies of any home improvement contract."<sup>16</sup> The DC Code seems to say that those documents must be included *in* the Notice of Lien. In practice, however, these documents are not filed with the Notice but are presented to the clerk for review in accepting the Notice for recording. The Recorder of Deed's website and the Notice of Lien form currently provide a list of required documents.<sup>17</sup>

It seems problematic that the clerk has power that would normally be judicial: to decide whether a claimant has valid lien rights. If the clerk refuses to file a notice of lien based on one of these requirements, a claimant could lose lien rights if the time to file passes, whether the clerk was correct or not. This does not seem fair to the Recorder of Deeds or contractors in the District. It is normally the function of a court to determine whether a mechanic's lien is valid.

For example, construction material suppliers from outside the District of Columbia have recently had trouble getting their notices of lien filed. Suppliers that simply deliver material in the District would not seem to be doing business in the District.<sup>18</sup> DC Code Section 40-301.02(7)(B) shown above, seems to recognize that some participants in the construction project entitled to lien rights would not be doing business in the District. Notices of Lien have been filed under (7)(B) above for years. However, recent experience has been that even if a claimant furnishes the documents described in (7)(B), the reviewing clerk has rejected liens and insisted that the entity register as a foreign corporation and obtain a good standing certificate, as well as obtain a business license in the District of Columbia. The Recorder of Deeds maintains that currently there are no business activities in DC that do not require some form of licensure. If a claimant is not registered and licensed in DC, it may be subject to sanctions for failing to file and register. Therefore, a foreign entity that wants to claim a lien in DC must register as a foreign entity in DC and then obtain a business license. If this is correct, then no claimant can ever qualify under (7)(B) above.

There are certainly legitimate public policy concerns in some of the DC Code and Recorder of Deed requirements. However, the result is that mechanic's lien rights are considerably more difficult and more expensive to enforce in the District of Columbia than surrounding jurisdictions. An attorney's help is normally necessary to collect or register for all the required paperwork. Multiple attorney visits are often necessary to the Recorder of Deeds office because of inconsistent requirements. It would seem likely that the precarious status of security rights and the higher costs of protecting those rights would make contractors and suppliers more reluctant to supply labor and material in the District and increase prices for construction

<sup>16</sup> DC Code Section 40-301.02.

<sup>17</sup> <http://otr.cfo.dc.gov/page/recorder-deeds-frequently-asked-questions>. Go to "Recorder of Deeds" and then to "Frequently Asked Questions" and then to "What do I need to file a mechanics lien in the District of Columbia?"

<sup>18</sup> DC Code Section 29-105.05(a)(10) [a foreign entity shall not be considered to be doing business in the District under this title solely by reason of doing business in interstate commerce].

The foreign registration can be done online.<sup>19</sup> The foreign registration must be done before applying for the business license.<sup>20</sup> There are two types of licenses in the District of Columbia: a Basic Business License and a General Contractor's License. If any installation work is being done on the construction site, then the Licensing Division has stated that the entity must have a General Contractor's License. The form is the same for either license but the fees are different.<sup>21</sup> The business license can also be done online but requires additional documents that must be submitted by mail or in person. If anyone other than the applying entity is submitting the documents, they will need a Power of Attorney Letter for the individual submitting the documents to the DCRA. The power of attorney can be in a form of a letter addressed to the DCRA. The additional documents required include a certificate of liability insurance naming DCRA as an insured, two samples of invoices and contracts; and confirmation that the entity has registered with the Office of Tax and Revenue. There is no fee for the tax registration and it can be done online.<sup>22</sup> Many of these Recorder of Deeds documentation requirements are not mentioned in the DC Mechanic's Lien Code.

The DC Mechanic's Lien Code has long stated that a contractor is entitled to a lien for "the contract price agreed upon between them, or, *in the absence of an express contract*, for the reasonable value of the work and materials furnished."<sup>23</sup> This is consistent with the law in other states, recognizes express or implied contracts and recognizes lien rights when the parties do not even have a clear verbal contract, much less a written contract.

DC case law, like most other states, had previously held that the right to lien arises as soon as labor or material is furnished, whether or not there was a written contract.<sup>24</sup> In the case of home improvement, however, it appears that a claimant will not be able to record a mechanic's lien without producing a copy of a written contract.

DC courts have held that the contractor must show that it has "proceeded properly to acquire and establish his lien."<sup>25</sup> Mechanic's lien statutes are "strictly construed" in most states, being in derogation of common law.<sup>26</sup> This means generally that a mechanic's lien claimant must do everything exactly the way the code says to do it. Even a minor mistake can mean lien rights are lost.

Other than these statutory filing requirements, the DC mechanic's lien Notice does not seem to have as many technical requirements as some other states like Virginia. Court case law tells us that the amount claimed, the name of the owner and a description of the property are essential requirements for a valid lien.<sup>27</sup> There is little additional case law ruling liens invalid for technical reasons. This may be because DC mechanic's lien law is more liberally in favor of a claimant. It may also be just because these technical questions have not been put before a DC court. A claimant should be careful to strictly comply with the mechanic's lien code. As in other states, DC courts have held that the Code should be strictly construed to determine whether the contractor has "proceeded properly to acquire and establish his lien," but then "liberally construed" in favor of the contractor's recovery once perfection has been established.<sup>28</sup>

<sup>19</sup> The foreign registration form can be done online at <http://dcra.dc.gov/service/corporate-registration-foreign-filing-entity>.

<sup>20</sup> See <http://dcra.dc.gov/node/551242> for licensing requirements in DC. The business license application can be done at <http://dcra.dc.gov/service/apply-basic-business-license-bbl>; [http://dcra.dc.gov/sites/default/files/dc/sites/dcra/publication/attachments/BBL\\_EZ\\_Fillable\\_4400\\_2011.pdf](http://dcra.dc.gov/sites/default/files/dc/sites/dcra/publication/attachments/BBL_EZ_Fillable_4400_2011.pdf).

<sup>21</sup> A Basic Business License is \$324.50 and a General Contractor's License is \$654.50.

<sup>22</sup> The tax registration can be done at <https://www.taxpayerservicecenter.com/fr500/>.

<sup>23</sup> DC Code Section 40-301.01.

<sup>24</sup> *Malcolm Price, Inc. v. Sloane*, 308 A.2d 779 (D.C. App. 1973), *aff'd* 339 A.2d 43, 45 (D.C. App. 1975); *Moore v. Axelrod*, 443 A.2d 40, 44 (D.C. 1982).

<sup>25</sup> *Fidelity Storage Corp. v. Trussed Concrete Steel Co.*, 35 App. D.C. 1 (1910).

<sup>26</sup> *McNair Builders, Inc. v. 1629 16th St., L.L.C.*, 968 A.2d 505, 506 (2009); *but see Deming v. Wardman Const. Co.*, 39 F.2d 504, 505 (D.C. 1930) [where the right to a lien is clear, and the question is whether the claimant has proceeded properly, the statute should be liberally construed in his favor].

<sup>27</sup> *Fidelity Storage Corp. v. Trussed Concrete Steel Co.*, 35 App. D.C. 1 (1910).

<sup>28</sup> *Fidelity Storage Corp. v. Trussed Concrete Steel Co.*, 35 App. D.C. 1 (1910); *Deming v. Wardman Construction Co.*, 39 F.2d 504, 59 App. D.C. 254 (1930).

### Deadline for Notice

The Notice of Mechanic's Lien must be filed in the Recorder of Deeds office within "90 days after the earlier of the completion or termination of the project."<sup>29</sup> This is discussed in greater detail in a section above and almost certainly means within 90 days after *all* contractors have completed all work on the project. The time for filing may, however, be much longer than 90 days after the claimant finished its particular portion of the work.

Failure to record the Notice within the 90-day period will terminate the contractor's lien.<sup>30</sup>

### Delivery of Notice

The DC Code requires all claimants, general contractors and subcontractors to serve the Notice of Mechanic's Lien on the owner. Any contractor must send a copy of the recorded Notice of Mechanic's Lien to the owner by certified mail to the current address (or if not available in the local public records, the last known address) of the owner within five business days after recordation in the land records.<sup>31</sup>

If the certified mail is returned to the contractor unclaimed or undelivered, the contractor must post a copy of the recorded Notice in a location generally visible from some entry point to the real property.<sup>32</sup> This provision can be very helpful if the owner refuses to accept certified mail. The Recorder of Deeds' Notice of Mechanic's Lien form requires a certification by the claimant that the Notice will be served on the owner by certified mail within five days of recordation and that if the recorded Notice sent to the owner by certified mail is returned unclaimed or undelivered, the claimant will post a copy of the Notice in a location generally visible from some entry point to the real property.

### Owner

The Notice of Mechanic's Lien must correctly name the owner of the property. If a lien names the wrong person as the owner, the Notice of Mechanic's Lien is fatally insufficient.<sup>33</sup>

### Tenants and Leaseholds

If a tenant orders work in DC, this will give rise to mechanic's lien rights on at least a leasehold interest. The statute makes it clear in two places that a contractor can obtain a lien on the leasehold.<sup>34</sup> The claimant may not be able to lien the "fee simple" property of the owner, but can obtain a lien in the lease owned by the tenant.<sup>35</sup> The eventual result would be a foreclosure on the leasehold. The purchaser at foreclosure would then own the lease, but the fee simple owner's interest would be unaffected.<sup>36</sup> If the lease is terminated for default, the lien claimant has no remedy, even though the landlord does obtain the benefit of the improvements.<sup>37</sup> It may be possible in some cases that the agent of the landlord ordered the work, making the fee simple property liable for the lien.<sup>38</sup>

### Contract Purchaser

A "contract purchaser" or "vendee" may begin construction on real property that is "under contract," but has not yet gone to settlement. The DC Code provides that a contractor will obtain a lien if performing work for "a prospective purchaser in possession under a contract of sale authorized to contract for a project."<sup>39</sup> It does appear from this wording that the prospective purchaser must be in possession of the property. The contract for sale may also need to expressly authorize the construction project. The result seems to be that the contractor obtains a lien

<sup>29</sup> DC Code Section 40-301.02. See section above, Time Limits for Notice of Mechanic's Lien.

<sup>30</sup> DC Code Section 40-301.02(a)(1); *Shalom Baranes Associates, P.C. v. 900 F Street Corp.*, 940 F.Supp. 1 (1996).

<sup>31</sup> DC Code Section 40-301.02(a)(2).

<sup>32</sup> DC Code Section 40-301.02(a)(2).

<sup>33</sup> *McNair Builders, Inc. v. 1629 16th St., L.L.C.*, 968 A.2d 505, 509 (2009); *Chamberlin Metal Weatherstrip v. Karrick*, 53 F.2d 928 (D.C. App. 1931); *Hartford Accident and Indemnity v. ABC*, 350 F.2d 430 (D.C. Cir. 1965); *Shalom Baranes Associates, P.C. v. 900 F Street Corp.*, 940 F.Supp. 1 (1996).

<sup>34</sup> DC Code Section 40-301.03 and Section 40-303.07.

<sup>35</sup> *Lipscomb v. Hough*, 286 F. 775, 777 (D.C. Cir. 1923).

<sup>36</sup> *Langley v. D'Audigne*, 31 App. D.C. 409, 416-417 (D.C. Cir. 1908).

<sup>37</sup> *Langley v. D'Audigne*, 31 App. D.C. 409, 416-417 (D.C. Cir. 1908).

<sup>38</sup> *McLean v. Nolan*, 44 App. D.C. 1 (D.C. Cir. 1915).

<sup>39</sup> DC Code Section 40-301.03.

in the contract to purchase the property.<sup>40</sup> The buyer at foreclosure would have the right to buy the property at the contract price.

### Owner and Agent of Owner

The form provides a space for the claimant to fill in the name of the owner and the owner’s “registered agent (if applicable),” but then requests the address of either the owner or that registered agent. It is important for a subcontractor claimant to serve a copy of the lien on the owner or owner’s registered agent. The subcontractor claimant, therefore, needs a good address for service.<sup>41</sup> Sometimes it is difficult to obtain service if the owner is a corporation or out of state. In these cases, the lien can be served on an agent of the owner, such as the registered agent or a management company.

### Description of Property

The mechanic’s lien form provides a space for a property description. The DC Code makes it clear that the mechanic’s lien claimant must provide a description of the property on which the lien is claimed.<sup>42</sup> There is little DC case law, however, on questions that plague claimants in other states, such as allocation of materials to multiple parcels, vagueness in the property description, overinclusiveness, overburdening or blanket liens.<sup>43</sup> A DC mechanic’s lien claimant should still take great care to accurately and clearly describe the property to which labor and materials were supplied. Case law from other states should be consulted to consider the potential pitfalls of DC claimants if faced with an aggressive and imaginative defense team.

It is clear that an inaccurate property description can invalidate a lien in the District of Columbia. A lien notice filed after the recording of a condominium declaration on a building is invalid against specific condominium units if it sets forth the former superseded single lot number for the entire building, rather than the separate lot numbers assigned to each unit by the condominium declaration in connection with a condominium conversion.<sup>44</sup> The lien notice fails to properly describe the specific units sought to be encumbered.

### Extent of Lien

DC Code Section 40-301.01 provides a lien upon the “building erected, improved, added to, or repaired...” and “the land on which the same is erected, intended to be used in connection therewith, or necessary to the use and enjoyment thereof.” However, the extent of a claimant’s lien depends on whether the owner who contracted for the work has a fee simple interest in the property or some lesser interest.<sup>45</sup> For example, if the owner who contracted for the work and materials is a tenant, the lien may only extend to the tenant’s leasehold interest.<sup>46</sup>

The statute provides for a court determination of the dimensions of the land subject to a mechanic’s lien if the claim is contested.<sup>47</sup>

### Lot & Square and the Street Address

The Notice of Mechanic’s Lien form provides the claimant blank spaces to provide the “Square(s)”, “Suffix(es)” and “Lot(s)”. The DC mechanic’s lien code states that the Notice must include a legal description of the property and, to the extent it is also available, a street address. It is not clear whether the convenient form provided can create a requirement to provide the Tax Map Square, Suffix or Lot on a Notice of Mechanic’s Lien, but it is advisable to provide this information. Usually, a lot and square information is readily available from the tax assessment office and is an “easy” way to describe the property. A claimant should go to the DC government website<sup>48</sup> or visit the

<sup>40</sup> DC Code Section 40-301.03 and Section 40-303.07.

<sup>41</sup> See section below, Remote Subcontractor and Supplier Liens; subsection, Delivery of Notice.

<sup>42</sup> DC Code Section 40-301.02.

<sup>43</sup> See chapter, Mechanic’s Liens in Virginia; section, Amount of Claim and Allocation.

<sup>44</sup> *McNair Builders, Inc. v. 1629 16th St., L.L.C.*, 968 A.2d 505, 509 (2009).

<sup>45</sup> DC Code Section 40-301.03.

<sup>46</sup> See chapter, Mechanic’s Liens in Virginia; section, Memorandum or Mechanic’s Lien; subsection, Owner; sub-subsection, Tenants and Leaseholds.

<sup>47</sup> DC Code Section 40-303.14.

<sup>48</sup> The DC tax maps are available at <http://geospatial.dcgis.dc.gov/realproperty/>.



tax assessor's office to obtain copies of applicable tax maps. These maps are very helpful in identifying the project property and cross checking lot, square and street address information.

Unfortunately, there is always an element of doubt concerning tax assessment information. The assessor usually has multiple versions of a tax map from different time periods and assessment identifications will often change over time. Additionally, the assessor will consolidate or subdivide lots as property is redeveloped. Squares are sometimes renumbered. Lot and square information is almost always provided in Deeds and other documents recorded in the land records, but this information is not always consistent with information at the tax assessment office.

This raises the question of whether the "true" legal description is in the tax assessor's office or in the land records. If there are inconsistencies or doubts, the claimant should be careful to identify the property description either as coming from the tax assessor's office at a particular time or as coming from the land records as described in particular instruments.

### **Title Search**

The DC mechanic's lien is land record based. A lien must correctly identify the property and current record owner, in order that a title search will locate the lien.<sup>49</sup> Accordingly, an accurate title search is essential prior to filing a mechanic's lien. A title search in DC is difficult and often expensive. A claimant should hire a title searcher with extensive experience in DC and allow plenty of time for the search.

Unfortunately, the Recorder of Deeds has experienced budget and management problems. Indexing of deeds and other instruments can lag days behind. This means that it could be long after a settlement before any title searcher can find a deed in any index. Several title companies in DC obtain copies of all instruments recorded in the land records and create their own indexes. A claimant may wish to use such a title company. It is also a good idea, if possible, to have your title searcher check the indexes a few weeks after your lien is recorded.

### **Claimant**

A Notice of Lien may be filed by a contractor who has a contract with an owner to furnish work and materials for the improvement of a building.<sup>50</sup> A subcontractor or supplier having a contract with an original contractor (only one tier removed from the owner) has the same lien rights as the original contractor.<sup>51</sup> If the claimant contractor was not properly licensed, their lien claim will be unenforceable.<sup>52</sup>

### **Remote Subcontractors and Suppliers—No Sub-Subcontractor Lien**

District of Columbia case law makes it clear that a sub-subcontractor does not have lien rights.<sup>53</sup> A contractor or supplier<sup>54</sup> does not have lien rights unless they have a contract directly with the owner or a contract with the general contractor.

### **Description of Labor or Materials**

The DC Code provides a lien for "work or materials provided by a contractor for the erection, construction, improvement or repair of or addition to any real property... or the placing of any engine, machinery, or other thing therein or in connection therewith so as to become a fixture."<sup>55</sup> The purpose of the statute is to provide a preferred claim in property to a person who has enhanced the value of that property.<sup>56</sup>

There is little case law that provides guidance as to what is included in "work," "materials" and "fixtures" for which a claimant may lien. The wording of the statute is broad and would seem to allow liens for a fairly broad

<sup>49</sup> *Chamberlin Metal Weather Strip Co. v. Karrick*, 53 F.2d 928 (1931).

<sup>50</sup> DC Code Section 40-301.01; *Moore v. Axelrod*, 443 A.2d 40, 44-45 (D.C. 1982) [a real estate broker or property manager can also be a "contractor" within the meaning of the mechanic's lien statute].

<sup>51</sup> DC Code Section 40-303.01.

<sup>52</sup> *Highpoint Townhouses, Inc. v. Rapp*, 423 A.2d 932, 935 (D.C. 1980) [a contract made in violation of a licensing statute that is designed to protect the public will usually be considered void and unenforceable. If the underlying contract to perform plumbing services is unenforceable, a mechanic's lien is also unenforceable].

<sup>53</sup> *Battista v. Horton, Meyers & Raymond*, 128 F.2d 29 (D.C. Cir. 1942).

<sup>54</sup> *Leitch v. Central Dispensary & Emergency Hospital*, 6 App. D.C. 247 (D.C. Cir. 1895).

<sup>55</sup> DC Code Sections 40-301.01 and 40-301.03(7).

<sup>56</sup> *Moore v. Axelrod*, 443 A.2d 40, 43 (D.C. App. 1981).

spectrum of work and materials. Liens for machinery and fixtures may be broader than similar liens allowed in some other states.<sup>57</sup>

A number of questions remain unanswered, however. The DC Code does not address demolition, although this is a common component in the redevelopment and new construction in the city. Demolition may, therefore, be unlienable. It is not clear whether surveyors or architects have lien rights.<sup>58</sup> Furthermore, there is no provision concerning rental of equipment used in the construction process.

The DC Code does seem to clearly require that a Notice of Mechanic's Lien include a description of the work done and a description of the material furnished.<sup>59</sup> The form and the DC Code require the "specific dates of when: (1) work was commenced and completed; and/or (2) materials were furnished, including first and last delivery dates." The form seems to request the date the *claimant* commenced work, rather than the date work commenced on the project by any other contractor. This is a point of some uncertainty, however, since the mechanic's lien filing deadline seems to focus on the latest work performed by any contractor on the building or improvement.

### Description of the Contract

The Notice of Mechanic's Lien form also requests that the claimant identify whether the claim is pursuant to a contract with the owner or with a general contractor.

### Certifications and Signature of Claimant

The Notice of Mechanic's Lien form requires certification whether contractor is an individual or an entity organized under the laws of the District of Columbia; or an entity organized under the laws of another state and doing business in the District of Columbia; or an entity organized under the laws of another state and NOT doing business in the District of Columbia. This last entity type, not doing business in the District of Columbia, would be a material supplier that only shipped material into the District.

The form also requires certification that the Notice will be served on the Owner or the Owner's Agent by certified mail return receipt requested within five days of filing of the Notice, or will be posted on the property, if the certified mail is returned as unclaimed or undelivered.

The form also requires certification that the Notice is being filed within 90 days after the earlier of the completion or termination of the project; that the claimant understands that suit must be filed within 180 days from the recordation of the notice and that a notice of *lis pendens* (notice of pendency of enforcement action) must also be recorded.

There is no requirement in the DC Code for the certification that the Notice is filed within 90 days of the earlier of completion or termination of the project, although the Notice must state the date work was completed. There is also no DC Code section requiring certification that the claimant understands the suit to enforce must be filed within 180 days of the date the lien is filed in the land records. These are both correct statements of the law, however, and are helpful reminders to a claimant.

The claimant must "affirm under penalty of perjury" that the information requested on the form, discussed above, is correct to the best of claimant's information and belief and that the claimant has the right to recover the amount claimed. If the Notice is being filed by Contractor's Authorized Representative or attorney, a Letter of Authorization from the Contractor to execute and file the Notice must also be attached. A form Letter of Authorization is available on the Recorder of Deeds website.

## AMOUNT OF CLAIM AND ALLOCATION

The Notice of Mechanic's Lien form provides a place for the claimant to state the "Amount Claimed." The Notice of Mechanic's Lien must also state the "Date of Notice" and the "specific dates of when: (1) work was commenced and completed; and/or (2) materials were furnished, including first and last delivery dates." However, there is nowhere on the form to state a date from which interest is claimed. There should be a claim for legal or

<sup>57</sup> *Woodward & Lothrop v. Union Trust Co.*, 262 F. 627 (D.C. Cir. 1920) [furnishings supplied were not affixed to the realty, and hence were not fixtures within the meaning of the mechanic's lien statute].

<sup>58</sup> *Shalom Baranes Associates, P.C. v. 900 F Street Corp.*, 940 F.Supp. 1 (1996) [No work done based on architect's plans. Lien invalid on other grounds].

<sup>59</sup> DC Code Section 40-301.02.

contractual interest on a mechanic's lien in the District of Columbia, from the date payment was due.<sup>60</sup> This would be a matter of proof before the court on enforcement.

The contract price would normally be the correct amount of the claim.<sup>61</sup> No mechanic's lien has been ruled invalid in a published DC case because of problems with the claim amount. A claimant should take care, however, and assume that there is still a risk of forfeiting a lien, especially in the case of a willful overstatement of claim amount. A claimant should also make a good faith effort to avoid mistaken overstatement of claims.<sup>62</sup> The DC Code does state claimant must include "a sworn, notarized statement under penalty of perjury ... that the contents of the notice of intent are true and correct to the best of the contractor's information and belief" and that the "contractor has a right to recover the amount claimed."<sup>63</sup>

### Allocation

A contractor does not need to allocate labor and materials supplied to two or more buildings if they are "joined together and owned by the same person or persons."<sup>64</sup> This is a significant difference from Virginia mechanic's lien law where many liens are lost because of the claimant's failure or inability to allocate.<sup>65</sup>

The claimant may file a single mechanic's lien for more than one building *only* if they are joined together and owned by a single person or entity.<sup>66</sup> The court can allow the enforcement of a single lien against multiple buildings and can decree that all of the buildings be sold together or separately.<sup>67</sup>

If a claimant files a single lien on more than one property, it is possible for the claimant to release one of the buildings later.<sup>68</sup> This has been a problem in other states such as Virginia, where courts have decided that the release of one building would overburden the remaining property and invalidate the entire lien.<sup>69</sup>

## REMOTE SUBCONTRACTOR AND SUPPLIER LIENS

### No Sub-Subcontractor Mechanic's Liens

Sub-subcontractors are not entitled to liens in DC. The DC Code only provides for liens by an "original contractor" with a contract with the owner and by "any person directly employed by the original contractor, whether as subcontractor, materialman, or laborer..."<sup>70</sup> In other words, you have no lien rights in the District unless you have a contract directly with the owner or the general contractor.

### Subcontractor Mechanic's Liens

The DC Code provides that a subcontractor is "entitled to the same rights and subject to the same obligations as the original contractor..."<sup>71</sup> The Recorder of Deeds provides one form for a Notice of Mechanic's Lien, discussed above, which should be used by both general contractors and subcontractors. In addition to filing the Notice, the subcontractor must serve that Notice on the owner.

<sup>60</sup> DC Code Section [to obtain a release of the lien, the owner may pay into court the amount of the lien and "interest and costs"]; DC Code Section 15-108[prejudgment interest payable on a liquidated debt]; *Woodward & Lothrop v. Union Trust Co.*, 262 F. 627 (D.C. Cir. 1920) [interest disallowed on a lien because the owner was an innocent party, although there is a dissent on this point].

<sup>61</sup> *Sloane v. Malcolm Price, Inc.*, 339 A.2d 43, 45 (D.C. 1975) [where neither the existence of a valid contract nor performance thereunder is disputed, the contract price is *prima facie* proof of the reasonable value of the contractor's services and, therefore, the amount recoverable].

<sup>62</sup> See chapter, Mechanic's Liens in Virginia; section, Amount of Claim and Allocation.

<sup>63</sup> DC Code Section 40-301.02(b)(9)(A).

<sup>64</sup> DC Code Section 40-303.12.

<sup>65</sup> See chapter, Mechanic's Liens in Virginia; section, Amount of Claim and Allocation.

<sup>66</sup> *Alfred Richards Brick Company v. Trott*, 23 App. D.C. 284 (1904).

<sup>67</sup> DC Code Section 40-303.12.

<sup>68</sup> *Roth v. Eisinger Mill & Lumber Co., Inc.*, 70 F.2d 294 (1934).

<sup>69</sup> See chapter, Mechanic's Liens in Virginia; section, Amount of Claim and Allocation; subsection, Blanket Liens. See also *In Re Thomas A. Cary, Inc.*, 412 F. Supp. 667 (E.D.Va. 1976).

<sup>70</sup> DC Code Section 40-303.01; *Battista v. Horton, Myers & Raymond*, 128 F.2d 29 (1942).

<sup>71</sup> DC Code Section 40-303.01.

## Delivery of Notice

A subcontractor has two different statutes to follow to properly serve the lien. A subcontractor must serve the Notice of Mechanic's Lien "by leaving a copy thereof with said owner or his agent, if said owner or agent is a resident of the District..."<sup>72</sup> Although Section 40-303.03 does not state how the Notice must be left with the owner, Section 40-301.02 indicates that all claimants must send the Notice to the owner by certified mail within five days after the date of its recordation. A subcontractor should be careful to comply with both statutes and serve the Notice by certified mail if at all possible.<sup>73</sup> The Recorder of Deeds' Notice of Mechanic's Lien form also requires a certification by the claimant that the Notice was served on the owner by certified mail.

If the certified mail is returned to the contractor unclaimed or undelivered, the contractor must post a copy of the recorded Notice in a location generally visible from some entry point to the real property.<sup>74</sup>

## ENFORCEMENT OF MECHANIC'S LIENS

Although a DC mechanic's lien is "perfected" once a Notice of Mechanic's Lien is filed among the land records, the mechanic's lien must later be enforced. Essentially, this means that the claimant must bring a lawsuit to have the validity of the mechanic's lien established and the property sold to satisfy the lien. Selling the property to satisfy the lien is the end result of a mechanic's lien action.

To enforce the mechanic's lien, the claimant must file a complaint.<sup>75</sup> The DC Code requires the complaint to contain the following:<sup>76</sup>

- i. A brief statement of the contract on which the claim is founded;
- ii. The amount due;
- iii. The time the Notice of Mechanic's Lien was filed with the Recorder of Deeds;
- iv. The time the Notice of Mechanic's Lien was served on the owner or his agent;
- v. The time the building or work was completed;
- vi. A description of the premises;
- vii. Other "material facts;"
- viii. A request that the premises be sold to satisfy the lien.

A claimant should have all of this information readily available, along with a complete statement of account describing the claim, well before the complaint is filed. The DC statute and case law do not give us guidance as to what "other material facts" are necessary. The complaint should contain any additional facts that are necessary to establish the validity, priority and amount of the lien, important to proving the claim or to selling the premises.

## Deadline for Enforcement

The mechanic's lien must be enforced within 180 days after the Notice of Mechanic's Lien was filed with the Recorder of Deeds by filing a lawsuit in court.<sup>77</sup> A claimant must also record a "notice of pendency of action" in the land records within 10 days of filing suit. Failure to file suit within the 180-day period or the notice of pendency of action in a timely manner shall terminate the lien.

## Effect of Bankruptcy

Based on case law from other states, the bankruptcy of an owner or upstream contractor should delay enforcement of a mechanic's lien.<sup>78</sup>

<sup>72</sup> DC Code Section 40-303.03.

<sup>73</sup> See section above, The Notice of Mechanic's Lien; subsection, Delivery of Notice.

<sup>74</sup> DC Code Section 40-301.02(a)(2).

<sup>75</sup> D.C. Super. Ct. Civil Rule 3.

<sup>76</sup> DC Code Section 40-303.08.

<sup>77</sup> DC Code Section 40-303.13.

<sup>78</sup> See chapter, Mechanic's Liens in Virginia; section, Enforcement of Mechanic's Liens; subsection, Effect of Bankruptcy; *but see Woodward & Lothrop v. Union Trust Co.*, 262 F. 627 (D.C. Cir. 1920).

## Necessary Parties

The DC Code states that if a subcontractor brings suit to enforce a mechanic's lien, the original contractor shall be made a party as well as all other persons who have filed liens on the premises.<sup>79</sup> This means that the general contractor and all other lien claimants must be made defendants to the suit to enforce the lien.

If a mechanic's lien is bonded off, as discussed below, the DC Code requires that suit be brought against the owner.<sup>80</sup> It also states that suit *may* be brought against the sureties. It would be advisable, however, to always name the sureties as parties to the lawsuit.

Other than the two statutory provisions just mentioned, there is no DC statute or case law that requires other defendants in the suit to enforce. However, an owner is probably a necessary party on due process grounds because the complaint to enforce the mechanic's lien is a suit to sell the owner's property. Based on the case law from other states, it is also probably advisable to name mortgage lenders and other persons with an interest in the property.

## Purpose of Enforcement

The ultimate goal in a mechanic's lien action is to sell the premises. The DC statute provides that if the right of the claimant to the lien is established, the court shall decree the sale of the real estate or the interest of the owner.<sup>81</sup> Claimants should remember that the interest of the "owner" is being sold. If the person ordering the work (owner) is a tenant with a leasehold interest, then this leasehold interest will be sold.<sup>82</sup>

Once the property is sold, the proceeds of the sale are distributed to those persons with liens on the property. The proceeds are distributed in the order of priority of the liens on the property.<sup>83</sup> There may not be enough money from the sale to satisfy all of the liens on the property.

## Multiple Lien Claimants

Under the District of Columbia's Code, "All or any number of persons having liens on the same property may join in one suit..."<sup>84</sup> Joining together in one suit may lower the costs of enforcing the lien. If different claimants bring several suits, the court may order them "consolidated" or tried together.<sup>85</sup>

## Trial

A suit to enforce a mechanic's lien in DC is normally heard by a judge. It can also be heard before a "Master." The role of a Master is very similar to that of a Commissioner in Chancery in Virginia.<sup>86</sup> A Master is a "judge for a day" and conducts a hearing in which evidence is presented much as it would be presented in court.<sup>87</sup> After receiving the evidence, the Master writes a report on his findings.<sup>88</sup> The report is filed with the court and served on the parties to the case.<sup>89</sup> The court must accept the Master's findings of the facts of the case unless they are clearly wrong.<sup>90</sup> The court need not accept the Master's findings as to the legal issues in the case. The parties may object to the Master's report and bring their objections before the court. The court then accepts, modifies or rejects the Master's findings.<sup>91</sup>

## Deficiency Judgment

If the property is sold as a result of enforcement of a mechanic's lien, and the sale does not provide enough to satisfy the lien, then the claimant will have a deficiency judgment against those parties to the lawsuit who were

<sup>79</sup> DC Code Section 40-303.08.

<sup>80</sup> DC Code Section 40-303.18.

<sup>81</sup> DC Code Section 40-303.09.

<sup>82</sup> See section above, The Notice of Mechanic's Liens; subsection, Owner.

<sup>83</sup> See section below, Priority, for a discussion of mechanic's lien priorities vis-à-vis each other and other liens.

<sup>84</sup> DC Code Section 40-303.08.

<sup>85</sup> DC Code Section 40-303.08.

<sup>86</sup> See chapter, Mechanic's Liens in Virginia; section, Enforcement of Mechanic's Liens; subsection, Trial.

<sup>87</sup> DC Super. Ct. Civil Rule 53(c).

<sup>88</sup> DC Super. Ct. Civil Rule 53(e)(1).

<sup>89</sup> DC Super. Ct. Civil Rule 53(e)(1).

<sup>90</sup> DC Super. Ct. Civil Rule 53(e)(2).

<sup>91</sup> DC Super. Ct. Civil Rule 53(e)(2).

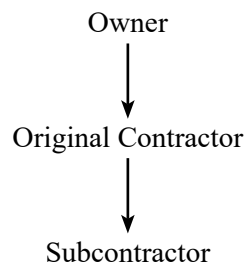
personally served with the lawsuit and who had a contract with the claimant.<sup>92</sup> A deficiency judgment is a judgment in the amount of the remaining debt. A deficiency judgment is collected out of the general assets of the debtor. If the debtor is insolvent, the judgment is worthless.

### **DEFENSE OF PAYMENT: OWNER'S RESPONSIBILITY FOR PAYMENT TO SUBCONTRACTORS**

An owner has a “defense of payment” to a subcontractor’s mechanic’s lien in DC.<sup>93</sup> The owner of the project need only pay for the construction once. If the owner has legitimately paid the original contractor in full for the project, subcontractor liens will fail. The DC Code states that if the owner, in good faith, has paid the general contractor in full for the project (and the amount of the payment is not disputed by the general contractor), the subcontractors shall not be entitled to a lien on the owner’s real property to recover any amounts due and owing to the subcontractors for their work or materials.<sup>94</sup> However, the DC Code also provides that once a subcontractor “notifies the owner in writing of amounts due to the subcontractor...while the owner has a balance due and owing” to the general contractor, the notice from the subcontractor “shall be *prima facie* evidence” that any payment made after that by the owner to the general contractor “was not made in good faith.”<sup>95</sup> Apparently, this does not necessarily mean service of an actual Notice of Mechanic’s Lien filed in the land records, but it could be a less formal “notice” of amounts due to a subcontractor. Potential claimants should consider sending a letter to an owner as soon as problems are apparent on a troubled project. Any provision in a contract that prohibits a subcontractor from contacting or communicating with an owner is be void to the extent it prevents this notice.<sup>96</sup>

The DC Code also provides that subcontractor liens are “subject to the terms and conditions of the original contract.”<sup>97</sup> DC courts have not faced this particular phrase in a recorded case. It may be in the statute to make it clear that a subcontractor’s lien is limited by the total amount due under the general contractor’s contract. This would be consistent with the law in other states. However, this phrase may also limit a subcontractor’s lien to charges that are in the general contract. For example, a subcontractor’s favorable interest rate upon default might be limited to the interest rate in the general contract.

#### **The Payment Chain**



The payment chain for DC mechanic’s liens is limited to contractors that dealt directly with the owner or the general contractor. Sub-subcontractors have no mechanic’s lien rights. The subcontractor’s lien is only valid to the extent to which the owner is indebted to the original contractor.<sup>98</sup>

#### **The “True” Deadline for Notice of a Mechanic’s Lien**

The deadline discussed above for filing a Notice of Mechanic’s Lien in the Recorder of Deeds is actually an outside deadline for subcontractors. The “true deadline” would be to get the Notice filed and served on the owner

<sup>92</sup> DC Code Section 40-303.20.

<sup>93</sup> DC Code Section 40-303.02.

<sup>94</sup> DC Code Section 40-303.02; *See* chapter, Mechanic’s Liens in Virginia; section, Defense of Payment: Owner’s Responsibility for Payment to Subcontractors.

<sup>95</sup> DC Code Section 40-303.02.

<sup>96</sup> DC Code Section 40-303.02(b).

<sup>97</sup> DC Code Section 40-303.02.

<sup>98</sup> DC Code Section 40-303.02.

while the owner is still holding enough money to pay the subcontractor's claim. The longer a subcontractor waits to file its Notice and serve it on the owner, the more payments an owner may make to the original contractor, reducing the enforceable amount of the subcontractor lien on the project. However, a potential claimant may be able to "freeze money" in the owner's hands by sending an informal "notice" of amounts due to the subcontractor before an actual Notice of Mechanic's Lien is recorded in the land records.<sup>99</sup>

To be safe, a subcontractor should file *and* serve its actual lien while the owner is still holding money. An owner may continue to make payments to the original contractor, even after a subcontractor's lien is filed and until the owner is served with the Notice filed with the Recorder of Deeds.<sup>100</sup>

### Affirmative Defense

In the Virginia Code, the defense of payment is expressly an "affirmative defense." It is up to the owner to prove that there is no debt between the owner and a general contractor.<sup>101</sup> In Maryland, the court has come to the opposite conclusion in the limited instances in which a homeowner has a defense of payment in Maryland.<sup>102</sup> In DC, it is not clear whether it is up to the owner to prove there is no debt in order to defeat a mechanic's lien or up to the subcontractor to prove that the owner owes the general contractor in order to enforce a mechanic's lien.

The DC statute merely states that a subcontractor's lien "shall be limited to the amount due, or to become due, but unpaid to the original contractor and be satisfied, in whole or in part, out of that amount only."<sup>103</sup> Claimants should assume they have the burden of showing a debt between the owner and original contractor. Enforcing a mechanic's lien could be very difficult for a subcontractor for this reason.

### Cost of Completion

Aside from direct payments from the owner to the original contractor, the debt between an owner and original contractor may be reduced by the cost to the owner of completing a project after an original contractor has failed or refused to complete.<sup>104</sup> This is similar to the law in other states. If an owner must pay another contractor to complete the project, or has legitimate back charges against the original contractor, a subcontractor's lien rights will be reduced. The owner does not have to pay twice. The back charges and costs are damages owed to the owner that reduce the debt between the owner and original contractor.<sup>105</sup> The owner may not be free, however, to pay subcontractors that have not filed liens.<sup>106</sup>

### Subcontractor "Bound" to General Contract

The DC statute states that "a lien in favor of parties so employed by the contractor shall be subject to the terms and conditions of the contract" between the owner and general contractor.<sup>107</sup> The general contract may have provisions on damages in the event that the general contractor breaches the contract which may affect a subcontractor's lien.<sup>108</sup> The general contract may have special financing arrangements that affect the owner's "defense of payment."<sup>109</sup> A DC subcontractor can obtain a copy of the general contract under DC law, as explained below, and should do so because the general contract's provisions may be important to the subcontractor's mechanic's lien rights.

<sup>99</sup> DC Code Section 40-303.02(b).

<sup>100</sup> DC Code Section 40-303.03.

<sup>101</sup> Va. Code Anno. §43-7(A) (Michie 1950); *See* chapter, Mechanic's Liens in Virginia; section, Defense of Payment: Owner's Responsibility for Payment to Subcontractors.

<sup>102</sup> *Ridge Heating, Air Conditioning and Plumbing, Inc. v. Brennen*, 783 A.2d 691, 366 Md. 336 (2001); *Winkler Construction Co. v. Jerome*, 355 Md. 231, 734 A.2d 212 (1999).

<sup>103</sup> DC Code Section 40-303.02(a).

<sup>104</sup> DC Code Section 40-303.02(a) states that a subcontractor shall be subject to the terms and conditions of the general contract.

<sup>105</sup> *Washington Concrete Sales Corp. v. Morrisette*, 377 F.2d 137, 139-40 (D.C. Cir. 1966); *Harper v. Galliher & Huguely, Inc.*, 29 F.2d 452 (1928).

<sup>106</sup> *Spencer v. Old Stein Grill*, 194 F. Supp. 274 (D.D.C. 1961); *but see Union Wesley A.M.E. Zion Church v. Rider Enterprises, Inc.*, 369 A.2d 608 (D.C. 1977) [Owner payments to subs in order to complete project].

<sup>107</sup> DC Code Section 40-303.02.

<sup>108</sup> *National Brick & Supply Company, Inc. v. Baylor*, 299 F.2d 454 (1962).

<sup>109</sup> *Washington Concrete Sales Corporation, Inc. v. Morrisette*, 377 F.2d 137 (1966).

### Owner's Duty on Receipt of Notice

After service of a Notice of Mechanic's Lien, "The owner shall be bound to retain out of any subsequent payments becoming due to the contractor a sufficient amount to satisfy any indebtedness due from said contractor to the said subcontractor."<sup>110</sup> A subcontractor should file and serve its lien as soon as possible so the owner has this duty to withhold money. This is the "true deadline" for filing a lien, as discussed above. If the owner makes payments to the original contractor after it was given notice of the lien, the owner cannot claim those payments as part of the owner's "defense of payment."<sup>111</sup> Similarly, if the owner makes payments to subcontractors that have not filed liens, the owner may not be able to claim those payments as part of the owner's "defense of payment."<sup>112</sup> In fact, under DC case law, any amount the owner pays the contractor after receiving notice is lienable, even if the eventual costs of completion result in total costs to the owner exceeding the contract amount.<sup>113</sup>

Consider this example. An owner contracts with original contractor for the construction of a warehouse for \$100,000. As work progresses, the owner makes a \$50,000 payment to the original contractor. The original contractor hires subcontractor and soon is in debt to subcontractor for \$10,000. The subcontractor files a Notice of Mechanic's Lien and serves it on the owner. After the owner has been given notice, owner makes a \$10,000 payment to the original contractor, without withholding anything for subcontractor. After subcontractor's notice, the contractor abandons the project and owner spends \$50,000 to complete the project. If the owner never made the \$10,000 payment to the original contractor, subcontractor's lien would be worthless because the owner contracted for a \$100,000 warehouse and paid out \$100,000 to the original contractor to have the project completed. The owner would have a defense of payment. However, because the owner paid the original contractor \$10,000 after the subcontractor's notice, the subcontractor still has a lien for \$10,000, regardless of the fact that the total cost of completing the project was \$110,000.

### Advance Payments to General Contractor

Under the DC statute, an owner cannot make advance payments to a contractor in order to set up a defense of payment to subcontractor liens that are filed later.<sup>114</sup> If the owner makes advance payments for the purpose of avoiding subcontractor mechanic's liens, the payments are treated as if they were never made. It is important for subcontractors to realize, however, that the advance payment must be made in "bad faith." The payments must be made *for the purpose of* avoiding the subcontractor's lien.<sup>115</sup> If advance payments are made in order to speed up work and no "bad faith" is shown, the payments may still reduce a subcontractor's lien. It is, therefore, important that a subcontractor be aware of an original contract's payment terms and the status of accounts between an original contractor and owner.

### Subcontractor's Right to Request Information from Owner

The DC statute provides that a subcontractor is entitled to know the terms of the original contract and the status of accounts between an original contractor and the owner.<sup>116</sup> The owner must forward the information upon request from the subcontractor. If the owner provides false information or does not comply with the request, the property is liable to the lien of the subcontractor demanding the information as if no payments had been made to the general contractor. The owner cannot then defend a mechanic's lien action by showing that the general contractor has been paid in full.

If this request is sent early in the project, then the subcontractor will understand the payment terms of the general contract. The subcontractor will be better able to avoid a defense of payment. If the request is sent later in the project and the owner does not respond, the subcontractor may be able to "bootstrap" its way up to a valid mechanic's lien

<sup>110</sup> DC Code Section 40-303.04.

<sup>111</sup> *Ritzenberg v. Noland Co.*, 364 F.2d 667 (D.C. Cir. 1966).

<sup>112</sup> *Spencer v. Old Stein Grill*, 194 F. Supp. 274 (D.D.C. 1961); *but see Union Wesley A.M.E. Zion Church v. Rider Enterprises, Inc.*, 369 A.2d 608 (D.C. 1977) [Owner payments to subs in order to complete project].

<sup>113</sup> *Ritzenberg v. Nolan Company, Inc.*, 364 F.2d 667 (1966).

<sup>114</sup> DC Code Section 40-303.06.

<sup>115</sup> *F.T. Merrill v. B.R. Acker Co., Inc.*, 142 F.2d 102 (1944).

<sup>116</sup> DC Code Section 40-303.05; *Hutchison Bros. Excavating Co. v. Dworman*, 307 A.2d 760 (D.C. 1973) [release of mechanic's lien waives right to information from owner].



where a defense of payment would have otherwise existed. Our practical experience is that an owner rarely responds to such a request. All subcontractors, therefore, should send this request early in the project.

As discussed above, a subcontractor's lien is subject to the terms and conditions of the original contractor's contract. A subcontractor cannot complain that it does not know the original contract terms, especially if the subcontractor never requested the information from the owner. DC cases that have limited a subcontractor's lien discuss the fact that the subcontractor could have learned the terms of the original contract and the status of accounts.<sup>117</sup>

## PRIORITY

Mechanic's liens in DC have priority over certain other liens that may be on the property. Generally, liens on a piece of property are satisfied in the order in which they were recorded. Older liens are paid first. Mechanic's liens have a special priority in that they are prior to other liens on the property recorded *after work is commenced*, even if those other liens are recorded before the mechanic's lien is recorded.<sup>118</sup>

### Priority between Mechanic's Liens and Other Liens

Generally, a DC mechanic's lien has priority over all liens and mortgages that attach to the property *after work has commenced*. A DC mechanic's lien also has priority over any transfer of the property, which must be recorded in the land records, but was not recorded before commencement of the work.<sup>119</sup>

The general rule above has some exceptions. A mechanic's lien does not have priority over a mortgage on the property used to pay its purchase price.<sup>120</sup> This is because the owner would not have the property unless this money was lent.

A DC mechanic's lien does have priority over construction loan advances made after the claimant filed its Notice of Mechanic's Lien.<sup>121</sup> The mechanic's lien is prior only to *post-Notice* advances, regardless of when the construction loan was recorded. If a claimant started work before the construction lender recorded its loan on the property, the claimant's lien still only has priority over advances made after the claimant's Notice was filed.<sup>122</sup> A claimant could also find that its lien is being eroded by interest accruing on construction loan money advanced before the claimant filed its Notice of Mechanic's Lien.<sup>123</sup> As a practical matter, a mechanic's lien claimant may want to serve the Notice on the lender, even though not required, to make sure a construction lender will not make further advances. The construction lender may not have security for these advances. The owner may have to "bond off the lien" to solve this problem.<sup>124</sup>

The mechanic's lien priorities relate back to when work was commenced.<sup>125</sup> The DC statute is not clear as to whether "commenced work" means when work started on the entire project or when the particular claimant started work.<sup>126</sup> However, in one DC case, the court wrote in a footnote that a mechanic's lien's priority is set by the date the particular claimant started work.<sup>127</sup>

<sup>117</sup> See e.g., *National Brick & Supply Company v. Baylor*, 299 F.2d 454 (1962); *F.T. Merrill v. B.R. Acker Co., Inc.*, 142 F.2d 102 (1944).

<sup>118</sup> *Deland v. Wagner*, 64 F.2d 552, 553 (D.C. 1933).

<sup>119</sup> DC Code Section 40-303.07.

<sup>120</sup> For the purchase price mortgage to have priority of a mechanic's lien, it must be recorded within 10 days from when it is executed. DC Code Section 40-303.07; *Guardian Federal Sav. & Loan Asso. v. Suskind*, 265 A.2d 295, 297 (D.C. 1970).

<sup>121</sup> DC Code Section 40-303.07; *Electrical Equipment Co. v. Security Nat'l Bank*, 606 F.2d 1357 (D.C. Cir. 1979).

<sup>122</sup> *Waco Scaffold & Shor. Co., Inc. v. 425 Eye St. Assoc.*, 355 A.2d 780 (1976).

<sup>123</sup> *Electrical Equipment Company v. Security National Bank*, 606 F.2d 1357 (1979).

<sup>124</sup> See section below, Rights and Options of Owners and Lenders.

<sup>125</sup> *Deland v. Wagner*, 64 F.2d 552, 553 (D.C. 1933) [The mechanic's lien attached upon the property at the time of the commencement of the work upon the building].

<sup>126</sup> DC Code Section 40-303.07.

<sup>127</sup> *Waco Scaffold & Shor. Co., Inc. v. 425 Eye St. Assoc.*, 355 A.2d 780, 782 at f.n. 6 (1976).

## Sale or Foreclosure of Property

Generally, mechanic's liens survive foreclosures or other sale of a property because they are inchoate and relate back to the time that work commenced.<sup>128</sup> If a property is sold, the lien claimant would have to identify the new current owner on the Notice of Mechanic's Lien, but lien rights would otherwise be unaffected. If the lien holder foreclosing on the property is inferior to the mechanic's lien holder, the purchaser at foreclosure takes the property "subject to" the mechanic's lien.<sup>129</sup> If a lender with superior priority forecloses, however, the foreclosure purchaser takes the property free of the mechanic's lien. The mechanic's lien will be extinguished.<sup>130</sup>

## Priority between Different Mechanic's Liens

A subcontractor has priority over a general contractor. The subcontractor's lien is paid first.<sup>131</sup> If there are multiple subcontractors with liens, and there is not enough money from the sale of the property to pay them all, the liens are paid pro rata,<sup>132</sup> with one condition. Subcontractors that served their Notice on the owner before the owner made payments to the original contractor have priority over other subcontractors to the extent of those payments.

## Priority between Mechanic's Liens and Other Unsecured Claims

A mechanic's lienor has a lien against the owner's property that was improved. Unsecured creditors of the original contractor or owner do not have a lien as to that property. Rather, they must try to collect from the general assets of the original contractor or owner.<sup>133</sup>

## Bankruptcy

Because the lien is inchoate, the "automatic stay" of the United States Bankruptcy Code should not stay the perfection (filing in the land records) of the mechanic's lien. There is no case law in DC, but bankruptcy cases from other jurisdictions should apply.<sup>134</sup> The claimant already had the lien, so the filing does not improve the claimant's position and is not a preference. In fact, it is important to keep in mind that the mechanic's lien *must* still be filed within the normal time limits.

The *enforcement* of a mechanic's lien by filing a lawsuit, however, probably is stayed by the bankruptcy of the owner, general contractor or other upstream contractor. It is probably not permissible to enforce a mechanic's lien without permission of the Bankruptcy Court, but the claimant should be provided additional time later to enforce the mechanic's lien. Since there is no case law in DC, the safest course would be to seek relief from the bankruptcy stay and file the enforcement action before the deadline.

## MECHANIC'S LIEN WAIVERS

A contractor in DC can probably waive its mechanic's lien rights at any time.<sup>135</sup> However, under the DC statute, a waiver of liens in a general contract is not effective against a subcontractor.<sup>136</sup>

DC also has a "Prompt Pay Act" that restricts a contractor's ability to withhold payment from subs and suppliers.<sup>137</sup> This Prompt Pay act also states that a "pay when paid" clause will not defeat lien rights. A subcontractor may (and

<sup>128</sup> *Deland v. Wagner*, 64 F.2d 552, 553 (D.C. 1933).

<sup>129</sup> See chapter, Mechanic's Lien Rights and General Principles; section, Priority.

<sup>130</sup> *Waco Scaffold & Shor. Co., Inc. v. 425 Eye St. Assoc.*, 355 A.2d 780 (1976).

<sup>131</sup> DC Code Section 40-303.10.

<sup>132</sup> DC Code Section 40-303.11.

<sup>133</sup> See chapter, Mechanic's Liens in Virginia; section, Priority.

<sup>134</sup> *H.T. Bowling, Inc. v. Bain*, 52 Bankr. 58 (W.D. Va. 1985), *aff'd in part and rev'd in part*, 64 Bankr. 581 (W.D. Va. 1986).

<sup>135</sup> *Stevens v. Gordon*, 48 App. D.C. 604 (D.C. Cir. 1919); *Hutchison Bros. Excavating Co. v. Dworman*, 307 A.2d 760 (D.C. 1973); See chapter, Contract Terms and Preserving Rights; section, Contract Administration; subsection, Waiver Forms.

<sup>136</sup> DC Code Section 40-303.02.

<sup>137</sup> DC Code Section 27-134. Prompt payments to subcontractors.

(a) If a contract is between a contractor and subcontractor, or between a first-tier subcontractor and a second-tier subcontractor, the contractor or subcontractor shall pay undisputed amounts owed to its subcontractor within 7 days after receipt by the contractor or subcontractor of each payment received for its subcontractors' work or materials.

(b) Notwithstanding subsection (a) of this section, conditions of payment to the subcontractor on receipt by the contractor of payment from the owner may not abrogate or waive the right of the subcontractor to:

- (1) Claim a mechanics' lien; or

is probably still required to) enforce lien rights within the deadline, even though the subcontract states that payment is not due until the owner has paid the general contractor.

Generally, such “pay when paid” clauses are effective. The subcontractor may not be able to sue the general contractor “on the contract” if that contract contains a properly worded “pay when paid” clause. This does not mean, however, that the subcontractor cannot enforce its lien rights.

Acceptance of a promissory note does not operate to release lien rights.<sup>138</sup> However, acceptance of security may release lien rights.<sup>139</sup>

## RIGHTS AND OPTIONS OF OWNERS AND LENDERS

### Right to Pay for the Project Only Once

The owner must pay for the project just once. This is the owner’s defense of payment to subcontractor liens, discussed above.<sup>140</sup> However, if the owner does not comply with several important provisions of the DC statute, it may lose its defense of payment. For example, the defense of payment could be lost if the owner fails or refuses to inform a subcontractor of the terms of a general contract on request<sup>141</sup> or if the owner continues to pay a general contractor<sup>142</sup> or pays subcontractors that have not filed liens<sup>143</sup> after the Notice of Mechanic’s Lien is served on the owner.

### Duties, Rights and Options after Notices Are Received

Once the owner has been served with a subcontractor’s Notice of Mechanic’s Lien, the owner must retain payments to the original contractor in a sufficient amount to satisfy the subcontractor’s lien.<sup>144</sup> If the owner does not retain the money, it cannot assert a defense of payment with regard to those funds.<sup>145</sup> Subcontractors should remember that the owner’s duty to withhold funds may only arise *after* the owner has been served with the subcontractor’s Notice of Mechanic’s Lien.<sup>146</sup>

Once the owner receives a Notice of Mechanic’s Lien, the owner should retain money sufficient to satisfy the mechanic’s lien claim. The owner may also decide to settle the mechanic’s lien claim or pay the indebtedness into court.<sup>147</sup> Owners may also choose to protect themselves with mechanic’s lien waivers and affidavits.

Apparently, even if an owner receives a less formal “notice” of amounts due to a subcontractor, an owner should not make further payments to the general contractor without withholding the amount claimed by the subcontractor. Any provision in a contract that prohibits a subcontractor from contacting or communicating with an owner is void to the extent it prevents this notice.<sup>148</sup>

### Removal of Mechanic’s Lien

The DC statute allows the owner to remove a mechanic’s lien from the property either by paying the amount claimed into court or by bonding off the lien with an “undertaking.”<sup>149</sup> This is probably the owner’s only choice to obtain a prompt release of the property from the lien, since the DC Code and case law do not provide for an

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(2) Sue on a contractor’s bond.

(c) Any provision of a contract made in violation of subsection (b) of this section is void as against the public policy of the District.

<sup>138</sup> *Grant v. Strong*, 85 U.S. 623, 624 (U.S. 1874); *Smith v. Johnson*, 9 D.C. 481 (D.C. Sup. 1876).

<sup>139</sup> *Grant v. Strong*, 85 U.S. 623, 624 (U.S. 1874).

<sup>140</sup> See section above, Defense of Payment: Owner’s Responsibility for Payment to Subcontractors.

<sup>141</sup> DC Code Section 40-303.05.

<sup>142</sup> DC Code Section 40-303.04; *Ritzenberg v. Noland Co.*, 364 F.2d 667 (D.C. Cir. 1966).

<sup>143</sup> *Spencer v. Old Stein Grill*, 194 F. Supp. 274 (D.D.C. 1961); *but see Union Wesley A.M.E. Zion Church v. Rider Enterprises, Inc.*, 369 A.2d 608 (D.C. 1977) [Owner payments to subs in order to complete project].

<sup>144</sup> DC Code Section 40-303.04; *Ritzenberg v. Noland Co.*, 364 F.2d 667 (D.C. Cir. 1966).

<sup>145</sup> See section above, Defense of Payment: Owner’s Responsibility for Payment to Subcontractors; subsection, Owner’s Duty on Receipt of Notice.

<sup>146</sup> DC Code Section 40-303.03.

<sup>147</sup> See chapter, Mechanic’s Liens in Virginia; section, Rights and Options of Owners and Lenders.

<sup>148</sup> DC Code Section 40-303.02(b).

<sup>149</sup> DC Code Section 40-303.16.

arly hearing as to the validity of a mechanic's lien.<sup>150</sup> Once the lien amount is paid into court or an undertaking is accepted, the property stands released from the lien.<sup>151</sup> The claimant can only recover on the cash or undertaking if their lien would have been enforceable against the property.<sup>152</sup>

These are methods to judicially “bond off” a mechanic's lien. The Recorder's office has issued a form, available on the Internet in Adobe Acrobat.<sup>153</sup> The owner can bond off a lien before or after the claimant files suit to enforce it.<sup>154</sup>

The owner can pay into court the amount of the claim, along with interest and costs, the court will release the mechanic's lien from the property.<sup>155</sup> If the owner pays the bond in cash, it need not send notice to anyone.<sup>156</sup> The owner can also file with the court a “written undertaking” by which the owner and a surety promise to pay any judgment rendered by the court.<sup>157</sup> The owner must give five-days' notice to the lien claimant of a written undertaking to bond off the mechanic's lien. The surety must swear that their net worth is double the amount of the lien and must be approved by the court.<sup>158</sup> A lien claimant should seriously consider appearing in court to object to the procedure, unless it is clear that the surety has a sufficient net worth. The surety could be an individual or could be a nationally known insurance company. It is not clear in the statute whether the surety can be forced to prove their net worth, beyond the requirement that they make oath that their net worth is double the amount of the lien. A court should not approve a surety over objection, however, unless there is some proof of that net worth.

As a practical matter, “judicial bonding,” described above, is not always utilized. Because of the expense of judicial bonding, a practice of non-judicial bonding has developed. Many owners, lenders and sureties are satisfied with an informal bond that does not involve the court or appear in the land records. A surety company will provide a bond to a title company, the owner or the lender. The owner, lender or title company may then be willing to allow payments or loan draws to continue. The mechanic's lien will remain of record with the Recorder of Deeds, but the bonded party will have protection in case of a judgment for the claimant. A claimant may never know that an owner or other party has been non-judicially bonded since the claimant is not entitled to notice of this process.

## ALTERNATIVES TO MECHANIC'S LIEN FILING

### Enforcing the Contract

A mechanic's lien is not an exclusive remedy. A claimant may decide to bring include a claim against the contract debtor together with the lien claim in one lawsuit.<sup>159</sup>

A claimant could also only bring an action on its contract instead of filing and enforcing a mechanic's lien. Such a strategy can be cheaper than enforcing a mechanic's lien, but a claimant should always consider the advantages of preserving its mechanic's lien rights in the owner's property. If the judgment debtor is insolvent, the judgment will be unenforceable.

<sup>150</sup> *Clarke v. Huff*, 165 F.2d 247, 248 (D.C. Cir. 1947) [Since the statute provides a specific procedure to remove liens, another form of action for that purpose may not be brought].

<sup>151</sup> *Hartford Acci. & Indem. Co. v. A. B. C. Cleaning Contractors, Inc.*, 350 F.2d 430, 432-433 (D.C. Cir. 1965); *Deland v. Wagner*, 64 F.2d 552, 553 (D.C. 1933).

<sup>152</sup> *Hartford Acci. & Indem. Co. v. A. B. C. Cleaning Contractors, Inc.*, 350 F.2d 430, 432-433 (D.C. Cir. 1965); *Maiatico v. Fletcher*, 39 F.2d 295 (1930).

<sup>153</sup> The Mechanic's Lien Undertaking is currently located on the District of Columbia's Office of Tax and Revenue website <http://otr.cfo.dc.gov/publication/rod-17-mechanics-lien-undertaking>. This is on the District of Columbia, Office of Tax Revenue website <http://otr.cfo.dc.gov/>. Go to “Recorder of Deeds” and then to “Forms Center” for a number of helpful real estate forms.

<sup>154</sup> DC Code Section 40-303.17.

<sup>155</sup> DC Code Section 40-303.16; *Deland v. Wagner*, 64 F.2d 552, 553 (D.C. 1933).

<sup>156</sup> *Woodward & Lothrop v. Union Trust Co.*, 262 F. 627 (D.C. Cir. 1920).

<sup>157</sup> DC Code Section 40-303.16.

<sup>158</sup> DC Code Section 40-303.16.

<sup>159</sup> *Redding & Co. v. Russwine Constr. Corp.*, 463 F.2d 929, 933 (D.C. Cir. 1972) [Enforcement of a mechanic's lien is not the exclusive remedy in regard to the obligation which such lien secures, merely because it is statutory. A court exercising its equity jurisdiction may assure that a plaintiff's remedy is complete, practical and efficient].

### Liability of Owner to Subcontractor

The DC statute states that a subcontractor shall not be entitled to a personal judgment against the owner “except upon a special promise of such owner, in writing, for a sufficient consideration...”<sup>160</sup> An owner is personally liable to a subcontractor only if, for example, the owner promises in writing to pay the subcontractor in exchange for the subcontractor’s staying on the job and not filing a mechanic’s lien.<sup>161</sup>

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<sup>160</sup> DC Code Section 40-303.19.

<sup>161</sup> See *Union Wesley A.M.E. Zion Church v. Rider Enterprises, Inc.*, 369 A.2d 608 (1977); *Kidwell & Kidwell, Inc., v. W.T. Galliher & Bros., Inc.*, 282 A.2d 575 (1971).

