CHAPTER 10

Mechanic's Liens in Virginia

EXECUTIVE SUMMARY

Distinctive Features of Law in State

Priority determines which lien gets paid first after a foreclosure sale and which lien survives a sale of the property or bankruptcy. A Virginia mechanic's lien may have the highest priority of any in the United States. The mechanic's lien claimant will have priority over the construction loan bank. The Virginia mechanic's lien will also survive a foreclosure or any other sale of the property. Bankruptcy will not defeat lien rights.

Partly because the Virginia lien is so powerful, the courts have "strictly construed" the mechanic's lien law, meaning claimants must be extremely careful to follow each and every legal requirement or the mechanic's lien will be invalid.

There is a "defense of payment" in Virginia. Consequently, the owner is only required to pay for the project once. The owner can keep making legitimate payments until receipt of notice of a mechanic's lien from a subcontractor. If the owner has already paid once for the project, all mechanic's liens will fail.

Deadline Summary

Prefiling Before Construction. All contractors on residential property are required to give mechanic's lien agent (MLA) notice by certified mail within 30 days of beginning supply of labor or materials.

Lien Filing and/or Service After Labor or Materials Supplied. All contractors must file mechanic's liens in land records within 90 days of last supply of labor or materials (may be a little more time, *see* below).

Enforcement. All contractors must enforce by filing a lawsuit within six months after lien filing.

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.[1] Until the owner has received a notice of mechanic's lien (in the form and the manner prescribed by statute), 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: before your customer has been paid.

There is a "payment chain"—from the owner to the general contractor to the subcontractor to the sub-subcontractor or supplier. The mechanic's lien of any lower tier contractor is only as strong as the *weakest* link in this payment chain.[2] Accordingly, the further down you are on the payment chain, the greater the chance of a defense of payment. For this reason, a sub or supplier wants to file its lien and provide notice as soon as problems are apparent. 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.

A defense of payment is an "affirmative defense."[3] This means that it is up to the owner to prove that it has paid in full for the project. An owner often has some indebtedness to the general contractor but not enough to pay all subcontractor claims. In this case, the owner has a "partial defense of payment."[4] All subcontractors who have valid mechanic's liens will share pro rata in the fund held by the owner.[5]

---

1 *Maddux v. Buchanan*, 121 Va. 102, 92 S.E. 830 (1917).

2 *John T. Wilson Co. v. McManus*, 162 Va. 130, 173 S.E. 361 (1934).

3 Va. Code Anno. §43-7(A) (Michie 1950).

4 *Thompson v. Air Power, Inc.*, 248 Va. 364, 448 S.E.2d 598 (1994).

5 Va. Code Anno. §43-23 (Michie 1950).

A subcontractor or supplier should also consider sending Virginia Code §43-11 Notices early in a project. These notices, sent by certified mail at the beginning of the project and again after delivery of labor and materials, can partially eliminate this defense of payment problem and will make it the responsibility of the owner and/or general contractor to pay the claimant.

Remote Subcontractor and Supplier Liens

There is no known limit to how far down the contract chain lien rights exist. All claimants should file liens as long as they can "trace" their labor or materials to the property.

Priority

The timing of various liens on a property usually determines 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 upon, 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 is mechanic's liens that are "inchoate," such as liens in 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. Any mortgage or judgment lien recorded after work began on the property will be inferior to the mechanic's lien.

Although a mechanic's lien for new construction will have priority over the construction loan, the bank will have first priority for money advanced to buy the land. In other words, the bank has the first lien on the land and the mechanic's lien claimant has the first priority in the building. A contractor supplying labor and materials "for the repair or improvement of any building or structure" (not new construction) has a lower priority. A mortgage or other lien recorded prior to the commencement of work has *complete* priority over a mechanic's lien for rehabilitation, remodeling or home improvement.[6]

Sale or Foreclosure of Property

The priority of various liens on real property also determines whether or not the liens survive foreclosure. Upon foreclosure by any lien holder, the inferior liens are eliminated and have no security interest in the property after foreclosure. All liens that are "prior" will survive the foreclosure. The foreclosure purchaser now owns the property "subject to" the prior liens.[7]

Since Virginia mechanic's liens are prior to most other liens, they survive most foreclosures. Since a mechanic's lien is inchoate, it can actually be filed after foreclosure. A first trust lender may foreclose on a piece of real estate, only to see a mechanic's lien filed after they have taken title. The mechanic's lien claimant must be certain to name the new property owner in the mechanic's lien, but lien rights otherwise still exist.[8]

Virginia mechanic's lien rights similarly survive any other type of sale of the property.[9] Any real estate purchaser must be aware that mechanic's liens might be filed after they purchase the property, for labor and materials supplied to the prior owner. For this reason, real estate purchasers and title insurance companies always insist that the real estate seller sign an affidavit stating that no labor and materials have been supplied to the property in the last 90 days or that payment has been made for all such labor and materials.

---

6 Va. Code Anno. §43-21 (Michie 1950).

7 *See Hadrup v. Sale*, 201 Va. 421, 424-425, 111 S.E.2d 405, 407, 76 A.L.R.2d 1159 (1959).

8 *Wallace v. Brumback*, 177 Va. 36, 12 S.E.2d 801 (1941).

9 *Hadrup v. Sale*, 201 Va. 421, 424-425, 111 S.E.2d 405, 407; 76 A.L.R.2d 1159 (1959).

Bankruptcy

Because the lien is inchoate, the "automatic stay" of the United States Bankruptcy Code does not stay the perfection (filing in the land records) of the mechanic's lien. The claimant already had the lien, so the filing does not create new legal rights 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, is stayed by the bankruptcy of the owner, general contractor or other upstream contractor.[10] 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.

Subdivision and Utility Improvement Off-Site Work

The Virginia General Assembly created special provisions for contractors supplying "site development improvements" to serve an entire subdivision, such as streets, storm or sanitary sewer or waterlines.

Section 43-3(B) solved most allocation problems for site development improvements. Logically enough, each lot in the subdivision bears an equal amount of the lien for any improvement that serves all the lots in the subdivision (even though the site development improvement may not physically be on the lot being liened). Claimants must be careful, however, to make sure they comply with the special provisions.

In order to get the benefits of Section 43-3(B), the claimant must also "prior to the sale of such lot or condominium unit, file with the clerk ... a document setting forth a full disclosure of the nature of the lien to be claimed, the amount claimed against each lot ... and a description of the development." This is referred to as a "Memorandum of Disclosure."

The code does not provide us a form for a Memorandum of Disclosure. In practice, however, a Memorandum of Disclosure usually looks very much like a mechanic's lien. This memorandum must "allocate" the claim, showing the amount claimed against each lot. The important point is the timing. A Memorandum of Disclosure must be filed "prior to the sale of such lot." This is the one situation in Virginia where a claim must be filed in the land records before the property is sold. Claimants providing labor or materials for site development improvements, therefore, may have an earlier deadline for getting their claim filed.

In some situations a contractor may have mechanic's lien rights *only* under Section 43-3(B). This means that a road builder may not be able to lien for subdivision streets at all, except with a Memorandum of Disclosure under Section 43-3(B).[11]

"Off-site" improvements may also be lienable *only* through the use of Section 43-3(B). With off-site improvements a contractor is, by definition, liening a piece of property to which the contractor supplied no labor or materials. A developer is often required to make improvements in a public right-of-way, including street widening or sewers. Those improvements in the street right-of-way are on public property and cannot be liened. "Off-site easements" may be purchased from a neighbor for the construction of storm water drainage facilities. Section 43-3(B), with an early Memorandum of Disclosure, allows such an "extra-territorial lien" for a structure not physically on the property liened.[12]

Renovation or Repair Work

Contractors do have a mechanic's lien for renovation and repair work. The rules work the same, except there is a difference in priority. *See* the section on "Priority" above.

Tenant Work

In general terms, a contractor only can obtain a lien on the property of the person ordering the work. An underlying property cannot be subject to a mechanic's lien if the fee simple owner did not order or authorize the work. If it is the tenant ordering the work, the claimant can obtain a mechanic's lien in the "leasehold interest" of the tenant, but cannot obtain a mechanic's lien in the building and underlying ground. In theory, the mechanic's lien holder can then foreclose upon this leasehold interest.

---

[10] *McCoy v. Chrysler Condo Developers Ltd. Partnership*, 239 Va. 321, 389 S.E.2d 905 (1990).

[11] *Rosser v. Cole*, 237 Va. 572, 379 S.E.2d 323 (1989). *But see Poretsky Building Group, Inc. v. Simmons Equipment Corp.*, 26 Va. Cir. 254 (Va. Cir. Ct. 1992).

[12] *Rosser v. Cole*, 237 Va. 572, 379 S.E.2d 323 (1989).

Special Problems—Title Search

The Virginia lien is land record based. This means that the claimant must perform a complete land records title search to make sure the lien names the exact legal owner and has an accurate legal description of the property. This takes time and additional expense.

Special Problems—Allocation and Tracing

Since the Virginia lien is "strictly construed," the claimant must make sure that exactly the right piece of real estate is liened for exactly the right dollar amount. The labor and materials claimed must be allocated with reasonable certainty among the multiple parcels of land, such as separate townhouse units. If the lien claims too much money or includes some real estate that did not receive labor and materials, then the entire lien can be ruled invalid.

Special Problems—150-Day Rule

There are actually two time limits operating from the day of last work. The time limit for filing the mechanic's lien counts forward from the last day of work. The claimant must also count backwards 150 days from the last day of work. The contractor is generally not allowed to include labor and materials supplied outside this window in any one mechanic's lien. The 150-day rule does not apply to retention held up to 10% of the total contract price or to sums not yet due because of a contract "pay when paid" clause. The entire lien is invalid if it includes some dollar amounts outside the 150-day window.[13]

Lien Waivers[14]

Under Virginia law, a lien waiver in a general contract is effective against the general contractor. However, a subcontractor, lower tier subcontractor, or material supplier may not waive or diminish its lien rights in a contract in advance of furnishing any labor, services, or materials.[15] So it seems impossible for any claimant other than a general contractor to waive the right to lien before supplying labor or material.

It usually is requested of contractors to sign waivers of lien at the time of each progress payment. Waiver forms presented for signature vary greatly in their wording and effect. Virginia Supreme Court case law suggests that some common waiver language is effective to completely waive mechanic's lien rights for the future; waive lien rights for materials not yet delivered; or waive lien rights for retention, even if the initial progress payment is very small.[16]

PREFILING BEFORE CONSTRUCTION: NOTICE TO THE MECHANIC'S LIEN AGENT

Claimants must give notice to the mechanic's lien agent (MLA) when the project involves construction of one- and two-family residential dwellings.[17] A real estate owner *may* (but is not required to) designate a mechanic's lien agent when a building permit is issued. *If* an MLA is designated, then any contractor supplying labor and materials to this project must provide notice that the contractor seeks payment for labor performed or materials furnished**.**

Any contractor filing a lien for site development improvements under Virginia Code §43-3(B) (streets, storm or sanitary sewer, waterlines or roads) is expressly excluded from the MLA statute and does not need to give this notice.[18]

Form of Notice

There is no particular form required for a mechanic's lien agent notice. By statute, however, the notice must contain:[19]

1. The name, mailing address and telephone number of the person (or company) sending the notice
2. The building permit number

---

[13] *Carolina Builders Corp. v. Cenit Equity Co.*, 257 Va. 405, 512 S.E.2d 550 (1999).

[14] *See* chapter, Contract Terms and Preserving Rights (section, Contract Administration; subsection, Waiver Forms), for a more detailed description of waiver problems in all states generally.

[15] Va. Code Anno. §43-3 (Michie 1950). This was a 2016 amendment and it is not yet clear whether a conduit clause, notice and claim requirements or a pay if paid clause "diminishes" these rights within the meaning of the statute and would be void.

[16] *See United Masonry, Inc. v. Riggs Nat'l Bank*, 233 Va. 476, 357 S.E.2d 509 (1987).

[17] Va. Code Anno. §43-4.01 (Michie 1950).

[18] Va. Code Anno. §43-4.01(C) (Michie 1950).

[19] Va. Code Anno. §43-4.01(B) (Michie 1950).

3. A description of the property as shown on the building permit
4. A statement that the person filing such notice seeks payment for labor performed or material furnished.

The building permit contains all outside information necessary to send an MLA notice. All other information necessary for the notice is obtained from the contractor's own records. A convenient form for such a notice is the Virginia Mechanic's Lien Agent Notice (MLA) in the Appendices.

A similar form, the Virginia §43-11 and MLA Notice in the Appendices, if properly filled out, will also constitute the first notice necessary to create personal liability on the part of the owner pursuant to §43-11 of the code.[20]

Section 43-4.01(B) states that "an inaccuracy in the Notice as to the description of the property shall not bar a person from claiming a lien under this title ... if the property can otherwise be reasonably identified from the description."

Deadline for Notice

Notice must be provided within 30 days after the contractor *begins* work if the contractor wants to preserve its right to lien for all labor and materials furnished. A contractor can provide notice at a later time but can then lien only for labor and materials furnished *after* the notice.[21]

Delivery of Notice

The MLA notice is not filed with the court or anywhere else at this point. The MLA notice must be sent registered or certified mail, or physically delivered to the mechanic's lien agent at the address shown on the building permit.[22]

The building permit is required to contain the name, mailing address and telephone number of the mechanic's lien agent. The return receipt for a registered or certified mailing should be kept in the file in order to prove delivery. If a notice is physically delivered, some type of affidavit should be placed in the file by the person delivering the notice, showing the date, place and person to whom the notice was delivered. A signature from the mechanic's lien agent showing receipt is preferable.

The Building Permit

The mechanic's lien agent code is focused on the building permit. If a mechanic's lien agent has been named, the name will appear on the building permit. If there is no name on the building permit, then there is no mechanic's lien agent. If a building permit has not yet been issued, there can be no mechanic's lien agent.

The building permit contains all outside information necessary to send a mechanic's lien agent notice, including the building permit number, a description of the property and the name and address of the mechanic's lien agent. All other information for the notice is obtained from the contractor's own records.

Since the mechanic's lien agent statute is focused on the building permit, all construction contractors should also focus on the building permit. Contractors should seriously consider requiring a copy of the building permit from all owners and general contractors with whom they work. Contractors should already have company policies to make sure they have a signed contract before they begin work. A copy of the building permit should also be a required document before labor and materials are supplied.

By statute, the building permit "shall be conspicuously and continuously posted on the property."[23] As a practical matter, however, contractors cannot count on this. If permits are posted at all, they often are removed or damaged. Permits are often "conspicuously posted" inside the construction trailer or headquarters. While this protects the permit, it makes it harder for all contractors to find.

If a building permit is *not* posted, it is up to the contractor to "determine from appropriate authorities"[24] whether a permit with a mechanic's lien agent has been issued. For this purpose, all contractors should have an index of phone numbers and contact names for all the building departments of all counties in which they work. Counties vary in their practice, but many will advise on the telephone whether a mechanic's lien agent has been designated. If the county will not advise by telephone, a trip to the building department may be necessary to obtain a copy of the permit. In

---

[20] *See* section below, Alternatives to Mechanic's Lien.

[21] Va. Code Anno. §43-4.01 (Michie 1950).

[22] Va. Code Anno. §43-4.01(B) (Michie 1950).

[23] Va. Code Anno. §43-4.01(A) (Michie 1950).

[24] Va. Code Anno. §43-4.01(C) (Michie 1950).

any event, a contractor must be prepared to quickly determine whether notice is necessary since the notice must be sent within 30 days after the contractor *begins* work.

Most of the local building departments are willing to provide MLA information on the telephone. There are also professional services available to supply building permit MLA information, including Building Permits–VA. For more information on Building Permits–VA, view their website at www.buildingpermitsva.com or call 540-719-8746.

If no building permit has been issued, then there can be no mechanic's lien agent, and all contractors can begin work without notice.[25] If a permit with a mechanic's lien agent is issued later in the project, however, all contractors already on the job must provide notice within 30 days after the permit has been issued. If a contractor has already filed a mechanic's lien when the permit is issued, no notice to the mechanic's lien agent will be necessary for that claim.

What if changes are made or if an agent is added after the building permit is first issued?[26] A contractor may require the owner to provide a copy of the building permit before work is begun, but the building department may still issue the owner an amended permit adding a mechanic's lien agent. We would hope that the law would not allow an owner to fraudulently employ such methods for the purpose of defeating contractor mechanic's lien rights. On the other hand, there may be legitimate reasons for amending a building permit.

The real issue is timing. *When* does a claimant have the obligation to check whether the MLA has changed, compared to *when* the claimant begins work or compared to *when* an MLA notice is sent or compared to *when* building permit is amended? The MLA statute states:

> no person other than a person claiming a lien under [Virginia Code §43-3(B) for streets, storm or sanitary sewer, waterlines or roads] may claim a lien ... with respect to a one or two family residential dwelling unit if such person fails to notify any mechanic's lien agent identified on the building ... (i) within thirty days of the first date that he performs labor or furnishes material to or for the building or structure or (ii) within thirty days of the date such a permit is issued, if such labor or materials are first performed or furnished by such person prior to the issuance of a building permit.

What if there is no MLA on the building permit when the claimant starts shipment, but the permit is amended to add an MLA within 30 days after the claimant begins shipment? Do you determine whether there is an MLA and a need to send notice as of the day shipments begin, 30 days after shipments or at the end of a construction project? Can an owner eliminate any rights to lien for any claimant by simply amending the building permit at the end of a construction project to add an MLA, when all suppliers are complete and it is already too late to send notice? Hopefully the Courts will give us some clarification and prevent abuses of this statute.

Requirement of the Notice

The mechanic's lien agent statute applies only to the construction of a "one- or two-family residential dwelling unit."[27] It does not apply to commercial construction, such as the building of shopping centers, office buildings and industrial sites. It is clear that the mechanic's lien statute applies only to residential projects, but there is some uncertainty about the definition of a "one- or two-family residential dwelling unit." Single-family detached residential dwellings are obviously included, but what about townhouses or multi-family apartment buildings? "One-family residential dwelling unit" may refer only to single family detached dwellings but could also refer to any type of dwelling unit in which only one family lives, including a townhouse or a condominium apartment. "Two-family residential dwelling unit" seems to refer to a duplex.

We need a clarification from the Virginia legislature or a few Virginia Supreme Court cases to straighten out this confusion. Meanwhile, contractors and owners should assume that this statute may apply to any residential construction except for site development improvements. The key is to obtain a copy of the building permit on any residential construction. If a mechanic's lien agent is named, then a contractor should send the notice. If the permit contains no MLA, then contractors do not need to worry about the notice.

---

[25] Va. Code Anno. §43-4.01(C) (Michie 1950).

[26] Va. Code Anno. §43-4.01(C) (Michie 1950) [Nothing herein shall be construed to prohibit a permit being amended after it has been initially issued to name a mechanic's lien agent or a new mechanic's lien agent].

[27] Va. Code Anno. §43-4.01(C) (Michie 1950).

If an MLA is named on the permit *any* contractor must send the notice, even the general contractor.

Any contractor filing a lien for site development improvements under Virginia Code §43-3(B) (streets, storm or sanitary sewer, waterlines or roads) is expressly excluded from the mechanic's lien agent statute.[28] Section 43-3(B) liens for site development improvements are discussed in greater detail below. If such a lien is filed, however, there is no need to provide notice to any mechanic's lien agent to preserve Section 43-3(B) lien rights, discussed below. A site utility contractor should still provide notice to any mechanic's lien agent named in order to preserve the right to file a lien under other portions of the mechanic's lien code.

The Mechanic's Lien Agent

By law, the mechanic's lien agent must be a licensed attorney at law, a licensed title insurance company or a financial institution (bank).[29] As a practical matter, most mechanic's lien agents are the title insurance companies that the property owners intend to use to settle out sales of residential lots to consumers.

Practical Application and General Recommendations

There is no doubt that the mechanic's lien agent statute has reduced the number of valid mechanic's liens. Most contractors will simply fail to get over this hurdle. The notice must be sent early in the project, usually well before the contractor senses any trouble.

For this reason, contractors must make the notice a part of their normal project initiation procedure, even for healthy projects, in order to preserve mechanic's lien rights. In fact, all contractors on all jobs should provide notice to any mechanic's lien agent named. There are some internal costs involved in filing mechanic's lien agent notices, but these costs are usually minor. Contractors can usually provide mechanic's lien agent notices without the assistance of counsel. There are also benefits to providing the notice beyond the preservation of mechanic's lien rights. Providing notice increases the chances of payment and decreases the chance that a mechanic's lien will ever need to be filed. Contractors can also consider splitting their customers into two groups: MLA notice customers and non-MLA notice customers. Contractors can decide to avoid the costs and trouble of an MLA notice for customers that are well capitalized or have a long track record. MLA notices should always be sent to customers that are new or of questionable financial strength.

If an MLA is named on the permit *any* contractor must send the notice, even the general contractor. If a general contractor applies for a permit in its own name or as agent for the owner, that general contractor should certainly take note of the MLA and promptly send notice in accordance with the statute.

We think it would be very unusual for a property owner to amend permits for the purpose of thwarting mechanic's liens. Naming any MLA on the original building permit will reduce the number of mechanic's liens. The owner still has a defense of payment. As long as the owner pays its contractors in full, no lower tier subcontractor or suppliers will have lien rights. Owner-builders do not really have a motivation to amend building permits to thwart mechanic's liens. The MLA statue was passed to protect subsequent consumer purchasers (and their title insurance companies); they are the parties most concerned about insolvent builders that do not pay their contractors.

Labor and material suppliers usually need to contact building departments or use a notice service to find out if a project has an MLA. Building permits are almost never posted on a construction site. Material vendors cannot take the time to travel to a project just to see the building permit. It is important to have current MLA information.

If there are big continuous shipments, it may be advisable for a claimant to check for MLAs more than once on a project. It is advisable to send MLA notices at the first shipments, to help make sure vendors do not forget. However, it is also advisable to check the current building permit and send MLS notices closer to the deadline of thirty days after shipments start. If a claimant sends a proper notice to the MLA agent on the building permit at the deadline to preserve rights, it would be hard to believe that an owner could eliminate rights retroactively by later amending the permit.

There is no doubt that owners and title insurance companies want mechanic's lien agents named whenever possible. Most contractors will fail to give notice and the number of mechanic's liens will be reduced, making life easier for owners and title companies. If notices are sent and received to preserve mechanic's lien rights, this puts the owner in a better position to administer the project.

---

[28] Va. Code Anno. §43-4.01(C) (Michie 1950).

[29] Va. Code Anno. §43-1 (Michie 1950).

Together with the MLA law, the Virginia General Assembly also requires builder-owners to provide an affidavit at settlement stating that all labor or materials have been paid for or listing all contractors that have not been paid. The settlement company can compare this affidavit with the MLS notices that have been received. Because of these mechanic's lien notices and the payment affidavits, owners, purchasers and title companies are in a much better position to know whether all contractors have been paid. Owners and title companies have a strong incentive to make sure all contractors have been paid, especially when mechanic's lien agent notices have been sent. Accordingly, the sending of a mechanic's lien notice by a contractor will increase the chances of getting paid at settlement and decrease the chances that a mechanic's lien will ever need to be filed.

Viewed in this light, the mechanic's lien agent statute is not just another technical legal hurdle to deprive contractors of their mechanic's lien rights. Instead, the mechanic's lien statute can be viewed as a system requiring a freer and more complete flow of information among owners, contractors and title insurance companies that will help ensure that all contractors get paid.

Similarly, owners and general contractors should not view mechanic's lien agent notices as a threat. Contractors should be encouraged to send notice so that the owner and its title insurance company are aware of which contractors are on the project and which contractors have not been paid. Owner-developers should also be ready and willing to provide copies of building permits to all contractors. In time, contractors requiring such information before they begin work will be the norm and not the exception. Owner-developers will view such contractors not as a threat but as contractors that are better organized than others, more likely to be better organized throughout the project and more likely to complete their portion of the project promptly and competently.

TIME LIMITS FOR MEMORANDUM OF MECHANIC'S LIEN

In Virginia, the contractor perfects its mechanic's lien rights by filing a "Memorandum of Mechanic's Lien." This is a piece of paper filed in the land records of the county where the real property is located.[30] It is not necessary to prove anything at this point, although an affidavit must be attached. No court order is necessary and the contract debtor need not agree. The contractor simply prepares a one or two-page memorandum of lien, takes it to the land records of the county where the property is located and pays a small filing fee.

Section 43-4 of the Code of Virginia states that any lien claimant, in order to perfect its lien,

> ... shall file a memorandum of lien at any time after the work is commenced or materials furnished, but not later than 90 days from the last day of the month in which he lasts performs labor or furnishes material, and in no event later than the 90 days from the time such building, structure, or railroad is completed, or the work thereon otherwise terminated.

This means that a lien:

1. Can be filed at any time after the claimant has commenced work, but not before
2. Must be filed within 90 days of the last day of the month in which the claimant last performs labor or furnishes material
3. If the claimant happens to be one of the last contractors on the project, the claimant's time limit may be shortened. If the project is completed, or the work thereon otherwise terminated, then the mechanic's lien must be filed within 90 days of such completion or termination (instead of 90 days from the last day of that month).

This means that most mechanic's lien due dates will be in the last few days of a month. Unless the project has been completed or terminated, the claimant focuses on the claimant's own last work.[31] The claimant determines in which month the claimant's last work was performed. The claimant then counts 90 days (not three months) from the last day in that month. Some months have 31 days, so the deadline usually will not fall on the last day of month but rather a few days earlier. February, with its 28 or 29 days, throws this general rule off. The deadline can fall after the first of the month, if last work was performed in November, December or January. Weekends or holidays can also

---

[30] Va. Code Anno. §43-4 (Michie 1950).

[31] *Glasser & Glasser, PLC v. Jack Bays, Inc*., 285 Va. 358, 371-75, 741 S.E.2d 599, 606-10 (2013).

impact the deadline, since county land record offices are closed. If a filing date falls on a weekend or holiday, then the deadline seems to be the next day in which courts are open in that county.[32]

Since most mechanic's liens are due in the last few days of each month, construction law firms are often flooded with requests for mechanic's liens at the end of each month. For this reason, it is important to avoid waiting until the last minute to contact your attorney.

Completion of the Project and Claimant's Last Work

How do contractors know when a project has been completed? Does trivial work, warranty work or repair work extend the deadline for mechanic's lien filing? The general rule is that any original contract work required to complete the contract will extend the deadline for filing a mechanic's lien.

In a 1994 Virginia Supreme Court case,[33] the architect issued a Certificate of Substantial Completion. The general contractor was required to complete several punch list items thereafter. Eventually, the general contractor filed a mechanic's lien and the bank foreclosed upon the property. In defending against the mechanic's lien, the bank contended that the 90-day deadline for mechanic's lien filing ran from the date of substantial completion.

The Virginia Supreme Court disagreed, ruling that the 90-day deadline runs from when the project is *complete*. The court stated that the general contractor was required to complete the punch list items in order to fulfill its contract obligations. The contract was not complete, therefore, until these punch lists items were complete. The court made it clear that a mechanic's lien can be ruled invalid if the general contractor purposefully delayed completion in order to extend its mechanic's lien rights or committed some type of fraud. The mechanic's lien may also be invalid in other extenuating circumstances.

This case confirms that minor work will extend a contractor's mechanic's lien rights, if it is a part of the original contract scope of work. The status of replacement items, repair work or warranty work is still uncertain.[34] If a contractor is replacing or repairing work already in place, this may not extend lien rights.

Work "Otherwise" Terminated

All claimants must file their mechanic's lien within 90 days from the date the project is completed *or the work thereon is otherwise terminated*. There is not much case law on the "otherwise terminated" wording, but it seems to get a common sense reading.[35]

In one case before the Virginia Supreme Court, the general contractor abandoned the project. The Supreme Court ruled that the work thereon had "otherwise terminated" when the project was abandoned, and the subcontractor's deadline for filing a mechanic's lien began at that time.[36] It seems that work has not been "otherwise terminated" if there is any activity on the project by any contractor.[37] However, there is often uncertainty whether and when a contractor has abandoned a project or been terminated. Contractors may simply fail to appear for long periods of time without any clear statement that they will not return. What if a general contractor has a lengthy punch list remaining and continues to claim that punch list items will be completed? What if the general contractor never, in fact, returns? Does a subcontractor's mechanic's lien deadline begin to run on the last day the general contractor actually performed work or when it became "obvious" that the general contractor was not going to return? Owners may send letters "terminating" the general contractor only to allow the general contractor back on the project at a later time.

There is no way for contractors to eliminate this uncertainty. The safest course is to simply lien earlier rather than later. If there is *ever* a gap of 90 days since the general contractor and the subcontractor have performed work on the project, then both the general contractor and subcontractor should have liens filed before the 90th day.

---

[32] Va. Code Anno. §1-13.3:1 (Michie 1950); *A. E. Tate Lumber Co. v. First Gen. Servs. of Richmond, Inc*., 12 Va. Cir. 135 (Va. Cir. Ct. 1988); *Donohoe Constr. Co. v. Mt. Vernon Assocs*., 235 Va. 531, 369 S.E.2d 857 (1988).

[33] *Dominion Trust Co. v. Kenbridge Constr. Co.*, 248 Va. 393, 448 S.E.2d 659 (1994).

[34] *American Std. Homes Corp. v. Reinecke*, 245 Va. 113, 425 S.E.2d 515 (1993); *Calcourt Props., Inc. v. Barnes Constr. Co*., 20 Va. Cir. 202 (Va. Cir. Ct. 1990).

[35] *Glasser & Glasser, PLC v. Jack Bays, Inc*., 285 Va. 358, 371-75, 741 S.E.2d 599, 606-10 (2013); *Northern Va. Sav. & Loan Ass'n v. J.B. Kendall Co.*, 205 Va. 136, 135 S.E.2d 178 (1964); *Hadrup v. Sale*, 201 Va. 421, 424-425, 111 S.E.2d 405, 407, 76 A.L.R.2d 1159 (1959); *Burkes Pleading and Practice*, 4th ed., § 459, p. 891 (1959).

[36] *Mills v. Moore's Super Stores*, 217 Va. 276, 227 S.E.2d 719 (1976).

[37] *Glasser & Glasser, PLC v. Jack Bays, Inc*., 285 Va. 358, 371-75, 741 S.E.2d 599, 606-10 (2013).

Multiple Contracts

What if a contractor has two different contracts to supply labor and materials to the property? Do labor and materials supplied under the second contract extend the deadline for filing a mechanic's lien under the first contract? The Virginia Supreme Court has ruled that each contract has its own filing deadline.

The Virginia Supreme Court has been moving more toward a "contract analysis" to answer many mechanic's lien questions, including filing deadlines.[38] In the *Addington-Beaman* case, the Supreme Court implied that each shipment by an open account supplier was a separate contract.[39]

Soon after this, the Virginia Supreme Court employed a similar "contract analysis" to a mechanic's lien filing deadline issue in the *American Standard Homes* case. In this case, American Standard Homes supplied complete house packages pursuant to a "material order contract" that listed all of the materials to be delivered. More than 90 days after all the materials listed in the "material order contract" were delivered, the customer requested and American Standard Homes delivered some replacements for items that had been "lost, damaged or stolen." The Virginia Supreme Court ruled that the delivery of these replacement items did *not* extend the time for filing a mechanic's lien on the basic delivery. In other words, the supplier may still file a lien solely for the new replacement materials, but cannot file a lien for the original delivery months earlier.[40]

The court was concerned with the fact that *all* of the materials listed in the original contract had been delivered earlier. This contract was then complete. The customer was not obligated to buy from this building supplier and the supplier was not obligated to ship. The delivery of replacement materials was a different contract for which a different mechanic's lien filing deadline would begin.

It is fairly clear, therefore, that if a contractor has more than one contract for a project, the contractor should count the mechanic's lien deadline separately for each contract.

Deadlines for Open Account Suppliers

These cases have generated considerable debate on the filing deadlines for open account suppliers, since they have suggested that each delivery by an open account supplier would be a separate contract with its own mechanic's lien filing date. In other words, the supplier would not be able to file a mechanic's lien within 90 days of the last delivery. A mechanic's lien would have to be filed within 90 days of each delivery. Three different Circuit Court opinions moved up to the Virginia Supreme Court and are now collectively referred to as the "Jim Carpenter" case.[41]

The Carpenter decision does not give us a perfectly clear rule, but it is generally very helpful to open account suppliers. The opinion differentiates between "specific continuing contracts" and "merely marketplace suppliers under general open accounts." "[W]here work or materials are furnished as part of a continuing contract related to a single property," then the contractor can count its mechanic's lien deadline from the last work or materials. "[W] here the course of dealing between the parties shows that each understood that the materials were being supplied for a particular project, rather than merely for general use by the contractor, and nothing in the records suggests that a mere open account was intended, a continuing contract will be found."

The Supreme Court upheld the mechanic's liens in all three cases. It was important to the court that one supplier had performed a "take-off," listing the materials for each house, and then furnished a "30-day firm offer" on the materials it could supply. The materials were furnished along with an invoice referencing each individual parcel of land supplied.

This decision will bring Virginia in line with other jurisdictions in the area, including Maryland. Generally speaking, if the supplier and customer "contemplate" that the supplier will provide all materials for an entire project, then the supplier should have extended lien rights. Suppliers who provide proposals committing themselves to supply an entire project should have lien rights from the date of last delivery to each parcel. It will still be very important to allocate the materials supplied to each home or town home. This information must be required from the customer at the point of sale.[42]

---

[38] *See First American Bank of Virginia v. J.S.C Concrete Construction, Inc.*, 259 Va. 60, 523 S.E.2d 496 (2000).

[39] *Addington-Beaman Lumber Co. v. Lincoln Sav. & Loan*, 241 Va. 436, 403 S.E.2d 688 (1991).

[40] *American Std. Homes Corp. v. Reinecke*, 245 Va. 113, 425 S.E.2d 515 (1993).

[41] *United Savings Association of Texas v. Jim Carpenter Company*, 252 Va. 252, 475 S.E.2d 788 (1996).

[42] *See* section below, Amount of Claim and Allocation; subsection, Allocation.

Some suppliers will still be a "mere market place supplier under general open accounts," who must count their mechanic's lien deadline from each delivery.[43] This will especially be a problem for customer pick-ups, where suppliers are not delivering materials and will have difficulty tracing materials to a project. The knowledge that a supplier has about the project and the wording used in contracts will make a big difference in preserving mechanic's lien rights.

Open account suppliers and subcontractors should do their best to protect themselves. It is difficult to provide any sure-fire solution to avoid a problem. Each supplier/subcontractor must also decide for themselves what will work in the field and what level of administrative expense they can afford. There is a spectrum of options that may provide increasing levels of protection but may also involve increasing costs.

File More Mechanic's Liens

The *only* certain solution is to file a mechanic's lien for each unpaid delivery within 90 days of the unpaid delivery. Contractors have always known to watch whether the last unpaid invoice went over 90 days. The safest course is to watch *every* invoice, and not count on subsequent deliveries to extend time. Increased attorney's fees are an obvious expense, but at least on large deliveries, this approach may be the best option.

Separate Contract for Each Parcel of Land

The *American Standard Homes v. Reinecke* court was very concerned that after the initial delivery, the supplier was not obligated to sell *and* the customer was not obligated to buy. If a supplier is committed to supply at set prices throughout the life of each project and the customer is obligated to buy from this supplier, this should take the supplier out of the "American Standard Homes problem" and put them in the "Jim Carpenter safe harbor."

It can be a problem for a supplier to commit to prices for too long. Additionally, many customers will refuse to commit to one supplier. This may be the best option, however, where a supplier is confident prices can be held or that the project will be of short duration.

Similarly, "more conventional" subcontractors with one contract for an entire project need not be concerned with this problem so long as the subcontractor is still delivering the labor and materials described in that one contract. Such subcontractors should still be concerned, however, with extras supplied *after* the completion of all original contract work, especially if these extras are supplied long after the original contract work. These "extras" may be viewed as a separate contract for which a separate mechanic's lien deadline runs. For this reason, it will be important that all extras or change orders state that the parties "intend to create an amendment or a change to the original contract."

Base Contract with Purchase Orders

This is a variation of the previous idea but may be more workable in some situations. Developers and general contractors often wish to have a base contract covering the activities of subcontractors and suppliers on the project, including warranties, indemnities, insurance, billing, etc. Consequently, it may not be necessary to commit to prices for the length of the project. Suppliers will want to make it clear that the base contract covers "all deliveries to this project." Suppliers should also add language stating, "All deliveries to each lot shall be considered a single contract" or "shall be considered a part of this base contract." Similar language can be added to a credit agreement,[44] but the use of this type of base contract for each project has a better chance of standing up against "third parties" if a supplier later must enforce the lien after the lot has been sold or foreclosed upon.

Proposals with Commitment to Ship

Even if a customer will not commit to buying, it may be enough if the supplier is committed to sell. A supplier will be in a stronger position if it commits to prices long enough to cover each lot improvement.

---

[43] *See e.g., First National Bank of Richmond v. William R. Trigg Co.*, 106 Va. 327, 56 S.E. 158 (1907).

[44] *See* chapter, Contract Terms and Preserving Rights; section, Contractor and Supplier Contract Forms; subsection, Supplier Credit Applications and Proposals. *See also* in the Appendices.

Suppliers should submit proposals stating that the supplier "commits to ship sufficient quantities to complete this project" or "Prices will be held firm for 30 days. Thereafter, supplier commits to ship sufficient quantities to complete the project, but the price will be subject to an increase to the extent supplier's costs have increased."

It will also be helpful to have "boot strap" language in price proposals. State that "all shipments to this project will be a part of this proposal" or "a part of a single contract." Also state that the customer "can accept this proposal by making an order."

This seems like a fairly painless solution that will be workable in many situations. While this approach provides less protection than the solutions discussed above, it should be helpful in determining mechanic's lien deadlines from the date of last delivery to each parcel.

Agreements in Credit Agreement

A supplier can also add "boot strap" language to the credit application or open account agreement, stating that "all shipments to any single project shall be considered a single contract." The supplier could also add commitments to "ship to complete any single project to which shipments have been made, subject to the customer's continued creditworthiness and subject to a price increase to the extent supplier's costs have increased."

This sort of language is advisable and also seems to be fairly painless. This is probably the weakest solution discussed, however, especially as against third parties. The owner of the property or their bank would argue that they cannot be bound by this language to extend their exposure to a mechanic's lien.

Be Aware of Project Scope

It will make a difference if a supplier is even aware of the size of a project and the amount of materials to be used. Suppliers should obtain site plans for the project if possible, to help enforce lien rights if necessary. The more a supplier knows about the project generally or at least discusses project scope with the customer, the easier it will be to establish a continuing agreement. It will be helpful to have letters from the supplier discussing the project and the approximate quantities of materials that will be needed. This, together with a commitment to supply all materials needed for the project, will help prove that the parties "contemplated" that this supplier would provide all materials for this project.

How Soon Mechanic's Lien Can Be Filed

Virginia Code Section 43-4 states that the mechanic's lien may be filed "at any time after the work is commenced or material furnished" and further states that the lien shall identify the time that the claim "is or will be due and payable ..." This makes it clear that the mechanic's lien cannot be filed before the claimant has begun work but may be filed at any time thereafter. This *may* also mean that a claimant can claim a lien for labor and materials not yet provided, but doing so would be risky.[45]

The safer reading is that a contractor can lien for labor and materials actually supplied, even if payment for labor and materials is not yet contractually due. One example would be a contract in which materials are supplied and payment is to be made "within 90 days after invoice." The claimant could lien any time after materials were delivered, even if it would not yet be possible to sue the customer for breach of contract. Another modern example is the "pay when paid" clause. A general contractor may be under no contractual obligation to pay a subcontractor until the owner makes payments. The subcontractor *must* still preserve mechanic's lien rights by filing in a timely manner. The contractor is entitled to do this even though the funds are not yet "due."

Retention can, and sometimes must be, liened before it is due. Retention may not be due until long after labor and materials are supplied, especially in the case of excavators and other contractors providing labor and materials in the early stages of the project.

Effect of Bankruptcy

Once an owner or contractor files bankruptcy, their creditors will be general unsecured creditors of the bankrupt debtor, unless the perfect their mechanic's lien rights.[46] The effect of bankruptcy on the enforcement of Virginia

---

[45] *See* section below, Amount of Claim and Allocation; subsection, Overburdening.

[46] *Perrin & Martin, Inc. v. United States*, 233 F. Supp. 1016, 1019-1020 (E.D. Va. 1964) [the claimant never perfected its inchoate mechanic's lien. Its failure in this regard causes the lien to be no longer in existence] *citing Furst-Kerber Cut Stone Co. v. Wells*, 116 Va. 95, 81 S.E. 22, 24 (1914) [A materialman who had not perfected his lien was simply a general creditor of the subcontractor who had ordered

mechanic's liens (lawsuit after lien filing) is discussed below. However, the "automatic stay" of the United States Bankruptcy Code does not stay the perfection (filing in the land records) of the mechanic's lien. This means that if the owner on the project files bankruptcy, a general contractor or subcontractor can still file their mechanic's lien without seeking the permission of the United States Bankruptcy Court.[47] If a general contractor files bankruptcy, a subcontractor can still file its mechanic's lien. 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 through the filing of a lawsuit is stayed by the bankruptcy of the owner or general contractor.[48] It is not permissible to enforce a mechanic's lien without permission of the bankruptcy court, but the usual time limits for enforcement are also altered. The contractor is provided additional time later to enforce the mechanic's lien.

Site Development Improvements

Contractors supplying labor or materials for "site development improvements" such as streets, sewers, storm water drainage, etc., may want to file a lien pursuant to Virginia Code Section 43-3(B).[49] Such a mechanic's lien, however, requires that an additional "Memorandum of Disclosure" be filed in the land records *before the sale of any lot* in the subdivision.[50] This deadline can easily pass while the claimant is still providing labor and materials to the project.

The 150-Day Rule

There are actually two distinct time limits operating from the last day that labor is performed or material is furnished. We have seen that the time limit for *filing* the mechanic's lien is 90 days from the last day of the month in which the last labor is performed or material is furnished (last day of work). The contractor must also count backwards 150 days from the last day of their work. The contractor is not allowed to include any labor or materials supplied earlier than this in the mechanic's lien, except for retention or sums held on a "pay when paid" clause. The 90-day deadline for filing the mechanic's lien does *not* count from the exact same date as the 150-day rule, unless the project has been completed or terminated.[51]

Code of Virginia Section 43-4 states the following:

> The lien claimant may file any number of such memoranda, but no memorandum ... shall include sums due for labor or materials furnished more than 150 days prior to the last day on which labor was performed or materials furnished preceding the filing of such memorandum. Provided however, any memorandum may include sums withheld as retainages with respect to labor performed or materials furnished at any time before it is filed, but not to exceed 10% of the total contract price and (ii) sums which are not yet due because the party with whom the lien claimant contracted has not yet received funds from the owner or another third party.

This means that each mechanic's lien can only include labor and materials supplied within a window going back 150 days from the last day labor or material is furnished by that lien claimant immediately preceding the lien filing. The 150-day rule does not apply to retention up to 10% of the total contract price and does not apply to money not yet due because of a "pay when paid" contract clause.

The 150 days counts back from the last day any labor or material was supplied, not the last day of labor or material *included* in the lien amount.[52] In other words, even if the claimant has been paid for that last labor or material and

---

the materials and that he was entitled no priority in the fund due the subcontractor from the general contractor]; *M &T Elec. Contrs., Inc. v. Capital Lighting & Supply, Inc. (In re M&T Elec. Contrs., Inc.),* 267 B.R. 434, 466-467 (Bankr. D.D.C. 2001).

[47] *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); *In re Concrete Structures, Inc.*, 261 B.R. 627 (2001).

[48] *In re Concrete Structures, Inc.*, 261 B.R. 627 (D.C. E.D.Va. 2001); *McCoy v. Chrysler Condo Developers Ltd. Partnership*, 239 Va. 321, 389 S.E.2d 905 (1990); *Thompson v. Air Power, Inc.*, 248 Va. 364, 448 S.E.2d 598 (1994); *See also* section below, Enforcement of Mechanic's Liens.

[49] This is discussed in greater detail in the section below, Amount of Claim and Allocation; subsection, Site Development Improvements, Roads and Utilities—Section 43-3(B).

[50] *Rosser v. Cole*, 237 Va. 572, 379 S.E.2d 323 (1989).

[51] *Glasser & Glasser, PLC v. Jack Bays, Inc*., 285 Va. 358, 371-75, 741 S.E.2d 599, 606-10 (2013).

[52] *Carolina Builders Corporation v. Cenit Equity Co.*, 257 Va. 405, 512 S.E.2d 550 (1999).

even if that last labor or material is not included in the lien, the 150-day window still counts back from that day of last labor or material preceding the filing of a memorandum of mechanic's lien. On the other hand, the 150 days may only count back from the last day any labor or material added value or was billable to the project.[53] It does seem clear that each individual contractor could have a different 150-day window, the same as each could have a different 90-day filing deadline, depending on their individual last day of work. In other words, there is no "unitary" 150-day window for all contractors on the project.[54]

The Virginia Supreme Court has ruled that an entire lien is invalid if the lien includes dollar amounts outside the 150-day window. The 150-day requirement is not a filing deadline like the 90-day rule; rather, it is a limitation on how far back a mechanic's lien may reach. The rule is a requirement of the statute, and failure to abide by it will result in a total invalidation of the mechanic's lien.[55] The court cannot simply subtract claim amounts beyond the 150-day period,[56] although a claimant may have the opportunity to show that any lien amounts outside the 150-day window were an "inaccuracy" that was not "willfully false."[57]

Contractors will rarely be on the project more than 150 days without receiving progress payments. Usually, only retention is held for labor and materials supplied more than 150 days earlier. The problem sometimes appears in change order work performed but unpaid for a long period of time while awaiting change order approval. In any event, if a contractor is approaching 150 days on the project and has not received progress payments of at least 90% on all work performed, it will be necessary to file a mechanic's lien and then continue work. This may be necessary to preserve all lien rights even if the payment is not yet contractually due. The contractor's only other choice is to waive lien rights for the unpaid work prior to the 150-day window and exclude that work from any mechanic's lien eventually filed. A contractor may be in the position of explaining to an owner that a mechanic's lien must be filed to preserve mechanic's lien rights, even though the money is not yet due and the contractor intends to continue to work on the project. This may be an incentive to an owner or general contractor to expedite payments or approval of change orders.

There is no problem with filing more than one mechanic's lien. The Code makes it clear that "a claimant may file any number of Memoranda,"[58] and it is sometimes necessary to do so in order to comply with the 150-day rule. If a construction contract calls for retention greater than 10% or if progress payments under the contract are not due for many months after work is performed, it may be necessary to file multiple mechanic's liens in order preserve rights.

MEMORANDUM OF MECHANIC'S LIEN

All contractors wishing to claim a mechanic's lien must file a Memorandum of Mechanic's Lien in the land records of the county where the construction project is located. This is public notice that the contractor claims a lien on the property.

Form of Memorandum

The General Assembly of Virginia has provided a form to follow for a Memorandum of Mechanic's Lien in the Appendices. Section §43-5 of the Code of Virginia looks like this:

> §43-5. *Sufficiency of memorandum and affidavit required by §43-4.* The memorandum and affidavit required by §43-4 shall be sufficient if substantially in form and effect as follows:

---

[53] *Glasser & Glasser, PLC v. Jack Bays, Inc*., 285 Va. 358, 371-75, 741 S.E.2d 599, 606-10 (2013).

[54] *Glasser & Glasser, PLC v. Jack Bays, Inc*., 285 Va. 358, 371-75, 741 S.E.2d 599, 606-10 (2013) [seems to say that a general contractor can have a 150-day window that operates independently from any subcontractor's window, even if all subcontractor work is included in the general contract].

[55] *Smith Mt. Bldg. Supply, LLC v. Windstar Props., LLC*, 277 Va. 387, 672 S.E.2d 845 (2009).

[56] *Carolina Builders Corporation v. Cenit Equity Co.*, 257 Va. 405, 512 S.E.2d 550 (1999); *Brian K. Johnson v. R, Craig Tadlock*, 19th Cir., Fairfax County, Ch. No. 143099 (1996); *Westburg Construction, Inc. v. Lilly L. Zuckerman*, 19th Cir., Fairfax County, Ch. No. 139269 (1997).

[57] Va. Code Anno. §43-15 (Michie 1950), *Reliable Constructors v. CFJ Properties*, 559 S.E.2d 681, 263 Va. 279 (2002); *but see Smith Mt. Bldg. Supply, LLC v. Windstar Props., LLC*, 277 Va. 387, 672 S.E.2d 845 (2009).

[58] Va. Code Anno. §43-4 (Michie 1950).

Memorandum for Mechanic's Lien Claimed by General Contractor

Name of owner: .....

Address of owner: .....

Name of claimant: .....

Address of claimant: .....

Contractor license or certificate number of claimant (if applicable): .....

Issuance date of license or certificate (if applicable): .....

Expiration date of license or certificate (if applicable): .....

If no contractor license or certificate number is included, the claimant certifies that such a valid license or certificate is not required by law for the work done for which the benefit of a lien is claimed.

1. Type of materials or services furnished: .....…….……...…….
2. Amount claimed: $ .....
3. Type of structure on which work done or materials furnished: ……..……..
4. Brief description and location of real property: ……...……..
5. Date from which interest on above amount is claimed: ……..……..

Date: .....….

It is the intent of the claimant to claim the benefit of a lien.

The undersigned hereby certifies that he has mailed a copy of this memorandum of lien to the owner of the property at the owner's last known address: .....(address), on ..... (date of mailing).

....…….....(Name of claimant)

AFFIDAVIT

State of Virginia

County (or city) of .....…….....…., to wit:

I, ... (notary or other officer) for the county (or city) aforesaid, do certify that ..... claimant, or ....., agent for claimant, this day made oath before me in my county (or city) aforesaid that ..... (the owner) is justly indebted to claimant in the sum of ..... dollars, for the consideration stated in the foregoing memorandum, and that the same is payable as therein stated.

Given under my hand this the ……..... day of .....…….....…, 20…..

…….....……...
(Notary Public or Magistrate, et cetera.)

Virginia Code Section 43-15 states that:

> No inaccuracy in the memorandum filed, or in the description of the property to be covered by the lien, shall invalidate the lien, if the property can be reasonably identified by the description given and the memorandum conforms substantially [to the form shown above], and is not willfully false.

This statute is very comforting[59] and the form provided is very helpful, but both are deceptively simple. Some of the items on the form have not caused much controversy and have not been the subject of court battles. This may be because such items are "simple" or "safe," or it may be just because no one has raised the issue yet in court.

Like many other state supreme courts, Virginia has "strictly construed" its mechanic's lien code, especially in the last thirty years. This means that a mechanic's lien claimant must precisely comply with all requirements of the Virginia Code in order to perfect a valid mechanic's lien. Even if the mechanic's lien code was not changing, mechanic's liens were found invalid in one case after another on grounds previously unknown. This has been a cumulative and expanding trend. It had become increasingly difficult to file a valid mechanic's lien.

Section 43-15 has been in the Virginia Code since at least 1919,[60] but has almost never found its way into judicial consideration in order to find a lien valid. Fairly recently, however, the Virginia Supreme Court issued a striking mechanic's lien opinion in *Ulka Desai v. A. R. Design* ("*Desai*"), based on Section 43-15, that can only be described as the most pro-claimant mechanic's lien opinion in a generation.[61] The Supreme Court employed Section 43-15, to find that the claimant had *substantially complied* with code requirements and that the challenged mechanic's lien was valid. The claimant used the Virginia Code in § 43-5, shown above, to file two memoranda of mechanic's lien. This *Desai* opinion gives us confirmation that these forms do operate as a "safe harbor."

Virginia Code § 43-4 specifies the steps necessary to perfect a mechanic's lien: when it must be filed, where to file it, and what must be included in the memorandum of mechanic's lien. "Strictly construing" § 43-4 has led the Virginia Supreme Court to find many mechanic's liens invalid. Amongst other things, § 43-4 requires the claimant to:

> show the names of the owner of the property sought to be charged, and of the claimant of the lien, the amount and consideration of his claim, and the time or times when the same is or will be due and payable, verified by the oath of the claimant, or his agent.

In *Desai*, the owner contended that memoranda did not properly identify the owner, did not show when the claim became due or when interest began to run and did not have a proper verification by oath of the claimant. However, the Supreme Court found that the memoranda substantially complied with the Code and were valid.

The real estate in *Desai* was owned by a trust, rather than any individual or other entity. One mechanic's lien filed did not identify the trust as the owner and only identified an individual, Ulka Desai, as owner. Although she was the trustee of the owner trust, the memorandum did not state that. The Supreme Court found that "legal title" to the real estate was in the name of the trustee Ulka Desai. For this reason, the lien properly identified the owner of the real estate. The absence of the word "trustee" after her name would not have negatively impacted a land records index search.

There was also a problem with the claimant signature on both liens. Code Section 43-4 requires that the debt be verified by the oath of the claimant, or his agent. The wrong blank was filled in the safe harbor form so that the affiant (person swearing oath) was incorrectly identified as the "claimant" rather than the "agent of claimant." The Supreme Court found that the memoranda still substantially complied with the Code.

---

[59] *Reliable Constructors v. CFJ Properties*, 263 Va. 279, 559 S.E.2d 681 (2002).

[60] The current § 43-15 has been in the Virginia Code unchanged since 1919. However an apparently similar predecessor code section is discussed in *Gilman v. Ryan*, 95 Va. 494, 497, 28 S.E. 875, 876 (1898) [By section 2478 a substantial compliance is declared to be sufficient, but nothing less than a substantial compliance will answer. It provides that "no inaccuracy in the account filed * * * * shall invalidate the lien if * * * * the account conform substantially to the requirements" of the statute "and is not willfully false"].

[61] *Ulka Desai v. A. R. Design Grp., Inc*., 293 Va. 426, 799 S.E.2d 506 (2017).

Code Section 43-4 also requires that the memorandum of mechanic's lien "show. . . the time or times when the [claim] is or will be due and payable." The safe harbor form provides a blank to fill in reading: Date from which interest on the above amount is claimed: .....… This is an interesting twitch in the code, at least for lawyers, because Section 43-4 very definitely requires one thing, while the safe harbor form portions of the code say that a memorandum substantially complies if it provides different information.

However, the memoranda in *Desai* did not provide either. They were silent about the date from which interest was claimed or the date the claim became due. However, the claimant took the position that it was not claiming interest. The affidavit provided in the safe harbor form used by the claimant does say in the affidavit that the sum listed was "payable as therein stated." The Supreme Court found that this language constituted substantial compliance with the Code requirements, at least if a claimant was not claiming interest. The Court stated that a lienholder who is not claiming any interest does not fall within the plain language of Code § 43-5. The memoranda were sufficient to alert the owner that the lien claimant was seeking amounts presently due, rather than amounts "not yet due."

In the past, many would not have been surprised to see the Virginia Supreme Court find these memoranda of lien invalid on any of the three grounds argued by the owner in *Desai*. It is noteworthy that the claimant's arguments were accepted on all three. However, the most striking part of the *Desai* opinion is the adoption of the "substantial compliance" standard in Section 43-15 to evaluate lien validity and the apparent need to find "prejudice" (damage) from the Code noncompliance. The Supreme Court held that the word "substantial" means "something of moment: an important or material matter, thing, or part." The Court held that a defect in a memorandum of mechanic's lien is substantial if it would prejudice a party or if it would thwart one of the purposes underlying the statute. Does any property owner now need to show that they were somehow damaged by missing or incorrect information in a mechanic's lien or show that the Code's purposes were somehow thwarted in order to argue a lien invalid?

Deadline for Memorandum

In order for a mechanic's lien to be valid, the statute requires that all contractors do three things. First, the Memorandum of Mechanic's Lien must be filed in the land records within 90 days from the last day of the month of the claimant's last work, but in no event later than the 90 days from the time such building or structure is completed, or the work thereon otherwise terminated.[62] Second, all contractors must serve notice of the mechanic's lien on the owner and upstream contractors.[63] Third, all contractors must file a Complaint to Enforce Mechanic's Lien within six months of the Memorandum filing.[64]

Owner

The requirement of correctly naming the owner on the mechanic's lien has led to many court rulings that a lien is invalid.[65] The owner's name must appear exactly as it appears in the land records. A developer named John Smith might form a corporation called John Smith Properties, Inc. John Smith Properties, Inc., might then buy a piece of real estate and begin development. John Smith, personally, might be on the project every day. He might act like the owner and everyone might say he is the owner. If a contractor eventually filed a Memorandum of Mechanic's Lien identifying John Smith as the "name of owner," it is an invalid mechanic's lien. There are no mechanic's lien rights whatsoever, and the owner has a complete defense.

Related Entities and Artificial Tiers

In today's market, a similar problem exists with related entities. Large Development Company, Inc., may be a well-known developer in the area, and this may be the name appearing on its letterhead and building. Large Development Company, Inc., may create separate entities for each project, however. The owner may be Large Development Company of Fairfax, Inc., for one project and Large Development Company of Arlington, Inc., for another project. The precise corporate name of the property owner must appear for a valid mechanic's lien.

---

[62] *See* section above, Time Limits for Memorandum of Mechanic's Lien.

[63] *See* subsection below, Notice of Mechanic's Lien. *See also* section below, Subcontractor and Supplier Liens; subsection, Delivery or Service of Lien Notice. *See also* section below, Defense of Payment: Owner's Responsibility for Payment to Subcontractors.

[64] *See* section below, Enforcement of Mechanic's Liens.

[65] *Wallace v. Brumback*, 177 Va. 36, 12 S.E.2d 801 (1941).

Owner's Spouse

When working with individual owners, it is necessary to identify the full legal name of the owner and add the full legal name of any spouse or other owner who jointly holds title. A contractor may deal only with John Smith and not even be aware that John Smith is married. If legal title to the property is held by Jonathan A. Smith and Jane B. Smith, as tenants by the entirety, then the mechanic's lien must identify the owners in exactly this manner.[66]

Tenants and Leaseholds

Labor and materials are often ordered not by the "fee simple" property owner but by a tenant. Such construction contracts can involve a great deal of money, when the tenant is a restaurant, large department store or large corporate office.

In general terms, a contractor can obtain a lien only on the property of the person ordering the work. An underlying property cannot be subject to a mechanic's lien if the fee simple owner did not order or authorize the work. If it is the tenant ordering the work, the tenant is the "owner" for mechanic's lien purposes.[67] The contractor cannot obtain a mechanic's lien in the building and underlying ground but can obtain a mechanic's lien in the "leasehold interest" of the tenant. In theory, the mechanic's lien holder can foreclose upon this leasehold interest and become the owner of the leasehold interest.

Other than a discussion of these general principles, little guidance is found in Virginia Supreme Court cases, and much uncertainty exists in determining when the fee simple owner's interest is subject to the mechanic's lien. Court cases make it clear that "mere knowledge" of the fee simple owner of the construction project is not enough.[68] Consent to the construction is not enough.[69] Even if a lease requires the tenant to construct a building, the fee simple owner's interest in the real property will not be subject to the lien when the tenant does construct that building.[70] On the other hand, at some point the tenant becomes the "agent" of the owner for construction purposes,[71] or the owner is so involved in the construction process that a court would decide that the fee simple owner is authorizing the construction and consciously subjecting the property to mechanic's lien rights.[72]

It is not clear what level of involvement by the owner is necessary. In the modern shopping center lease, the tenant is often required to construct improvements. The tenant must submit to the landlord detailed blueprints of the planned improvements for landlord approval. The landlord often physically signs or initials the plans as approved. The owner's participation is often necessary for rezoning applications and building permits. The landlord usually has the right to inspect and reject construction work. This collectively may be enough to subject the property to a mechanic's lien. Unfortunately, the most recent, applicable Virginia Supreme Court cases were from the year 1911, when many of these features did not exist in the typical lease document.[73]

Modern tenant projects can exceed $1 million in scope. Contractors may consider an attempt to lien both the leasehold and the underlying property in such a construction project. Owners will vigorously defend such mechanic's liens. With any luck, the tenant will be able to pay to resolve the case. Otherwise, owners and contractors must decide whether they wish to settle the case or be responsible for the creation of new Virginia Supreme Court case law.

Most modern office or shopping center leases state that the tenant will be in default if the tenant fails to pay for labor and materials supplied or if a mechanic's lien is filed. The landlord can declare the tenant in default as soon as a mechanic's lien is filed and then terminate the lease. A contractor may have nothing, if the contractor is left with a mechanic's lien in a lease that has been terminated.[74] This makes the contractor more likely to seek a lien on the underlying property.

It is also possible that a contractor could have a lien in the leasehold *improvements* themselves (the structure), even if the contractor does not qualify for a lien in the fee simple owner's interest in the real property.[75] It may be

---

[66] *Duckworth v. Satlin*, 24 Va. Cir. 157 (Va. Cir. Ct. 1991) .

[67] Va. Code Anno. §43-20 (Michie 1950).

[68] *Feuchtenberger v. Williamson, Carroll & Saunders*, 137 Va. 578, 120 S.E. 257 (1923).

[69] *T & M Elec. v. Prologis Trust*, 70 Va. Cir. 403 (Va. Cir. Ct. 2006).

[70] *Atlas Portland Cement Co. v. Main Line Realty Corp.*, 112 Va. 7, 70 S.E. 536 (1911).

[71] *Carter v. Keeton & Coleman*, 112 Va. 307, 71 S.E. 554 (1911) [In order to bind the fee owner's interest in the land, it must appear that the tenant making the repairs was her agent for that purpose].

[72] *In re Presidential Golf Course Claims*, 83 Va. Cir. 541, 543-544 (Va. Cir. Ct. 2010).

[73] *Atlas Portland Cement Co. v. Main Line Realty Corp.*, 112 Va. 7, 70 S.E. 536 (1911).

[74] *Feuchtenberger v. Williamson, Carroll & Saunders*, 137 Va. 578, 120 S.E. 257 (1923).

[75] *In re Presidential Golf Course Claims*, 83 Va. Cir. 541, 543-544 (Va. Cir. Ct. 2010).

helpful to have the right to foreclose upon the improvements, even if there is no right to foreclose on the real estate. There is also some support in some states for the theory of merger. When a landlord retakes premises, the leasehold and the fee merge, subjecting the owner's interest to the lien against the tenant's interest.[76]

Contract Purchaser

A "Contract Purchaser" or "Vendee" may begin construction on real property, which is "under contract" but has not yet gone to settlement. A contractor in such a case is in a similar position to a contractor working for a tenant.[77]

If the contract purchaser eventually takes title to the property, then the contractor will presumably be in the same position as if the contractor were always working directly with the owner of the property. If the contract purchaser never takes title to the property, however, Virginia Code Section 43-20 states that the contractor's mechanic's lien will still attach to the property so long as the owner had "actual knowledge" of the construction project. The priority of this mechanic's lien must, however, be carefully considered.

Most "priority" issues are discussed in greater detail below. In this case, however, if the mechanic's lien is foreclosed upon, the owner of the property is "preferred" or gets a "priority" in the proceeds of the foreclosure sale. The owner is preferred in the proceeds of sale to the extent of the purchase price in the contract to sell the property.

The owner, for example, may contract to sell the property for $100,000. The contract purchaser may have a house constructed on the property before settlement. The contract purchaser may then default on the contract to purchase the land and the contract to pay for the house constructed. The contractor can file a mechanic's lien and then foreclose upon the property. Upon foreclosure, the owner of the property will get the first $100,000. The contractor will then get whatever proceeds are left, until the mechanic's lien is satisfied. The law protects the owner of the property by making sure that the owner gets the amount of money in its contract. The law also protects the contractor by allowing the contractor a mechanic's lien. The contractor is entitled to the value added to the property by the labor and materials. If the foreclosure sale does not bring enough proceeds to satisfy both the owner and the contractor, however, the contractor will take the loss because the owner of the property has "priority."

Notice of Mechanic's Lien

A general contractor must also file with the Memorandum of Mechanic's Lien a certification of mailing to the owner of the property at the owner's last known address.[78] Presumably, this means that the memorandum must be sent to the owner before it is actually filed. Otherwise, it would be impossible to sign a certification that notice of lien was mailed and include that certification along with the lien filed. If a "bring down" title search at the time of lien filing necessitates an amendment to the lien before filing, the safe course would be to mail the amended lien to the owner and sign a new certification to be filed with the amended lien.

There is no specific form of the notice required by the code for general contractor with a direct contract with the owner. A subcontractor or more remote contractor, however, must send a specific form of notice of the lien to the owner and upstream contractors. This is for different defense of payment reasons, discussed below.[79]

Although not specifically required, it is advisable to send the memorandum to the owner Certified Mail Return Receipt requested.[80]

Address for Owner

Having the correct address for the owner on the face of the memorandum for lien has not caused much controversy, but the owner must actually receive the required notice from subcontractors and other remote contractors discussed below.[81] As discussed above, the general contractor must certify that the memorandum was mailed to the owner at

---

[76] *See e.g.*, *Waite Lumber Co. v. Masid Bros., Inc.*, 189 Neb. 10, 14, 200 N.W.2d 119, 122 (1972); *Evans v. Young*, 10 Colo. 316, 323-24, 15 P. 424, 427-28 (1887); *Koenig v. Mueller*, 39 Mo. 165, 169 (1866).

[77] *Feuchtenberger v. Williamson, Carroll & Saunders*, 137 Va. 578, 120 S.E. 257 (1923).

[78] Va. Code Anno. §43-4 (Michie 1950); *Britt Constr., Inc. v. Magazzine Clean, LLC*, 271 Va. 58, 623 S.E.2d 886 (2006); *Capstone Contr. Co. v. Am. Eagle Selfstorage, L.L.C.,* 72 Va. Cir. 473, 475 (Va. Cir. Ct. 2007) [The requirement that a certification of mailing be filed along with the memorandum is applicable only to general contractors, and not to subcontractors].

[79] *See also* section below, Defense of Payment: Owner's Responsibility for Payment to Subcontractors.

[80] Va. Code Anno. §43-14.1 (Michie 1950); *see also* Va. Code Anno. §43-64 (Michie 1950) How notices served, acts done, etc., in case of bankruptcy, death or absconding.

[81] *Coleman v. Pearman*, 159 Va. 72, 165 S.E. 371 (1932); *Mills v. Moore's Super Stores*, 217 Va. 276, 227 S.E.2d 719 (1976).

the owner's last known address, but there does not seem to be any requirement of actual receipt of that notice from a general contractor.

An address for the owner can be obtained from the contract documents, correspondence, tax assessment rolls or the State Corporation Commission. The tax assessment rolls are a reliable source as this is where the county sends tax bills every year. If the owner is a corporation or limited partnership, it must have a registered agent listed with the State Corporation Commission. If either of these addresses is different from the address in the contract documents or correspondence, then a contractor should consider using more than one address to make sure the owner receives proper notice.

Description of Property

This is a troublesome portion of the mechanic's lien. Needless to say, if you lien the wrong property, you have an invalid lien. The "Description of Property" portion of the mechanic's lien is linked to the "legal description" of the property to which labor and materials were supplied. The correct description of the property is found in the county land records and a thorough title search is again indispensable. Some types of property are not lienable at all. The extent of the reach of a mechanic's lien is also often a question, even if the exact legal description of the property is not.

Extent of the Lien

Virginia Code Section 43-3(a) states that "all persons supplying labor or materials shall have a lien upon the building or structure constructed" and "so much land therewith as shall be necessary for the convenient use and enjoyment ..." of the building or structure.

In other words, if a contractor builds a shed in one corner of a 350-acre farm, the lien filed can and should describe the full parcel; however, the contractor will not be able to foreclose on the entire 350-acre farm. The mechanic's lien will be a lien upon the shed itself and the amount of land necessary to make "convenient use and enjoyment" of the shed.

In one early 20th century case, a Virginia Circuit Court was faced with a farmhouse constructed on a large farm. The court ruled that the mechanic's lien extended to a small amount of acreage surrounding the farmhouse.[82] The court created a road easement across the balance of the farm to reach this farmhouse, presumably deciding that such an easement was necessary for the "convenient use and enjoyment" of the farmhouse. In another 19th century case, a contractor built a house in a town. The Virginia Supreme Court decided that the entire lot in such a town would be necessary for the convenient use and enjoyment of the building.[83] In a more recent case, the trial court ordered that an entire 22-acre parcel be sold, in order to bring enough money to pay all the liens. However, the entire incomplete building accounted for only 2.8 acres. The Virginia Supreme Court overruled this portion of the decision and ordered the trial court to determine how much of the land was "necessary for the convenient use and enjoyment" of the building.[84]

Public Property

Contractors are not allowed to lien public property.[85] Any lien filed on public property is invalid. It is as if no lien was ever filed. In most cases, contractors who work on public property such as schools, firehouses and highways have protection in the form of Little Miller Act payment bonds. Bond rights are in many ways better than mechanic's lien rights, so the contractor is not injured.

A special problem exists when a private developer must perform some "off-site improvements." An office building or residential subdivision developer may need to widen the public road fronting the project. The portion of the labor and materials (asphalt, stone, etc.) that is used on the public road right-of-way is on public property. The public right-of-way cannot be liened for that portion of the labor and materials. Consequently, the contractor must be very careful liening the office building for the labor and materials in the right-of-way. This is the same over-burdening

---

[82] *Federal Land Bank v. Clinchfield Lumber and Supply Co.*, 171 Va. 118, 198 S.E. 437 (1938).

[83] *Pairo v. Bethell*, 75 Va. 825 (1881).

[84] *Glasser & Glasser, PLC v. Jack Bays, Inc*., 285 Va. 358, 382-82, 741 S.E.2d 599, 611-12 (2013).

[85] *London Bros. v. National Exch. Bank*, 121 Va. 460, 93 S.E. 699 (1917).

case in Amount Claimed, Overburdening, below.[86] The only possible solution to this problem is to file a Virginia Code Section 43-3(B) Memorandum of Disclosure.[87]

Title Search

To properly prepare a mechanic's lien, there is no substitute for a thorough title search in the land records. A complete title search is the only way to determine the legal name of the owner and the correct legal description of the property.[88] It is the title search that requires the greatest lead time in preparing a mechanic's lien, reveals the greatest complexities in preparing a mechanic's lien and has the greatest impact on the costs of preparing a mechanic's lien.

In a clearly defined residential subdivision, a title search will be relatively simple, fast and inexpensive. When there is no doubt that labor and materials went on Lot 2, a title search will show that Lot 2 is owned by John and Jane Smith. In complex and large developments, however, the development property has often been assembled by joining several parcels of land, then later subdivided. The developer may re-subdivide one or more times after that, as the developer becomes aware of the needs of new tenants or purchasers. These changes can be very hard to follow through the land records. A lawyer has to be part surveyor in order to figure out exactly which parcel of land now contains the labor and materials supplied. A title search may take one hour or it could take 15 hours; the search is the greatest variable in determining the costs of a mechanic's lien.

The title search also creates the greatest need for lead time to prepare a mechanic's lien. A complex title search can easily take a week. They are often performed by outside title search companies that are very busy. If an account is more than 60 days past due, the creditor should consider ordering a title search. An attorney should be willing to order a search without spending any further attorney time on the file. If the search proves to be relatively simple, costs should be $50-$150. Once the title search is obtained, a Memorandum of Mechanic's Lien can be prepared in just a few days. If the search proves to be complex, or if there are multiple parcels for allocation, then the contractor will be very glad that it was started early.

The end of each month is a very busy time for mechanic's lien work and residential real estate settlements. It may be possible to perform one title search and prepare one mechanic's lien on short notice. The reality is, however, that many clients get the same idea at the end of the month. During this time period, title search companies are also very busy with real estate settlements. Waiting until the end of the month increases chances of mistakes, drives up costs and increases the chances of missing deadlines altogether.

Claimant

The claimant should provide its correct legal name, which should be the same name appearing on any contract to supply labor or materials.[89] This should also be the same name appearing on business and contractor's licenses. If the claimant is a partnership or corporation, it should also be qualified to do business in the State of Virginia through the State Corporation Commission, although the status of out-of-state material suppliers is less certain. A contractor providing labor and materials for a construction project in the state must have a Virginia Contractor's License.[90] Lack of a proper contractor's license can be a complete defense to a contract claim or a mechanic's lien. If all of these prerequisites are not met, the claimant may not be entitled to payment for labor and materials supplied.

The claimant should provide a good address for the purposes of future notice. The claimant will want to receive notice of any attempts to have the lien removed or bonded off. If an address is changed after a mechanic's lien is

---

[86] *Dominion Trust Co. v. Kenbridge Constr. Co.*, 248 Va. 393, 448 S.E.2d 659 (1994).

[87] *See* section below, Amount of Claim and Allocation; sub-sub-subsection, Liens Required under Section 43-3(B), Subdivision Streets and Off-Site Improvements.

[88] *Wallace v. Brumback*, 177 Va. 36, 12 S.E.2d 801 (1941).

[89] *G.H. Watts Constr., Inc. v. Cornerstone Builders, LLC*, 95 Va. Cir. 121, 123 (Va. Cir. Ct. 2017) [On the first page of the Memorandum the claimant is identified as "G.H. Watts Construction, Inc." On page two the claimant is identified as "Gary H. Watts." The affidavit of the Notary states that "Gary Watts" signed as "claimant" and not as "agent for claimant." The Memorandum does not substantially in form and effect identify the claimant as required by Va. Code § 43-8. The Demurrer to Count I is sustained]; *Davenport Insulation of Harrisonburg, Inc. v. Aliff,* 50 Va. Cir. 314, 316-17 (1999) [The lien is invalid because the memorandum names as claimant an entity other than that which entered into the contract or performed the work]; *discussing TQY Investment v. Rodgers Co.,* 26 Va. Cir, 40 (Fairfax County 1991) [clear from the lien and the affidavit together who the correct parties are, then the lien will not be invalidated. The claimant named Bogle Group II, L.P., rather than Bogle Construction Co., Inc., in the memorandum of lien as the debtor. However, the party was correctly identified in the affidavit].

[90] Va. Code Anno. §54.1-1103 (Michie 1950); *J.W. Woolard Mechanical v. Jones Development*, 235 Va. 333 (1988).

filed, but before a Complaint to Enforce Mechanic's Lien, a claimant should consider filing a Notice of Change of Address in the land records.

Remote Suppliers and Subcontractors

It is not clear exactly how far down the contract chain lien rights go. All claimants should file liens, as long as they can "trace" their labor or materials to the property. It is clear that lien rights extend to general contractors, subcontractors, and sub-subcontractors, but the status of lower tier contractors is somewhat uncertain. The Code provides a definition of "general contractor" and "subcontractor" but does not provide a definition for sub-subcontractors or any lower tier contractor.[91] The Code provides forms to be used by general contractors, subcontractors and sub-subcontractors, but does not provide any additional forms. However, these omissions probably do not preclude lower tier contractors from mechanic's lien rights. Section 43-3 of the Code states that "*all persons* performing labor or furnishing materials ... shall have a lien ..." This indicates that there would be no limit to lien rights for lower tier subcontractors so long as an upstream debt is established.

Architects and Engineers

Virginia Code Section 43-2 makes it clear that lien rights exist for "any surveying" required for the improvement. The status of other engineers and architects, however, is less clear. Virginia Supreme Court case law states that an architect actually involved on site in the construction process does have mechanic's lien rights.[92] It is unclear, however, about lien rights of an architect with no on-site responsibilities. Although it is certain that a set of plans is essential to the construction of the improvement and also contributes to the value of the property, it is not certain whether mechanic's lien rights exist. Engineers are in a similar situation. On-site surveying provides mechanic's lien rights. The status of drafting time back in the office, after surveying has been performed, is less certain.

Lien rights for architects, engineers and even surveyors are much more in doubt if no structure is ever constructed. Surveyors and engineers providing boundary surveys, topographic studies, site plans, etc., will add considerable value to unimproved property, especially if these documents are used in a rezoning process or are recorded in the land records. It is very questionable, however, whether an engineer or surveyor will have lien rights if that owner does not utilize the engineering and surveying work to build a structure in connection with or around the same time that surveying or engineering work is performed.[93]

Assignment of Mechanic's Lien Rights

The most obvious observation is that an assignment of mechanic's lien rights is not effective if the claimant is not owed any money on the project. If the claimant was paid or the claimant defaulted on its contract, then the claimant also has no mechanic's lien rights. Anyone with an assignment of lien or bond rights from the claimant has no enforceable rights on the project.

In addition to problems when *the claimant* is not owed money, any supplier with an assignment of mechanic's lien rights has no enforceable rights on the project if *the claimant's customer* on the project has been paid because of the "defense of payment." In other words, even if the claimant is owed money, the claimant will have no lien rights if upstream contractors have been paid.

In Virginia, mechanic's lien rights are assignable, at least once a memorandum of lien has been recorded.[94] The assignability of mechanic's lien rights may depend on whether the labor or material has already been supplied, so that the mechanic's lien rights already exist at the time of assignment. The assignability of mechanic's lien rights

---

[91] Va. Code Anno. §43-1 (Michie 1950).

[92] *Cain v. Rea*, 159 Va. 446, 166 S.E. 478 (1932).

[93] *See* subsection below, Structure; *Dallan Constr., Inc. v. Super Structures Gen. Contrs., Inc.,* 79 Va. Cir. 11, 13 (Va. Cir. Ct. 2009) [There will be no mechanic's lien rights where an architect (or any other laborer) performed work to enhance a building, but cannot show that their work enhanced the building].

[94] Va. Code Anno. §8.01-13; Va. Code Anno. §43-65 (Michie 1950) [Protection of assignees, transferees or endorsees of debts secured by mechanics' or crop liens. Whenever any debt secured on real estate or personal property by a mechanics' or crop lien has been assigned, transferred, or endorsed to another, in whole or in part by the original payee thereof, such payee, assignee, transferee, or endorsee may cause a memorandum or statement of the assignment to such assignee, transferee, or endorsee to be recorded, which memorandum or statement shall be signed by the assignor, transferrer, or endorser, or his duly authorized agent or attorney, and when so signed and the signature thereto attested by the clerk in whose office such encumbrance is recorded the same shall operate as a notice of such assignment and transfer. Such assignment, transfer, or endorsement shall reference the book and page where the original debt secured on real estate or personal property is recorded ...]. This statute at least allows assignment of a recorded mechanic's lien.

may also depend on whether the mechanic's lien has already been perfected (filed) at the time of assignment.[95] Legal rights are generally assignable and this does allow a general prediction that mechanic's lien rights are also assignable.[96]

Materials or Services Furnished

This part of the mechanic's lien has not resulted in much question or litigation.[97] This means we do not have guidance from any court cases but probably also means that this part of the lien is less likely to be a problem. It is important to accurately describe the labor and materials supplied. The contractor should not describe labor and materials that it did not yet supply. This would arguably be "overburdening." It also is important to be descriptive and describe all labor and materials supplied, especially if other contractors were supplying similar labor and materials. For example, "all labor and materials necessary for masonry portions of residential dwelling, including cinder block, brick, mortar and incidental materials" is probably a sufficient description.

Tracing Materials from Off-Site Suppliers

Lumber yards, HVAC equipment manufacturers, electrical supply houses and similar material suppliers that do not actually deliver materials to the project still have mechanic's lien rights so long as the materials can be "traced." The supplier must be able to establish with reasonable certainty the amount of materials supplied to each project.[98] If the supplier cannot show where materials were used, the supplier may not have mechanic's lien rights. If the supplier cannot show the materials were used in a qualified "structure," the supplier may also not have mechanic's lien rights.[99]

For this reason, suppliers should require information from all material purchasers at the "point of sale" concerning the location where materials will be used. Computer programs used by suppliers for creating invoices or sales tickets should require this information before the sale can be completed. This usually will enable the supplier to establish the location of materials with reasonable certainty to support a mechanic's lien.

Suppliers who actually deliver to the project will usually have signed delivery tickets or other evidence of the "situs" of the materials. Even suppliers that deliver materials should require "lot" information at the point of sale. This will help solve problems that occur when a construction project actually involves multiple units or properties.[100]

Site Improvements and Landscaping

Section 43-2 of the Code of Virginia states that all shrubbery, earth, sod, sand, gravel, brick, stone, pipe, equipment supplied, surveying services and similar items "required for the improvement of the grounds upon which such building or structure is situated shall be deemed to be materials furnished for the improvement of such building or structure..."[101] Claimants supplying any of these items, therefore, will have lien rights, as long as the materials were used in a qualified "structure."

---

[95] *Talco Capital Corp. v. State Underground Parking Comm'n,* 324 N.E.2d 762, 767 (Ohio Ct. App. 1974); *Gould, Inc. v. Dynalectric Company,* 435 A.2d 730 (Sup.Ct. Del 1981).

[96] *Bristol Iron & Steel Co. v. Thomas,* 93 Va. 396, 397 (1896) [As a general rule, any contractual right is assignable, and the assignment carries with it all liens given for its security. An assignee was entitled to perfect the inchoate lien which existed for the benefit of his assignor]; *Iaege v. Bossieux,* 56 Va. 83 (1859) [There is nothing in public policy or in the language or the policy of our act to forbid it; and if the statute be exclusively for the benefit of the builder and material-man it would certainly impair the value of his lien to declare it non-assignable]; *Davis v. Bilsland,* 85 U.S. 659 (1873) [Based on Montana mechanic's lien statute, U.S. Supreme Court ruled that mechanic's liens are assignable. Claimant had "completed his claim by filing his lien before assigning it to the plaintiff. It was perfectly lawful for him to assign his claim. It was not against any principle of public policy to do so." This case also at least allows assignment of a recorded mechanic's lien].

[97] *BP Realty, LP v. Urban Eng'g & Assocs., Inc.,* 2009 Va. Cir. LEXIS 48 (Va. Cir. Ct. Aug. 4, 2009) [With respect to a description of the work involved, §43-4 merely requires the claimant to state the "amount and consideration of his claim." For mere perfection, there appears to be no requirement that the description invoke the particular descriptive words used in §§43-2 and 43-3. The Court is not aware of a case in which the Virginia Supreme Court has held a lien invalid based on the description of the work done, other than the cases involving a violation of the 150 day limitation period].

[98] *Addington-Beaman Lumber Co. v. Lincoln Sav. & Loan*, 241 Va. 436, 403 S.E.2d 688 (1991).

[99] *See* subsection below, Structure.

[100] *See* section below, Amount of Claim Allocation; subsection, Open Account Suppliers.

[101] Va. Code Anno. §43-2 (Michie 1950).

Section 43-2 also states that a well, excavation, sidewalk, driveway, retaining wall, water or drainage system and the like "shall be deemed a structure." Claimants supplying any of these items, therefore, will have lien rights, whether a building is ever completed or not.[102]

Site Development Improvements, Roads and Utilities

The General Assembly created special provisions for contractors supplying "site development improvements" to serve an entire subdivision. These provisions assist a road builder, for example, who is building an access road to serve all of the lots in a subdivision. These site development provisions help to solve unsolvable problems, but contractors must be careful to make sure they comply with the special provisions.[103]

The Code states that "'Site development improvements' means improvements which are provided for the development, such as project site grading, traffic signalization, and installation of electric, gas, cable or other utilities, for the benefit of the development rather than for an individual lot." There are mechanic's lien rights for these types of labor or materials, therefore, at least when they are supplied to a subdivision development.[104]

Rental Equipment

The Code makes it clear that there are mechanic's lien rights for equipment. The "reasonable rental or use value" of equipment required for the improvement of the grounds are deemed to be materials furnished.[105] This language makes it clear that equipment renters have mechanic's lien rights, as long as the equipment is used in a qualified "structure."[106] Owners of equipment would have the same rights for the "use value" of the equipment, whether or not there was actually a rental.

Structure

The exact description used for this item does not seem to cause much controversy. Typical descriptions include "single family residential dwelling" or "two-story masonry and steel office building."

It does seem necessary to have a qualified "structure" for lien rights to exist.[107] Virginia Code Section 43-3(a) states that all persons supplying labor or materials for the construction of "any building or structure permanently annexed to the freehold *shall have a lien…upon such building or structure* and so much land therewith as shall be necessary for the convenient use and enjoyment…" of the building or structure. In other words, the lien is on the "structure." If there is no structure, there may not be any lien.[108]

Not all improvements to real estate will be a "structure" to which lien rights will attach. Years ago, contractors more often had trouble showing they supplied labor or materials to any type of structure. For example, an excavator may expend considerable time and energy digging a hole, but is that a "structure?" What about landscapers and equipment suppliers?

Many of these problems were solved by a special Virginia Code Section 43-2, which reads as follows:

> **Structures, materials, etc., deemed permanently annexed to freehold.**...a well, excavation, sidewalk, driveway, pavement, parking lot, retaining wall, curb and/or gutter, breakwater (either salt or fresh water), water system, drainage structure, filtering system (including septic or waste disposal systems) or swimming pool *shall be deemed a structure* permanently annexed to the freehold, and all shrubbery, earth, sod, sand, gravel, brick, stone, tile, pipe or other materials, together with the reasonable rental

---

[102] *See* subsection below, Structure.

[103] *See* section below, Amount of Claim and Allocation; subsection, Site Development Improvements, Roads and Utilities–Section 43-3(B).

[104] Va. Code Anno. §43-3(B) (Michie 1950).

[105] Va. Code Anno. §43-2 (Michie 1950); Va. Code Anno. §43-3(A) (Michie 1950).

[106] *BP Realty, LP v. Urban Eng'g & Assocs., Inc*., 79 Va. Cir. 176 (Va. Cir. Ct. 2009); *But see Able Equip. Co. v. Walter A. Ellis Constr. Corp*., 27 Va. Cir. 498 (Va. Cir. Ct. 1989).

[107] *Dallan Constr., Inc. v. Super Structures Gen. Contrs., Inc*., 79 Va. Cir. 11, 1-2 (Va. Cir. Ct. 2009) [Lien invalid when nothing provided by or derived from the lien claimants efforts was employed in the construction of the building on the real property against which the mechanic's lien is asserted]; *Summit Cmty. Bank v. Blue Ridge Shadows Hotel & Conf. Ctr*., 428 B.R. 231 (W.D. Va. 2010) [supply of sleeper sofas, lounge chairs, desk lamps, pillows, game tables, desks, benches, chairs, artwork, mirrors and design and purchasing services for these items were not for the improvement of the building within the meaning of §43-3].

[108] *Weaver v. Harland Corp*., 176 Va. 224, 230, 10 S.E.2d 547, 549 (1940) [It is not the contract for erecting the building which creates the lien, but it is the use of the materials furnished which gives the materialman his lien under the statute].

> or use value of equipment and any surveying, grading, clearing or earth moving required for the improvement of the grounds upon which such building or structure is situated *shall be deemed to be materials* furnished for the improvement of such building or structure and permanently annexed to the freehold. (emphasis added)

This section states that a well, excavation, sidewalk, driveway, retaining wall, water or drainage system and the like "*shall be deemed a structure*." If any of these items are supplied to a property, therefore, it will create rights to a mechanic's lien, whether or not another building is ever completed.

Section 43-2 goes on to say that all shrubbery, earth, sod, sand, gravel, brick, stone, pipe, equipment supplied, surveying services and similar items "required for the improvement of the grounds upon which such building or structure is situated *shall be deemed to be materials furnished for the improvement of such building or structure ...*"[109]

There is very little case law on this code section, but the subtle difference in wording in italics above would indicate that a well, excavation, sidewalk, etc., is a "structure" and results in lien rights, whether any other building is constructed or not.[110] Shrubbery, earth, sod, sand, etc., however, would not result in lien rights unless there is eventually a "structure" completed in connection with these items.

This code section does make it clear that equipment use provides lien rights for their "reasonable rental or use value."[111] This section also establishes that surveyors have lien rights. However, there is still uncertainty about other engineers and architects.[112] Lien rights are even more uncertain if plans are never used to construct a "structure."[113]

The Virginia Supreme Court has ruled that lien rights still exist if materials are removed from a structure once installed. The court stated that removal of the materials was "irrelevant" and that the "legislature could not have intended that the supplier's mechanic's lien may be avoided by simply removing from the building the materials furnished and incorporated in it." This case may still require that the materials be delivered, accepted and installed, adding value to the structure.[114]

Intervening Contractors

It is not clear whether it is necessary to name the general contractor or any other intervening contractors in the payment chain from the claimant to the owners. The form of mechanic's lien supplied in the Virginia Code provides a blank to fill in the name of such intervening contractors. The form in the Virginia Code is a "safe harbor" form that states explicitly that the "memorandum, affidavit and notice required ... shall be sufficient if substantially in form and effect as follows."[115] This is different than saying the memorandum "must be in the following form."

Other sections of the code state definitively what the lien must show and does not mention general or other intermediate contractors.[116] There is no law stating that identifying them is a necessary or indispensable portion of the lien, although a claimant does need to give notice of a mechanic's lien to these entities in order to stop the flow of money.[117] The exact legal name of the owner will be revealed by a thorough title search.[118] Intermediate contractors, however, will not appear in the land records.

Problems can arise when multiple related entities are involved in the construction project. A contractor may deal with Big Developer, Inc., that acts like the project owner. The legal owner of the property, however, may be Big Project Limited Partnership. Technically, Big Project L.P., has hired Big Developer, Inc., as general contractor.

Sub-subcontractors may have difficulty determining the names of intervening contractors between themselves and the owner. It is important, however, to identify each intervening entity and provide notice of the mechanic's lien. The Virginia Supreme Court may eventually decide that a sub-subcontractor cannot be required to give notice

---

[109] Va. Code Anno. §43-2 (Michie 1950).

[110] *Rosser v. Cole*, 237 Va. 572, 379 S.E.2d 323 (1989).

[111] *But see Able Equip. Co. v. Walter A. Ellis Constr. Corp*., 27 Va. Cir. 498 (Va. Cir. Ct. 1989).

[112] *See* section above, Claimant; subsection, Architects and Engineers.

[113] *Dallan Constr., Inc. v. Super Structures Gen. Contrs., Inc.,* 79 Va. Cir. 11, 13 (Va. Cir. Ct. 2009) [There are no mechanic's lien rights where an architect (or any other laborer) performed work to enhance a building, but cannot show that their work enhanced the building].

[114] *Moore & Moore General Contractors, Inc. v. Basepoint, Inc.*, 253 Va. 304, 485 S.E.2d 131 (1997*); See also Summit Cmty. Bank v. Blue Ridge Shadows Hotel & Conf. Ctr*., 428 B.R. 231 (W.D. Va. 2010).

[115] Va. Code Anno. §43-8 (Michie 1950) and Va. Code Anno. §43-10 (Michie 1950).

[116] Va. Code Anno. §43-4 (Michie 1950).

[117] *See* section below, Defense of Payment: Owner's Responsibility for Payment to Subcontractors.

[118] *See* subsection above, Title Search.

to or to name intervening contractors of which it could not be aware. However, until this decision is reached, sub-subcontractors should not take a chance and should try to name all intervening contractors on the lien.

The existence of multiple entities and artificial tiers also raises the possibility of a defense of payment, discussed below. If the owner and general contractor are related, it is possible that the owner will prepay the general contract. There is a greater possibility of collusion.

Interest

The lien should state the "date from which interest on above amount is claimed." This should be the date on which payment was due and be determined by looking at the contract with the debtor. The contract may say "due upon completion" or may say "30 days after invoice." In either event, you should compute the precise day the debt was due. If you do not have a written contract or if the contract is silent on the due date, then the debt would be due on the date the contract was complete.

The Virginia Supreme Court has reaffirmed that a mechanic's lien carries interest. This can be very important and can involve a lot of money, since mechanic's lien litigation can end long after work is completed. The mechanic's lien carries interest at the legal rate, currently 6%, unless there is a contract agreement for a different rate.[119]

The Virginia Supreme Court also ruled that a mechanic's lien carried interest at 18% per annum, where the contract stated that past due invoices would carry interest at that rate.[120] This case was decided by the Supreme Court years after the labor and materials had been provided. The large amount of interest recovered went a long way toward compensating the supplier for losses. For this reason, all contractors want a contract term calling for a high rate of interest. In this case, the mechanic's lien supplier had a contract directly with the owner of the property. Although it is arguable whether a subcontractor can get interest above the legal rate, it is still advisable for a subcontractor to put a high interest rate in its contract.

If a claimant desires to claim interest at a rate above the legal rate, it is advisable to give notice of this, by stating on the recorded memorandum the rate at which interest is claimed.

Affidavit

A Memorandum of Mechanic's Lien must be accompanied by an affidavit in the form shown above.[121] Someone with personal knowledge of the facts of the case should sign an affidavit. An affidavit for a corporation should be signed by its president, vice president, general manager, cashier, treasurer or director.[122] An affidavit for a partnership should be executed by a general partner. The affidavit should reflect the title of the person signing it and must be notarized.[123]

The affidavit should also state that the person signing is "an authorized agent" of the mechanic's lien claimant.[124] This rule comes from an older Virginia Supreme Court case that ruled a lien invalid because it did not explicitly state that the signature was by an agent.[125] An affidavit for a corporate subcontractor, therefore, should read something like this:

> State of Virginia;
>
> County of Fairfax:
>
> I, ……., notary for the aforementioned state and county, do certify that John K. Smith, Vice President and Agent for Claimant, this day made oath before that General Contractor, Inc. is justly indebted to Claimant in the sum of $100,000 for the consideration stated in the foregoing memorandum, and that the same is payable as therein stated.

---

[119] *American Std. Homes Corp. v. Reinecke*, 245 Va. 113, 425 S.E.2d 515 (1993).

[120] *American Std. Homes Corp. v. Reinecke*, 245 Va. 113, 425 S.E.2d 515 (1993).

[121] Va. Code Anno. §43-4 (Michie 1950).

[122] Va. Code Anno. §49-7 (Michie 1950).

[123] *Artitech, Inc. v. Naser,* 75 Va. Cir. 39 (Va. Cir. Ct. 2008) [A memorandum of a mechanic's lien must be verified by the oath of the claimant or his agent. The mechanic's lien was invalid because the affidavit failed to identify the capacity of the person executing on behalf of the claimant, or that such person is indeed an agent for the complainant].

[124] *John Diebold & Sons' Stone Co. v. Tatterson*, 115 Va. 766, 80 S.E. 585 (1914).

[125] *Clement v. Adams Bros.-Paynes Co.*, 113 Va. 546, 75 S.E. 294 (1912).

Given under my hand this day …… of ……., 20…...

……
NOTARY PUBLIC

My Commission Expires:……

AMOUNT OF CLAIM AND ALLOCATION

The amount of the claim would seem straightforward, but it can be deadly.

Overburdening

No parcel of property should be liened for more than the value of the labor and materials that went into it. Overburdening can occur on a single property project. If a contractor liens for more than the labor and materials supplied, this is overburdening.

In a Virginia Supreme Court case, a general contractor was owed $310,000 on a project. The vast majority of the labor and materials provided was used for the actual property liened. A small amount was actually in the public street for required off-site improvements. The contractor liened the property for all labor and materials supplied, including the small amount off site. The Virginia Supreme Court ruled the entire lien invalid, although this lien claimant perhaps could have reduced the lien amount claimed before the final trial court judgment.[126]

The tough lesson of this case is that the contractor must be aware of the legal property lines and must be able to determine the value of labor and materials supplied on each side of the property line. This case actually involved two pieces of property, the owner's property and the public right of way, but is a good example of overburdening.[127] The amount claimed must be linked to the description of property. If a contractor supplies labor and materials to multiple parcels of land, the amount claimed must be properly allocated to each parcel.[128] If labor and materials are misallocated on a multiple property project, one parcel will be underliened and the other will be overburdened.[129]

Forfeiture of Lien

If you try to claim more than you are entitled to, you can lose your entire lien. Section 43-23.1 of the Code of Virginia states that a contractor will forfeit any right to a lien if a memorandum of lien includes work not performed or materials not furnished "with intent to mislead." The most obvious problem would be labor and materials not furnished. If the contract is not complete, it would be very risky to claim the entire contract balance.[130]

Recent Virginia Supreme Court cases do give some assurance that contractors will not forfeit their lien if they fail to prove entitlement to the full amount claimed on a memorandum of lien if there is no intent to mislead.[131] A recent case refused to automatically dismiss a mechanic's lien and allowed a subcontractor the present evidence that improper amounts included in the lien were an "error."[132] The "savings" statute, Virginia Code Section 43-15, states that "no inaccuracy ... shall invalidate the lien if ... the memorandum conforms substantially to the requirements ... and is not willfully false."[133]

One earlier case implied that it would not be fatal to "merely claim a larger sum than its proof would perhaps support. That kind of over-inclusiveness is a traditional problem faced by a landowner and one that a trial court resolves when determining how much of a claimed lien should be allowed."[134] It is clear, however, that claimants can lose their entire lien in some instances if impermissible amounts are included in a lien.

---

[126] *Dominion Trust Co. v. Kenbridge Constr. Co.*, 248 Va. 393, 448 S.E.2d 659 (1994).

[127] *See* sub-subsection below, Liens Required under Section 43-3(B), Subdivision Streets and Off-Site Improvements.

[128] *Addington-Beaman Lumber Co. v. Lincoln Sav. & Loan*, 241 Va. 436, 403 S.E.2d 688 (1991).

[129] *See* section above, Amount of Claim and Allocation.

[130] *Moore v. Rolin*, 89 Va. 107, 15 S.E. 520 (1892).

[131] *Carolina Builders Corp. v. Cenit Equity Co.*, 257 Va. 405, 512 S.E.2d 550 (1999).

[132] *Reliable Constructors v. CFJ Properties*, 559 S.E.2d 681, 263 Va. 279 (2002).

[133] Va. Code Anno. §43-15 (Michie 1950), *See* subsection above, Form of Memorandum.

[134] *Carolina Builders Corp. v. Cenit Equity Co.*, 257 Va. 405,412, 512 S.E.2d 550 (1999).

150-Day Rule

The 150-day rule, discussed in greater detail above, is a specific condition in the code that a claimant must fulfill "in order to perfect the lien given by" the code. Violating this limitation will invalidate liens,[135] although a claimant may have the opportunity to show that any lien amounts outside the 150-day window were an "inaccuracy" that was not "willfully false."[136]

Delay Claims

A contractor who includes delay claims, acceleration claims or other "soft" claims in their lien is also running the risk that their lien will be considered overburdening and invalid. While there is no Virginia Supreme Court case providing us guidance on this question, it would be very risky to include these items in a lien, since they are not labor or materials incorporated into the property. Delays may cost money, but they do not add value to the property. They may be valid contract claims against the contract debtor, but they may not provide grounds for a mechanic's lien. Contractors can consider filing a separate lien for such soft claims or other questionable items. If this questionable lien is ruled invalid, the contractor may still have an effective lien for its hard claims.

Allocation

Allocation concerns liening the correct property for the correct dollar amount. A lien is "overinclusive" or "overbroad" if it liens property to which the contractor supplied no labor or materials. A lien is "overburdening" if it liens a property for more than the value of the labor and materials supplied to that property. These are obviously related concepts.

Allocation issues involve multiple pieces of property. A townhouse building, for example, includes multiple townhouse units. Each townhouse unit is a separate parcel of real estate.[137] Can a single lien be filed for all labor and materials supplied on the townhouse building? What about "site improvements" like a storm drainage structure that will serve 50 lots in a subdivision? How is the value of provided labor and materials allocated? Condominiums present a problem even more complex. The entire condominium is on a single parcel of real estate, but each condominium unit is separately owned. These problems required special help from the Virginia General Assembly in the form of special code provisions.

Overinclusiveness

A contractor cannot lien property to which it supplied no labor and materials.[138] If a contractor does, the lien is invalid as overinclusive or overbroad. There is no lien on any of the property. Obviously, for this problem to occur there must be more than one piece of real estate. The simplest case would involve two adjoining lots in a town with the same owner. The owner contracts to build a house, but that house is actually sited entirely on one of the lots. If a lien is filed identifying both lots in the description of property, the lien is overbroad and probably invalid.

Parcels of real estate are defined in the land records. Again, there is no substitute for a complete title search that runs right up to date of lien filing. If labor and materials are supplied to more than one parcel of land, it is necessary to allocate labor and materials to each parcel. The "description of property" in the mechanic's lien must be correctly linked to the "amount claimed" and "type of materials or services furnished" for each individual parcel of land.

Blanket Liens

When is it possible to file a single "blanket lien" on multiple parcels? Not very often. If it is possible to allocate the amount of the claim between multiple parcels, it is better to do so. If it is impossible to allocate, however, a blanket lien remains a possibility.

An 1890 Virginia Supreme Court case had declared that a general contractor may file a single lien when it has a *single* contract to construct dwellings on two separate lots.[139] This is true only if *no third party interests were*

---

[135] *Carolina Builders Corp. v. Cenit Equity Co.*, 257 Va. 405, 512 S.E.2d 550 (1999). *See* section above, Time Limits for Memorandum of Mechanic's Lien; subsection, The 150-Day Rule.

[136] Va. Code Anno. §43-15 (Michie 1950); *Reliable Constructors v. CFJ Properties*, 559 S.E.2d 681, 263 Va. 279 (2002).

[137] *Addington-Beaman Lumber Co. v. Lincoln Sav. & Loan*, 241 Va. 436, 403 S.E.2d 688 (1991).

[138] *Woodington Elec., Inc. v. Lincoln Sav. & Loan Ass'n*, 238 Va. 623, 385 S.E.2d 872 (1989).

[139] *Sergeant v. Denby*, 87 Va. 206, 12 S.E. 402 (1890).

involved.[140] Third party interests would be persons having an interest in the real estate, other than the general contractor and the owner. This would include lenders, purchasers from the contracting owner, judgment lien holders, etc. Since most modern real estate development projects will have a construction lender, this alone may eliminate the possibility of blanket liens. It is also clear that the general contractor must have a single contract in order to file a blanket lien. If a general contractor has separate contracts to construct improvements on two different parcels of real estate, there is no doubt that separate mechanic's liens must be filed.[141]

The problem with a blanket lien becomes most apparent when it is necessary to release one of the multiple properties from the mechanic's lien.[142] When a contractor files a blanket lien, the contractor is, in a sense, declaring that it is impossible to allocate the value of the labor and materials provided to each property. In order to release one of the properties, however, the contractor must determine the value of the labor and materials in that property, because the mechanic's lien amount must be reduced by this amount. Otherwise, the remaining property is overburdened, because it bears the lien for the labor and materials supplied to another property. The contractor has potential problems in filing a blanket lien and then has additional problems in trying to release one lot. If a mechanic's lien is filed as a blanket lien, it probably should be released only in its entirety. If a contractor must file a blanket lien on multiple parcels, it may consider requiring a complete settlement before any lots are released.

If it is at all possible to allocate the value of labor and materials, the lien should be filed separately. Unit prices or draw schedules in the contract may provide a basis for allocation. A means guide estimate is probably a reasonable basis for allocation. Contractors should be aware of this potential problem when negotiating a contract for improvements on multiple parcels. It may be advisable to attach an agreed value to each of the improvements to be constructed.

Open Account Suppliers

Open account suppliers have a special concern. One Virginia Supreme Court case suggests that each open account transaction will be considered a separate contract.[143] This may mean that an open account supplier will *never* be able to file a blanket lien if materials are used on more than one parcel of land. This is also a special concern for open account suppliers, because they often ship materials in "bulk" to a multi-unit project.

A common example involves subdivisions such as townhouse developments. A general contractor may acquire lumber from multiple sources. The lumber supplier may ship in bulk, "F.O.B. project." A lumber supplier wishing to lien may have to be aware of which townhouse units include the lumber it supplied and in what amounts. At a minimum, the lumber supplier must have a "reasonable basis" to allocate. If the lumber supplier liens the entire subdivision, or even a single townhouse building, the lumber supplier may be liening property to which it actually supplied no labor and materials. Some or all of the lien will be lost.

For this reason, suppliers should require information from all material purchasers at the "point of sale" concerning the location that materials will be used. Computer programs used by suppliers for creating invoices or sales tickets should require this information before the sale can be completed. This will usually enable the supplier to establish the location of materials with reasonable certainty to support a mechanic's lien. The requirement of "tracing materials" is a closely related issue.[144]

Recent Subdivisions

Recent subdivisions are a common problem. A larger parcel of land can be "subdivided." This changes the legal description and creates multiple parcels of land.[145] A house may be constructed in one corner of a large farm. If the land records show this farm as sitting on a single, 100-acre parcel, then the lien can describe this entire 100-acre parcel. If this farm is subdivided the day before lien filing, however, into multiple 10-acre lots, then the lien must describe only the 10-acre lot containing the house constructed. Otherwise, if the contractor liens the entire 100-acre parcel, the contractor has liened nine lots (totaling 90 acres) where it has supplied no labor and materials. The lien

---

[140] *Weaver v. Harland Corp.*, 176 Va. 224, 10 S.E.2d 547 (1940).

[141] *Gilman v. Ruan*, 95 Va. 494, 28 S.E. 875 (1898).

[142] *In re Thomas A. Cary, Inc.*, 412 F.Supp. 667 (E.D. Va. 1976), *aff'd sub nom. National Permanent Fed. Sav. & Loan Ass'n v. Virginia Concrete Co.*, 562 F.2d 47, *aff'd*, 562 F.2d 48 (4th Cir. 1977).

[143] *Addington-Beaman Lumber Co. v. Lincoln Sav. & Loan*, 241 Va. 436, 403 S.E.2d 688 (1991).

[144] *See* section above, Memorandum of Mechanic's Lien; subsection, Materials or Services Furnished.

[145] *Blue Ridge Constr. Corp. v. Stafford Dev. Group*, 244 Va. 361, 421 S.E.2d 199 (1992).

would be invalid. Again, the lien must describe the property where labor and materials were supplied as of the minute the lien is filed. A thorough title search is the only way to make this determination.

Site Development Improvements, Roads and Utilities—Section 43-3(B)

The General Assembly created special provisions for contractors supplying "site development improvements" to serve an entire subdivision or development. These provisions assist a road builder, for example, who is building an access road to serve all of the lots in a subdivision. Site development provisions help to solve some problems, but contractors must be careful to make sure they comply with the special provisions in Section 43-3(B) which states, in part:

> Any person providing labor or materials for site development improvements or for streets, storm water facilities, sanitary sewers or water lines for the purpose of providing access or service to the individual lots in a development or condominium units ... shall have a lien on each individual lot in the development for the fractional part of the total value of the work contracted for by the claimant in the subdivision as is obtained by using 'one' as the numerator and the number of lots being developed as the denominator ...
>
> ... however, no such lien shall be valid as to any lot or condominium unit unless the person providing such work shall, prior to the sale of such lot or condominium unit, file with the clerk of the Circuit Court of the jurisdiction in which such land lies a document setting forth a full disclosure of the nature of the lien which may be claimed, the total value of the work contracted for by the claimant in the subdivision and the portion thereof allocated to each lot as required herein, and a description of the development or condominium, and shall, thereafter, comply with all other applicable provisions of this chapter. 'Site development improvements' means improvements which are provided for the development, such as project site grading, traffic signalization, and installation of electric, gas, cable or other utilities, for the benefit of the development rather than for an individual lot.

Allocation under Section 43-3(B)

Section 43-3(B) solved many allocation problems for site development improvements. Logically enough, each lot in the subdivision bears an equal amount of the lien for any improvement that serves all the lots in the subdivision (even though the site development improvement may be physically on only one or some of the lots).

The Memorandum of Disclosure

In order to get the benefits of Section 43-3(B), the contractor does have the additional requirement that the contractor shall "prior to the sale of such lot or condominium unit, file with the clerk ... a document setting forth a full disclosure of the nature of the lien to be claimed, the amount claimed against each lot or condominium unit and a description of the development or condominium." This is referred to as a "Memorandum of Disclosure."[146]

The code does not provide us a form for a Memorandum of Disclosure. In practice, a Memorandum of Disclosure usually looks very much like a mechanic's lien. One important difference is that the Memorandum of Disclosure must state "the amount claimed against each lot or condominium unit." In other words, the allocation must be described on the Memorandum of Disclosure. The memorandum must also describe the "development or condominium." Identifying this by the subdivision or condominium name, along with a reference to a Deed of Subdivision or Declaration of Condominium, is probably sufficient. A "full disclosure of the nature of the lien to be claimed" creates some uncertainty, but it presumably means a declaration that the claimant intends to assert mechanic's lien rights for certain labor and materials supplied to the property for a certain site development improvement.

The Memorandum of Disclosure must be filed "prior to the sale of such lot or condominium unit" and the claimant must "thereafter comply with all other applicable provisions ..." Some attorneys have argued that the "thereafter" means that the Memorandum of Disclosure must be filed *before* any mechanic's lien. Courts, however, have ruled that mechanic's lien rights exist so long as the Memorandum of Disclosure is recorded "before any sale."[147]

---

[146] *Rosser v. Cole*, 237 Va. 572, 379 S.E.2d 323 (1989).

[147] *Valley Blox, Inc. v. Linpro Chantilly*, 24 Va. Cir. 154 (Va. Cir. Ct. 1991).

The Sale of a Lot or Condominium Unit

Some questions arise on the "sale" of developed lots to builders for improvement. A developer may subdivide property and have streets and sewers constructed. Such developed lots may then be sold to homebuilders who will construct dwellings and then resell the lot to a consumer. A contractor may file a Memorandum of Disclosure after the sale to a homebuilder but before the sale to a consumer. This is an arguable case since there is some evidence that the requirement of a Memorandum of Disclosure was intended to protect consumers.[148] Under a strict reading of the code section, however, this is a "sale" and the contractor would be unable to perfect a mechanic's lien on this lot.[149]

Another question had been whether lien rights are lost against all lots in a development once one or more lots are sold. The prevailing view was always that a contractor still has lien rights on the unsold lots, even though one lot has been sold.[150] This seems all the more certain under the 2012 amendments to the statute that stated that "[i]n the event that payments are made to the contractor without designating to which lot the payments are to be applied, the payments shall be deemed to apply to any lot previously sold by the developer such that the remaining lots continue to bear liability for an amount up to but not exceeding the amount set forth in any disclosure statement filed . . ." [151] If no payments or insufficient payments had been made, however, the lien rights for the labor or material that would have been apportioned to the sold lot cannot be shifted to the unsold lots and the lien rights for this portion of the labor and material are lost.

The Lot

Modern subdivisions usually have parcels of land known as common areas. The 2012 amendments to the statute clarified that these parcels are not considered "lots" for allocation purposes.[152] Section 43-3(B) excludes from the allocation computations "parcels of land within the development which are common area, or which are being developed for the benefit of the development as a whole and not for resale."

Some "lots" may use site improvements more than others. Some mixed-use developments may have a large number of small "lots" for single family residential dwellings and a few large "lots" for apartment buildings or office buildings. Under a strict reading of the statute, a lot intended for 50 apartments should be liened the same dollar amount as a lot intended for a single family dwelling, although this is an area that could use additional clarification.

The Development

In modern real estate developments, large subdivisions are often developed in "sections" or "stages." This can create questions concerning the meaning of the "development" for the purposes of Section 43-3(B). What if an entrance road and sanitary sewer outfall are constructed in the first section of a large residential development? The only development plan submitted or approved at this point involved the 30 lots in the first section. There is no doubt, however, that the owner has a generalized development plan whereby the entrance road and outfall will serve hundreds of additional lots at some point in the future. When the contractor constructing the road and outfall attempts to file a mechanic's lien, should the amount claimed be allocated amongst the 30 lots in the initial section or the hundreds of lots that will eventually be served? Hopefully, we will get some guidance from the General Assembly or Virginia Supreme Court on this question.

Alternatives to Section 43-3(B)

Section 43-3(B) states explicitly that "nothing contained herein shall ... prevent the filing of a mechanic's lien under" other mechanic's lien provisions.[153] A contractor may sometimes have a choice of filing their lien under §43-3(B) on every lot in the subdivision or filing a lien under §43-3(A) on just the lot on which the site improvement structure is actually placed. The contractor may also have the choice of filing the lien both ways simultaneously, "in the alternative."

---

[148] *Rosser v. Cole*, 237 Va. 572, 379 S.E.2d 323 (1989).

[149] *Roundtree, L.L.C. v. RAM Dev. Corp.,* 45 Va. Cir. 458, 459 (Va. Cir. Ct. 1998) [in the plain words of the statute, "sale" under Va. Code §43-3(B) means the sale from the owner obligated to the lienor, even thought he work was complete after the sale].

[150] *Calcourt Props., Inc. v. Barnes Constr. Co*., 20 Va. Cir. 202 (Va. Cir. Ct. 1990) (decided under prior law).

[151] Va. Code Anno. §43-3(C) (Michie 1950).

[152] *DLB, Inc. v. United Golf, Inc*., 2008 Va. Cir. LEXIS 25 (Va. Cir. Ct. Mar. 31, 2008) (decided under prior law) [The common area "parcels" should have been included in the lien in addition to the "lots" and "the amount claimed should have been apportioned over all of them." However, the court ruled that this did not invalidate the lien, only lowered the claim amount valid against each lot].

[153] *Rosser v. Cole*, 237 Va. 572, 379 S.E.2d 323 (1989).

Liens Required under Section 43-3(B), Subdivision Streets and Off-Site Improvements

In some situations, a contractor may have mechanic's lien rights *only* under Section 43-3(B). One Virginia Supreme Court case makes it clear that subdivision streets are not deemed to be "a structure" under Section 43-2.[154] This means that a road builder may not be able to lien for subdivision streets at all, except with a Memorandum of Disclosure under Section 43-3(B).[155]

Off-site improvements may also be lienable *only* through the use of Section 43-3(B). With off-site improvements a contractor is, by definition, liening a piece of property to which the contractor supplied no labor or materials. A Virginia Supreme Court case makes it clear, however, that Section 43-3(B) envisions an "extra-territorial lien" for a structure not physically on the property liened.[156]

In modern developments, "off-site easements" are often purchased for the construction of storm water drainage facilities. Section 43-3(B) would allow the developer's property to be liened, even though those labor and materials are on an adjoining parcel.

When a developer is required to make improvements in a public right-of-way, including street widening or sewers, those improvements in the street right-of-way are on public property and cannot be liened. Section 43-3(B), however, allows a lien on the adjoining private property that will benefit from the off-site improvements.

What if there is only one lot in the subdivision? In one Virginia Supreme Court case, the contractor constructed a large office building development, including some off-site right-of-way improvements.[157] The contractor liened the property for the full amount of the debt. Although $300,000 was owed for the building and only about $10,000 for the off-site improvements, the Virginia Supreme Court ruled the entire mechanic's lien invalid as over-burdening.[158] The contractor in this case *may* have been able to solve this problem by filing a Section 43-3(B) Memorandum of Disclosure first, followed by the mechanic's lien for the full amount of the claim.

Condominiums

Condominiums did not always exist as a form of real estate ownership. Once the notion of condominiums did come into existence, mechanic's liens on condominiums were so complex[159] that the General Assembly of Virginia passed a special statute to solve many allocation problems.[160] "Site improvements" and "off-site improvements" for condominiums can be handled with a Section 43-3(B) Memorandum of Disclosure. Condominiums also have many "common element" improvements that serve all of the units in the condominium, including swimming pools, sidewalks and hallways. Additionally, the entire condominium is on a single parcel of real estate.

Section 43-3(A) provides a logical allocation for such improvements. A condominium declaration, recorded in the land records to create a condominium, is required to contain a "table" or "exhibit" describing the "percentage liability for common expenses" for each unit in the condominium. These percentages for each condominium are used for Condominium Unit Owners' Association assessments and can be used for voting or other purposes. Section 43-3(A) of the mechanic's lien code states that these percentages shall also be used for allocation of mechanic's liens for improvements serving more than one unit.

Section 43-3(A) also states that any single condominium unit owner can obtain a release of his or her condominium unit by paying the mechanic's lien claimant the dollar amount attributable to just that condominium unit.

If improvements are constructed that serve just one condominium unit, then the lien must be filed on just the condominium unit served with the improvements. This would be true, for example, for flooring, painting or electrical fixtures contained entirely within one unit. Accordingly, although Section 43-3(B) solves many of the problems of allocating common element improvements, allocation on condominiums can still be complicated and time consuming. A single electrical contractor will often have one contract for installation of electrical service and fixtures for an entire building. Electrical service and fixtures on the exterior of the building and in the hallways are usually in common elements, which must be allocated to each unit according to the percentage liability for common expenses for each unit. Electrical service and fixtures serving a single unit must be allocated to that unit. Compare this to a

---

[154] *Rosser v. Cole*, 237 Va. 572, 379 S.E.2d 323 (1989); *see* section above, Memorandum of Mechanic's Lien; subsection, Structure.

[155] *But see Poretsky Building Group, Inc. v. Simmons Equipment Corp.*, Ch. No. 13970 (Loudoun Co. Cir. Ct. 1992).

[156] *Rosser v. Cole*, 237 Va. 572, 379 S.E.2d 323 (1989).

[157] *See* subsection above, Overburdening.

[158] *Dominion Trust Co. v. Kenbridge Constr. Co.*, 248 Va. 393, 448 S.E.2d 659 (1994).

[159] *United Masonry, Inc. v. Jefferson Mews, Inc.*, 218 Va. 360, 237 S.E.2d 171 (1977).

[160] Va. Code Anno. §43-3(A) (Michie 1950).

very similar electrical contract for the construction of a rental apartment building, where all of the improvements are on a single piece of real estate. A mechanic's lien for the entire balance due on this electrical contract can be filed in one lien on this single piece of real estate.

SUBCONTRACTOR AND SUPPLIER LIENS

Subcontractor Mechanic's Liens

The mechanic's lien form shown above is for general contractors. The General Assembly of Virginia has also provided a form for a Mechanic's Lien Claimed by a Subcontractor in the Appendices. Section 43-8 of the Code of Virginia states:

> §43-8. *Sufficiency of memorandum, affidavit and notice required by §43-7.* The memorandum, affidavit and notice required by §43-7 shall be sufficient if substantially in form and effect as follows:
>
> **Memorandum for Mechanic's Lien Claimed by Subcontractor**
>
> Name of owner: .....
>
> Address of owner: .....
>
> Name of general contractor (if any): .....
>
> Name of claimant: .....
>
> Address of claimant: .....
>
> Contractor license or certificate number of claimant (if applicable): .....
>
> Issuance date of license or certificate (if applicable): .....
>
> Expiration date of license or certificate (if applicable): .....
>
> If no contractor license or certificate number is included, the claimant certifies that such a valid license or certificate is not required by law for the work done for which the benefit of a lien is claimed.
>
> 1. Type of materials or services furnished: ....……....……...
> 2. Amount claimed: $ .....
> 3. Type of structure on which work done or materials furnished: ..……
> 4. Brief description and location of real property: …….…….
> 5. Date from which interest on above amount is claimed: …….…….
>
> Date: .....….
>
> It is the intent of the claimant to claim the benefit of a lien.
>
> .....……....
> (Name of claimant)
>
> **AFFIDAVIT**
>
> State of Virginia
>
> County (or city) of ....., to wit:

I, ... (notary or other officer) for the county (or city) aforesaid, do certify that ..... claimant, or ....., agent for claimant, this day made oath before me in my county (or city) aforesaid that ..... is justly indebted to claimant in the sum of ..... dollars, for the consideration stated in the foregoing memorandum, and that the same is payable as therein stated.

Given under my hand this the …… day of .....…, 20.….

.....……..... (Notary Public or Magistrate, et cetera.)

Notice

To ..... (owner).

You are hereby notified that .....……..... (general contractor) is indebted to me in the sum of ……..... dollars ($..…….....) with interest thereon from the .....……. day of ……....., 20..…, for work done (or materials furnished, as the case may be) in and about the construction (or removal, etc.,) of a ……..... (describe structure, whether dwelling, store, or etc.,) which he has contracted to construct (or remove, etc.,) for you or on property owned by you in the county (or city) of .....…….....…, and that I have duly recorded a mechanic's lien for the same.

Given under my hand this the ..... day of ..…….....…, 20.....

.....…….....
(Subcontractor)

You will notice that this form only has two differences when compared with the earlier general contractor form. First, the name of the general contractor is included along with the name of the owner. Secondly, the subcontractor must provide notice of the mechanic's lien in the form and in the manner required by the Code. For a general contractor lien, a certification of mailing to the owner is necessary and that certification of mailing must be recorded with the mechanic's lien, but no particular form is prescribed.

The owner is not aware of the status of accounts between the general contractor and its subcontractors. Therefore, the law requires that a subcontractor send the owner notice of the lien, so that the owner can protect itself. The owner is free to continue making payments to a general contractor until receipt of this notice. The notice should be in the form prescribed by the General Assembly, shown above. Actual notice to the owner is no substitute for the notice required by the statute.[161] It doesn't matter that the owner is aware that a subcontractor has not been paid. It doesn't matter if a subcontractor has sent the owner letters concerning nonpayment. The notice must be served in the form and in the manner prescribed by the statute.

Delivery or Service of Lien Notice

The notice must be sent by certified or registered mail or served by the sheriff.[162] The return receipt for a certified mailing should be carefully filed, so that proof of receipt can be shown in the future. There is no specific time limit for providing notice,[163] but subcontractors and sub-subcontractors will usually want to provide notice as soon as possible because of the defense of payment.[164]

---

[161] *Coleman v. Pearman*, 159 Va. 72, 165 S.E. 371 (1932).

[162] Va. Code Anno. §43-14.1 (Michie 1950); *see also* Va. Code Anno. §43-64 (Michie 1950) How notices served, acts done, etc., in case of bankruptcy, death or absconding.

[163] *Mills v. Moore's Super Stores*, 217 Va. 276, 227 S.E.2d 719 (1976).

[164] *See* section below, Defense of Payment: Owner's Responsibility for Payment to Subcontractors.

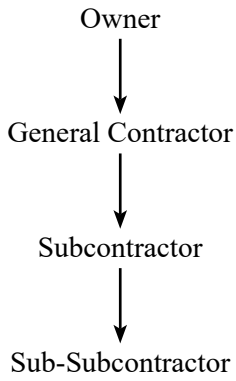
Sub-Subcontractor Mechanic's Liens

Section 43-10 of the Code of Virginia provides a form for sub-subcontractors shown in the Appendices. This form is essentially the same as the subcontractor lien form; both the general contractor and the subcontractor are identified. The sub-subcontractor must give notice of the lien to both the owner and the general contractor, since the general contractor will not be aware of the status of accounts between the subcontractor and the sub-subcontractor.

There may be an additional requirement that the sub-subcontractor sign the lien. General contractors and subcontractors must appear before a notary to affirm the debt and the notary must sign the form, but the forms provided by Virginia Code Sections 43-5 and 43-8 do not contain a signature line for the general contractor or subcontractor claimants. The forms provided for sub-subcontractors in Virginia Code Section 43-10, however, show a signature line for the claimant. This may or may not create any requirement on the part of a sub-subcontractor to sign a lien. It is a good practice, however, for *all* claimants to sign the lien form.

Definition of General Contractor, Subcontractor, etc.—The Contract Tiers or Payment Chain

For the purposes of notice, it is important to understand your status under the mechanic's lien statute. A general contractor is any contractor, laborer, mechanic or other person who contracts directly with the owner.[165] It does not matter whether you normally think of yourself as a subcontractor or a supplier. The only question is whether you dealt directly with the owner of the property.[166] A subcontractor is any contractor, supplier, laborer, mechanic or other person who contracts with a general contractor. Notice of the mechanic's lien must be provided to everyone with whom there were no direct contractual relations.[167] This can be summarized in the following chart of the "Contract Tiers" or "Payment Chain":



It is impossible to send too many notices under the mechanic's lien statute, so any contractor should err in favor of providing extra notices.

Multiple Entities and Artificial Tiers

Notice problems can arise when multiple related entities are involved in the construction project. A contractor may deal with Big Developer, Inc., that acts like the owner of the project. The legal owner of the property, however, may be Big Project Limited Partnership. Technically, Big Project L.P., has hired Big Developer, Inc., as general contractor. A subcontractor has to give notice of a mechanic's lien to each of these entities. The exact legal name of the owner will be revealed by a thorough title search.[168] Other related entities, however, will not appear in the land records.

Sub-subcontractors may have difficulty determining the names of intervening contractors between themselves and the owner. It is important, however, to identify each intervening entity and provide notice of the mechanic's lien. The Virginia Supreme Court may eventually decide that a sub-subcontractor cannot be required to give notice to entities of which it could not be aware. However, until this decision is reached, sub-subcontractors should not take a chance.

---

[165] Va. Code Anno. §43-1 (Michie 1950); *Alexandria Properties, Inc. v. First Va. Mtg. & Real Estate Inv. Trust*, 221 Va. 134, 267 S.E.2d 149 (1980).

[166] *Northern Va. Sav. & Loan Ass'n v. J.B. Kendall Co.*, 205 Va. 136, 135 S.E.2d 178 (1964).

[167] Va. Code Anno. §43-9 (Michie 1950).

[168] *See* section above, Memorandum of Mechanic's Lien; subsection, Title Search.

The existence of multiple entities and artificial tiers also raises the possibility of a defense of payment, discussed below. If the owner and general contractor are related, it is possible that the owner will prepay the general contract. There is also a greater possibility of collusion.

ENFORCEMENT OF MECHANIC'S LIENS

A mechanic's lien is not "self enforcing." Rather, a mechanic's lien is "perfected when the Memorandum of Mechanic's Lien is filed amongst the land records." The mechanic's lien is lost, however, if it is not "enforced."[169] A "Complaint to Enforce Mechanic's Lien" must be filed.[170] This is essentially a "lawsuit" but must meet several particular requirements.

Deadline for Enforcement

The Complaint to Enforce Mechanic's Lien must be filed within "six months from the time when the Memorandum of Lien was recorded or [within] 60 days from the time the building structure or railroad was completed or work thereon otherwise terminated, whichever time shall last occur..."[171] Usually, this means the lawsuit must be filed within six months after the lien is recorded in the land records. The lawsuit may be filed after that, however, if the building or structure is completed long after the mechanic's lien is filed, if the claimant has taken a voluntary nonsuit (dismissal) of a previously filed lawsuit, or in the case of bankruptcy.

Work on the project may continue by other contractors long after the claimant has stopped work. The Complaint to Enforce Mechanic's Lien is timely if filed within 60 days after the building or structure is completed or work on the project is terminated.[172] A claimant in any lawsuit has the right voluntarily nonsuit (dismiss) their lawsuit in Virginia.[173] If they do, they have right to refile that lawsuit within six months after taking the nonsuit, even if the statute of limitations (deadline) to file the lawsuit has otherwise expired.[174] This also applies to a Complaint to Enforce Mechanic's Lien and this can almost double the time to enforce the mechanic's lien.[175]

It is important to make sure the Complaint to Enforce Mechanic's Lien is properly filed within this deadline, with all necessary parties and other requirements fulfilled. It will be difficult or impossible to amend the Complaint after the filing.[176]

Effect of Bankruptcy

The bankruptcy of the project owner,[177] the general contractor[178] or any other upstream contractor can delay the time for filing the lawsuit. The "automatic stay" of the Bankruptcy Code means that any mechanic's lien claimant is not permitted to file their Complaint to Enforce a Mechanic's Lien[179] if the owner of the real property, the general contractor or any upstream contractor has filed for bankruptcy. The mechanic's lien claimant is provided additional

---

[169] *W.T. Jones & Co. v. Foodco Realty, Inc.*, 318 F.2d 881 (4th Cir. 1963).

[170] Va. Code Anno. §43-22 (Michie 1950).

[171] Va. Code Anno. §43-22 (Michie 1950).

[172] Va. Code Anno. §43-17 (Michie 1950); *also see* section above, Time Limits for Memorandum of Mechanic's Lien; subsection, Work "Otherwise" Terminated.

[173] Va. Code Anno. §8.01-380 (Michie 1950).

[174] Va. Code Anno. §8.01-229(E)(3) (Michie 1950).

[175] Va. Code Anno. §8.01-229(E)(3) (Michie 1950) [If a plaintiff suffers a voluntary nonsuit as prescribed in 8.01-380, the statute of limitations with respect to such action shall be tolled by the commencement of the nonsuited action, *regardless of whether the statute of limitations is statutory or contractual*, and the plaintiff may recommence his action within six months from the date of the order entered by the court, or within the original period of limitation, or within the limitation period as provided by subdivision B 1, whichever period is longer....]. The italicized words were a 2016 amendment and it is not yet entirely clear whether it applies to a Complaint to Enforce Mechanic's Lien.

[176] Va. Code Anno. §8.01-6.1 (Michie 1950).

[177] *McCoy v. Chrysler Condo Developers Ltd. Partnership*, 239 Va. 321, 389 S.E.2d 905 (1990); *see Heritage Contr., L.L.C. v. Vasquez*, 81 Va. Cir. 161 (Va. Cir. Ct. 2010) [bankruptcy of one joint tenant, with common law right of survivorship].

[178] *Thompson v. Air Power, Inc.*, 248 Va. 364, 448 S.E.2d 598 (1994).

[179] *In re Concrete Structures, Inc.*, 261 B.R. 627 (D.C. E.D.Va. 2001); *Graybar Electric Company, Inc. v. Property Technologies, Ltd*. (*In re Property Technologies, Ltd.)*, 263 B.R. 750 (Bkcy Ct. E.D.Va. 2001).

time, however, to file later. The Complaint to Enforce Mechanic's Lien must be filed within 30 days after the Automatic Stay terminates.[180]

Necessary Parties

A great amount of confusion and a large number of invalid mechanic's liens have concerned the issue of "necessary parties" to the Complaint to Enforce Mechanic's Lien. All of the persons or entities involved in the lawsuit as plaintiffs or defendants are "parties." It has long been clear, for example, that the owner of the property is a *necessary* party.[181] This means that if a mechanic's lien claimant files a Complaint that does not name the property owner as a defendant, then the claimant has failed to name a necessary party and has failed to properly enforce the mechanic's lien. It is as if the Complaint was never filed. Once it is too late for this mechanic's lien claimant to file the enforcement lawsuit, it is also too late to add an additional party.[182] The mechanic's lien is lost altogether.

Beginning in the late 1980s, multiple Virginia Supreme Court cases determined that several additional parties could be necessary to enforce the mechanic's lien. The Virginia Supreme Court has held that all deed of trust beneficiaries and trustees are necessary parties.[183] All parties that have a "substantial interest in the opportunity to challenge the validity of the mechanic's lien, or otherwise to litigate the elements of the lien" are necessary parties. Since the objective of the mechanic's lien is to eventually foreclose on the property, all such persons might otherwise be deprived of property without due process of law.[184]

There is now a great deal of confusion concerning how far this idea goes. It is uncertain, for example, whether necessary parties would include a tenant in possession of the premises, an easement owner, the county with a claim for past due real estate taxes, judgment lien holders,[185] the general contractor[186] or other mechanic's lien holders.[187]

Purpose of Enforcement

A Complaint to Enforce Mechanic's Lien must be filed in order to preserve mechanic's lien security rights. If the Complaint is not filed in a timely manner, all mechanic's lien rights are lost.

The end result of the enforcement action is foreclosure upon the real estate. The proceeds of sale are used to pay off the mechanic's lien claim and other liens on the property. This is why all other persons or entities with an interest in the property are "necessary parties," so that they can participate in the lawsuit to protect their interest. As a practical matter, mechanic's lien litigation very rarely results in foreclosure on the property. Usually, the mechanic's lien has a very high priority and is a relatively small dollar amount compared to the value of the property. Once it becomes clear that the mechanic's lien is valid and that the contractor has the right to foreclose on the property, some other interested party (like the owner or lender) will step in to pay off the mechanic's lien claim.

---

[180] *McCoy v. Chrysler Condo Developers Ltd. Partnership*, 239 Va. 321, 389 S.E.2d 905 (1990); *See* section above, Time Limits for Memorandum of Mechanic's Lien; subsection, Effect of Bankruptcy.

[181] *Mendenhall v. Cooper*, 239 Va. 71, 387 S.E.2d 468 (1990).

[182] *Mendenhall v. Cooper*, 239 Va. 71, 387 S.E.2d 468 (1990); *James T. Bush Construction Co. v. Patel*, 243 Va. 84, 412 S.E.2d 703 (1992).

[183] *Walt Robbins, Inc. v. Damon Corp.*, 232 Va. 43, 348 S.E.2d 223 (1986); *but see Glasser & Glasser, PLC v. Jack Bays, Inc*., 285 Va. 358, 370-71, 741 S.E.2d 599, 605-06 (2013) [the recorded named beneficiary is sufficient, even though it is acting as trustee for multiple bondholders, especially where the lien claimant had no way to determine the identity of those bondholders] and *Air Power v. Thompson*, 244 Va. 534, 538, 422 S.E.2d 768, 770 (1992)) [the recorded named beneficiary is sufficient, even though it is acting as trustee for an unrecorded land trust, especially where the land trust beneficiary's interest is personal property].

[184] *James T. Bush Construction Co. v. Patel*, 243 Va. 84, 412 S.E.2d 703 (1992); *Synchronized Constr. Servs. v. Prav Lodging, LLC,* 288 Va. 356, 764 S.E.2d 61 (2014) [the controlling considerations of the necessary party doctrine are not issues of which party may be best situated to provide proof. Instead, the necessary party doctrine is calculated to ensure that all parties central to a dispute can have their interests resolved, so that absent parties' interests are not adversely affected and participating parties may be awarded complete relief].

[185] *Arlington Iron Works, Inc. v. DCB Construction, Inc.*, Ch. No. 121673 (Fairfax Co. Cir. Ct. 1992).

[186] *Synchronized Constr. Servs. v. Prav Lodging, LLC,* 288 Va. 356, 764 S.E.2d 61 (2014) [the general contractor is not a necessary party once the lien has been bonded off, at least where the general contractor had not preserved its lien rights. The general contractor had no interest in the bond, which was now the subject matter of the enforcement action. This case may imply that a general contractor would otherwise be a necessary party]; *Tarmac Acquisition v. Gold Line Concrete Const.*, 26 V.C.O. 312 (1992); *Vulcan Materials Company v. PWC Development Limited Partnership*, Ch. No. 30047 (Prince William Co. Cir. Ct. 1991). *See also Ferguson Enterprises, Inc. v. Equity Resources, Inc.*, Ch. No. 30347 (Prince William Co. Cir. Ct. 1991); *See In re Richardson Builders,* 123 B.R. 736 (W.D.Va. 1990).

[187] *Peed Plumbing, Inc. v. Freedland*, 78 Va. Cir. 291, 294 (Va. Cir. Ct. 2009) [Other claimants with recorded mechanic's liens are proper parties, but not necessary parties]; *Ben Gravett Enters. v. Parcon Const., Inc.*, 29 V.C.O. 28 (1992); *Arlington Iron Works, Inc. v. DCB Construction, Inc.*, Ch. No. 121673 (Fairfax Co. Cir. Ct. 1992); *York Federal Savings & Loan Assoc. v. Hazel*, 256 Va. 598, 506 S.E.2d 315 (1998).

It is possible to include other "lawsuits" in the Complaint to Enforce Mechanic's Lien. Most commonly, a contractor will add a separate "count" for breach of contract, requesting a money judgment against the party with which they contracted. [188]

Petition to Intervene

There are often multiple mechanic's liens on a single piece of property. When one contractor files a Complaint to Enforce their Mechanic's Lien, other contractors can "intervene" in that Complaint.[189] A "Petition to Intervene," if properly filed, will effectively enforce the mechanic's lien and replace an independent Complaint.[190]

There are obvious efficiencies in such an arrangement. The contractor may be able to save a lot of time and expense by intervening in another Complaint to Enforce Mechanic's Lien. The court system is also more efficient if all mechanic's liens are litigated in a single suit. An intervening mechanic's lien claimant takes the risk, however, that the original Complaint named all necessary parties and was otherwise correct.

When one contractor files a Complaint to Enforce Mechanic's Lien, they will often name all other mechanic's lien holders as defendants. This will happen because there is uncertainty as to whether fellow mechanic's lien holders are "necessary parties." In a partial defense of payment situation, it is also necessary to determine the validity, priority and amount of *all* mechanic's lien claims on the property, in order to determine the validity, priority and amount of any one mechanic's lien claim.[191] It is important to remember, however, that being named as a defendant in another's Complaint does *not* enforce a contractor's mechanic's lien. Each mechanic's lien holder *either* must file an independent Complaint to Enforce Mechanic's Lien or file a Petition to Intervene, *even if they are already a party to the lawsuit*.[192]

Trial

A Complaint to Enforce Mechanic's Lien was historically heard before a "Commissioner in Chancery."[193] This is typically a lawyer in the locality with particular experience and expertise in the mechanic's lien area. The court essentially appoints the Commissioner in Chancery as "Judge for a Day" to hear the mechanic's lien suit. It has become more common for the Circuit Court to hear the case *ore tenus*. This means that the court hears evidence and arguments directly, instead of referring it first to a Commissioner in Chancery.

The Commissioner in Chancery hears evidence and argument in the case very much as would a judge. The Commissioner then submits a report of findings to the court. Once the Commissioner's report has been submitted, anyone involved in the lawsuit can file "exceptions." Exceptions are a list of objections, pointing out mistakes made by the Commissioner in Chancery. The court can then adopt the Commissioner's Report in full or accept some of the exceptions filed and adopt the Commissioner's report in part. In any event, the Circuit Court enters a final order. This final Circuit Court ruling can then be appealed to the Virginia Supreme Court, if any party still feels that mistakes have been made.[194]

At the "trial," the Commissioner in Chancery or court will take evidence concerning the status of accounts, the contract that existed, the amount of labor and materials supplied, any defects in the work and other issues that would usually be found in a contract action. The Commissioner or court also takes evidence on the validity of the mechanic's lien, including the date of last work, the date the mechanic's lien was filed, the description of the property and other issues. The Commissioner or court must make an independent determination concerning the status of title to the property. Thus, the Commissioner or court must either have expert testimony from a title searcher or independently conduct a title search to identify all persons or entities that have an interest in the property and determine whether all necessary parties are before the court.

---

[188] *See* Rules of Virginia Supreme Court 1:6 regarding *Res Judicata* Claim Preclusion. This may mean that a mechanic's lien claim cannot be brought after a breach of contract claim against one or more of the same defendants has been decided on the merits. It may be necessary to bring the mechanic's lien claim first or together with the contract claim in a single Complaint and not after the contract claim has been decided on the merits.

[189] *Burton & Robinson, Inc. v. Harmon at Oakton, L.C.*, 56 Va. Cir. 1 (Fairfax County 2001).

[190] *See* Rules of Virginia Supreme Court 3:14 regarding Intervention.

[191] *York Federal Savings & Loan Assoc. v. Hazel*, 256 Va. 598, 506 S.E.2d 315 (1998).

[192] *Commonwealth Mechanical Contractors v. Standard Fed. Sav. & Loan*, 222 Va. 330, 281 S.E.2d 811 (1981); *Isle of Wight Materials Co. v. Cowling Bros.*, 246 Va. 103, 431 S.E.2d 42 (1993).

[193] *See e.g., Walt Robbins, Inc. v. Damon Corp.*, 232 Va. 43, 348 S.E.2d 223 (1986).

[194] *Walt Robbins, Inc. v. Damon Corp.*, 232 Va. 43, 348 S.E.2d 223 (1986).

To determine priority issues, it usually is also necessary for the Commissioner or court to determine the value of the property and the value of the buildings or structures constructed. This proceeding is sometimes "bifurcated." The Commissioner and court can have one set of hearings to determine the validity and amount of the mechanic's lien and a second hearing concerning value in connection with the sale of the property. This bifurcated process is often more efficient, since the owner, title insurance company or other party may be willing to step in and pay off the lien once it is determined to be valid.

Costs of Proceeding

A Complaint to Enforce Mechanic's Lien can be one of the costliest of proceedings. A title search is necessary to make sure that all necessary parties have been named in the Complaint. Typically, a large number of defendants must be served. This results in a large number of lawyers monitoring the suit and filing papers with the court. This means that the plaintiff's attorney and all other counsel spend a great deal of time "shuffling paper."

The Commissioner must be paid an hourly rate to hear evidence on the case and to draft a report. A "simple" action will easily involve four to eight hours of trial time and a like amount for drafting the report at $200 to $300 per hour. A court reporter must transcribe the entire proceeding so that it can be used by the Commissioner in drafting his report and be reviewed at a later time by the court. This will run a minimum of $500 to $1,500, even in a simple mechanic's lien action. Once the plaintiff has argued the entire case before the Commissioner, it is often necessary to argue the points of law again before the Circuit Court in the form of exceptions to the Commissioner's report. All of this makes for a relatively cumbersome and expensive proceeding.

Much of this time and expense can be eliminated if the Circuit Court is willing to hear the case *ore tenus*. This means that the court hears evidence and argument directly, instead of referring it first to a Commissioner in Chancery. This eliminates a fee for the Commissioner in Chancery and a fee for a court reporter. Attorney's fees will be lower as well, since the case must only be argued once. Considerable time can also be saved, since litigants often have to wait a long time to receive a Commissioner's report and to set a court date to argue exceptions.

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

The owner of a construction project can be required to 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.[195] This is the owner's defense of payment. The owner's "defense" is that it has made "payment." For a valid subcontractor mechanic's lien, the required Notice of Mechanic's Lien must be received while the owner is still indebted to the general contractor.[196] THIS IS THE TRUE DEADLINE FOR FILING A SUBCONTRACTOR MECHANIC'S LIEN. The subcontractor must file a lien *and* serve the owner with notice while the owner is still holding money. Until the owner has received this notice (in the form and the manner prescribed by statute), the owner can continue to freely make payments to the general contractor.

More accurately stated, it is an affirmative defense to a Complaint to Enforce Mechanic's Lien of a subcontractor that the owner is not indebted to the general contractor.[197] If the owner has a contractual defense to any claim by the general contractor, the owner may have a defense against any subcontractor lien.[198] The status of accounts down the chain of payment can be impacted in many ways. The original contract amount and the payments made are the most obvious factors. Change orders can increase or decrease the contract amount. The owner may have back charges for defective work or failure to complete work.[199] These factors can increase or decrease the amount that a subcontractor can claim through a mechanic's lien. The owner can establish a defense of payment on any of these grounds. The question is whether there is a debt on the upstream contract.

---

[195] *Maddux v. Buchanan*, 121 Va. 102, 92 S.E. 830 (1917).

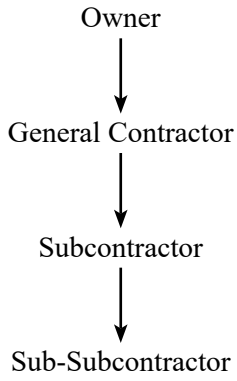
[196] *John T. Wilson Co. v. McManus*, 162 Va. 130, 173 S.E. 361 (1934).

[197] Va. Code Anno. §43-7(A) (Michie 1950).

[198] *W.O. Grubb Steel Erection, Inc. v. 515 Granby, L.L.C.*, 78 Va. Cir. 463 (Va. Cir. Ct. 2009) [subcontractor liens unenforceable where the owner was not contractually obligated to pay general contractor until the owner had received funding of the construction loan].

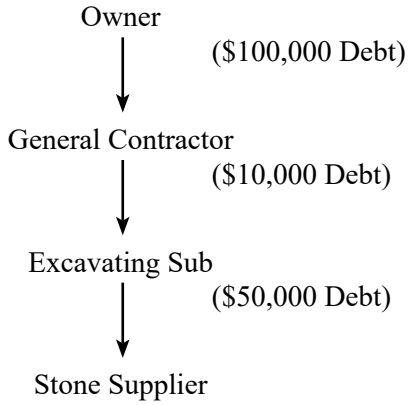
[199] *Henderson & Russell Assocs. v. Warwick Shopping Center, Inc.*, 217 Va. 486, 229 S.E.2d 878 (1976).

The Payment Chain



The payment chain shown above has already been discussed in defining general contractors, subcontractors, etc., and whether notice of the mechanic's lien must be provided to the owner. The payment chain also comes into play in the defense of payment. The general contractor's lien is, of course, valid only to the extent the owner owes the general contractor money on the contract. The subcontractor's lien is also limited to the amount of this debt. The sub-subcontractor's lien is limited by the amount of debt between the owner and general contractor *and* is further limited by the debt between the general contractor and the subcontractor.

Accordingly, the contract hierarchy shown above can be viewed as a "payment chain." The mechanic's lien of any lower tier contractor is only as strong as the *weakest* link in this payment chain.[200] The owner may still owe $100,000 in retention on the project, but if the general contractor owes only $10,000 to the excavating subcontractor, then the stone supplier who sold to the excavating sub will be able to enforce its lien only to the extent of $10,000, even if it is owed $50,000.



Stone Supplier can enforce a lien for only $10,000 in this example. If the excavating sub was terminated and the general contractor had to expend substantial sums to complete the excavation work, then the general contractor may not be indebted to the excavator at all, and the stone supplier will not be able to establish any lien rights.

Accordingly, the further down you are on the payment chain, the greater the chance of a defense of payment. For this reason, a sub or sub-sub wants to file its lien and provide notice as soon as problems are apparent. A sub or sub-sub wants to be as fully aware as possible 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.

Before a subcontractor is ready to file a mechanic's lien, it may want to contact the owner to learn about the status of accounts and to attempt to "freeze payments" from the owner. A subcontractor may want to send written notice (by letter) that the sub has not been paid. Owners will often withhold payment from the general contractor if such

[200] *John T. Wilson Co. v. McManus*, 162 Va. 130, 173 S.E. 361 (1934).

notices are received. The owner may be willing to make "alternative arrangements," such as writing joint checks, in order to avoid a lien filing.

A subcontractor or sub-sub should also consider sending a Virginia Code §43-11 Notice before supplying labor and materials to a project.[201] Unlike a mechanic's lien, this notice is not filed amongst the land records and does not disrupt title to the property, although it should help freeze payments from the owner.

The "True" Deadline for Notice of the Mechanic's Lien

The mechanic's lien statute states that the Memorandum of Mechanic's Lien must be filed in the land records within 90 days after the last day of the month in which labor and materials were supplied.[202] Lower tier contractors should not make the mistake of thinking this is their deadline. This is actually the outside deadline—the latest time in which to file a lien and provide notice for a subcontractor or sub-subcontractor. The sub or sub-sub must get its lien filed *and* get the prescribed notice to the owner (in the form and in the manner prescribed) while sufficient debt exists from the owner to the general contractor and then from the GC to the subcontractor.[203] A general contractor who contracts directly with the owner is not concerned with a defense of payment to its mechanic's lien. The general contractor's true deadline, therefore, will be 90 days from the last day in which the labor or materials were last supplied.

Affirmative Defense

A defense of payment is an "affirmative defense."[204] This means that it is up to the owner to prove that it has paid in full for the project. It is not up to the subcontractor to prove there is a debt; rather, it is up to the owner to prove that no debt exists.[205] If a subcontractor has supplied labor and materials to a project and has not been paid, it can and should file a mechanic's lien. It is then up to the owner to come forward with affirmative evidence of its defense of payment.

If the owner declares a defense of payment, a subcontractor will have difficulty proving its lien, unless the general contractor is involved in the litigation to prove the owner's debt. Even though the owner has the "burden of proof" on the defense of payment, this burden will be met if the owner shows evidence of back charges or the general contractor's failure to complete the project. If the owner presents the court with a large stack of documents proving back charges, the subcontractor will have a hard time defending its lien without assistance from the general contractor.

It is easiest for a subcontractor if the general contractor has filed its own lien and is actively enforcing that lien. In that case, the general contractor will be trying its utmost to prove that the owner is indebted to the general contractor. The subcontractor will be relieved of this issue and will have to prove only the status of its own accounts and the validity of its own mechanic's lien. If a general contractor has not filed its own mechanic's lien and/or is out of business, it will still be necessary to have representatives of the general contractor available as witnesses. If the owner produces a large stack of documents in the early stages of the case and the general contractor is not available, a subcontractor needs to seriously consider getting out of the case early by settling or by simply giving up.

Artificial Tiers and the Defense of Payment

In today's market, the project owner and general contractor are often closely related entities. Big Developer may set up Big Developer, Inc., to operate as a general contractor. Big Developer may also set up Big Developer Limited Partnership to be the legal owner of a particular construction project. A subcontractor contracting with Big Developer, Inc., should not make the mistake of thinking it is a general contractor.

---

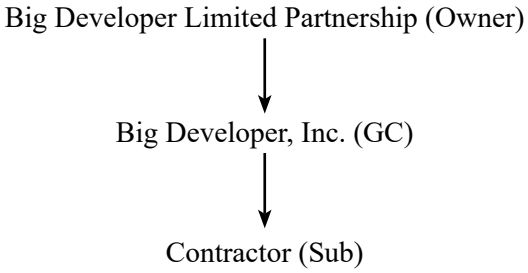
[201] *See* section below, Alternatives to Mechanic's Lien; subsection, The Section 43-11 Notice–Improving Subcontractor Lien Priority.

[202] Va. Code Anno. §43-4 (Michie 1950).

[203] *Coleman v. Pearman*, 159 Va. 72, 165 S.E. 371 (1932); *Mills v. Moore's Super Stores*, 217 Va. 276, 227 S.E.2d 719 (1976).

[204] Va. Code Anno. §43-7(A) (Michie 1950).

[205] *Knight v. Ferrante*, 202 Va. 243, 117 S.E.2d 283 (1960).



As discussed above, Contractor will have to get notice of its mechanic's lien to Big Developer L.P., since Contractor is a subcontractor for the purposes of the mechanic's lien code. The use of such "artificial tiers" also can impact the defense of payment. Big Developer L.P., may be able to prove that it is not indebted to Big Developer, Inc.

What if an owner prepays the related general contractor in full before the project even begins? This is an untested area in the law, and we do not have Virginia Supreme Court cases to provide us guidance. It would seem only right that a subcontractor would be entitled to a mechanic's lien if the subcontractor can show that artificial tiers were fraudulently used to deprive contractors of mechanic's lien rights. In at least one Circuit Court case, however, such artificial tiers did defeat a subcontractor's mechanic's lien rights. In that case, the owner and the general contractor had the same individual as president and had almost identical stockholders. The owner then *prepaid* the general contractor *in full* before work began. The Trial Court ruled that no fraud had been proven, and the owner had a defense of payment to the subcontractor's mechanic's liens.[206] This scenario made it impossible for any contractor ever to file a mechanic's lien.

Going into the project, the subcontractor must be aware of the identity of all of the players. There are usually legitimate business and tax reasons for the creation of artificial tiers, but they can impact mechanic's lien rights. A subcontractor should be aware in such a case that mechanic's lien rights may be difficult to prove. Since security is questionable, a subcontractor may want to require other types of security, to require a contract directly with the owner, or to require that the owner provide a general contract payment schedule and notice of any changes in the schedule. Otherwise, the subcontractor should be aware that it is depending on the creditworthiness of its contract debtor. In some cases, this may be enough of a problem that a wise subcontractor declines the project.

In this situation, it can be very difficult to determine the status of accounts between the owner and general contractor. Suspicions often arise that the owner and general contractor have "played with the books" to show that no debt existed at the time of notice of a subcontractor lien. The multiple tiers make it more likely that a legitimate defense of payment exists and also increases the opportunity for abuse.

Changes in the Status of Accounts after Notice

The status of accounts upstream can change after notice of a mechanic's lien has been sent. The general contractor may continue to perform work. This will increase the indebtedness from the owner and improve all subcontractors' mechanic's liens.

The amount of the subcontractor's mechanic's lien can also be reduced after notice is received by the owner. In general, the owner cannot make cash payments to the general contractor after notice. The debt to the general contractor may be reduced after notice, however, through legitimate back charges for the costs of completion.[207] There are also some opportunities for a subcontractor to obtain a "preference" over other subcontractors, through guaranties from the owner for completion[208] or through a §43-11 Notice.[209] In these circumstances, the owner may be able to make payments to a subcontractor or even the general contractor, thereby reducing the downstream debt and increasing the defense of payment.

Cost of Completion

If a general contractor fails or refuses to complete a project, the owner is entitled to complete it. Under Section 43-16 of the Code of Virginia, the amount expended, or to be expended, by the owner for such completion has

---

[206] *First Choice Concrete, Inc. v. UDI Contractors, Inc.*, (Fairfax Co. Cir. Ct. 1989).

[207] *Henderson & Russell Assocs. v. Warwick Shopping Center, Inc.*, 217 Va. 486, 229 S.E.2d 878 (1976).

[208] *Thomas & Co. v. McCauley*, 143 Va. 451, 130 S.E. 396 (1925); *Nicholas v. Miller*, 182 Va. 831, 30 S.E.2d 696 (1944).

[209] *Schrieber, Sons & Co. v. Citizens Bank*, 99 Va. 257, 38 S.E. 134 (1901).

priority over all mechanic's liens that may be filed.[210] This can obviously change the status of accounts between the owner and general contractor and lower the subcontractor's lien after notice of the lien has been sent. On early inquiry, a subcontractor may be told that the owner is holding $10,000 in retention. However, the owner may later have legitimate costs in completing the project that could partially or completely eat up the $10,000. Lower tier contractors should be especially concerned if an upstream contractor has abandoned a project or has been terminated. If a contractor has abandoned or been terminated, a sub can be fairly confident that substantial costs will be incurred in completing the contract. Unfortunately, there is not much a subcontractor can do to preserve the debt upstream. A subcontractor may be able to obtain a preference, however, if further work is required from the subcontractor to complete the project.[211]

If an upstream contract is terminated, a subcontractor's best hope is that the sub will be needed to complete the contract. A subcontractor should seriously consider offers to continue on the project once upstream contractors have been terminated, so long as there are at least adequate assurances of payment for new work. Even if an owner only promises to pay for new work, the subcontractor has an interest in seeing that the project is completed at as low a cost as possible. If an owner has to hire new subcontractors, it will probably increase the owner's cost of completion and further erode the debt to the general contractor.[212]

In order to accomplish the timely completion of its project, an owner may be willing to assure payment for more than just new work. The owner may also be willing to pay a subcontractor for past work. The Virginia Supreme Court cases considering the owner's right to complete the project have allowed owners to do this. An owner can, in essence, prefer one subcontractor to another, if necessary to complete the building.[213] Payments made to a preferred subcontractor in order to complete a building can be credited against the debt to the general contractor. In this manner as well, the status of accounts between the owner and general contractor can change, to the detriment of some subs, after the owner has received notice of mechanic's lien.

Multiple Contracts

There may be more than one contract between the owner and general contractor, and a subcontractor may have supplied labor and materials included in the scope of only one general contract. Is the subcontractor's mechanic's lien valid if the owner is indebted to the general contractor on a different contract?[214]

Virginia Code §43-7 states that:

> ... the amount for which a subcontractor may perfect a lien under this section shall not exceed the amount in which the owner is indebted to the general contractor at the time the notice is given or shall thereafter become indebted to the general contractor upon his contract with the general contractor for such structure or building ...

This area of the law is not completely settled. A subcontractor may have to show that the owner is indebted on the same general contract that included the sub's scope of work.[215] It may be enough for the sub to show that the owner is indebted for the same "structure or building," even if there is more than one general contract for that structure or building.[216] A sub's lien may fail if the indebtedness is on a different structure or building, especially if it is on a different parcel of property.[217] Subcontractors should at least be aware of the dangers if there is more than one general contract, and they should determine which general contract includes the sub's scope of work. The subcontractor should also try to track the status of accounts between the owner and general contractor on the general contract that includes the sub's scope of work.

---

[210] *Henderson & Russell Assocs. v. Warwick Shopping Center, Inc.*, 217 Va. 486, 229 S.E.2d 878 (1976); *Knight v. Ferrante*, 202 Va. 243, 117 S.E.2d 283 (1960).

[211] *Nicholas v. Miller*, 182 Va. 831, 30 S.E.2d 696 (1944); *Schrieber, Sons & Co. v. Citizens Bank*, 99 Va. 257, 38 S.E. 134 (1901).

[212] *Henderson & Russell Assocs. v. Warwick Shopping Center, Inc.*, 217 Va. 486, 229 S.E.2d 878 (1976).

[213] *Nicholas v. Miller*, 182 Va. 831, 30 S.E.2d 696 (1944).

[214] *Thompson v. Air Power, Inc.*, 248 Va. 364, 448 S.E.2d 598 (1994).

[215] *See American Std. Homes Corp. v. Reinecke*, 245 Va. 113, 425 S.E.2d 515 (1993).

[216] *Thompson v. Air Power, Inc.*, 248 Va. 364, 448 S.E.2d 598 (1994).

[217] *See Woodington Elec., Inc. v. Lincoln Sav. & Loan Ass'n*, 238 Va. 623, 385 S.E.2d 872 (1989).

Line Item Defense of Payment

An owner cannot defeat a sub's lien by showing only that the general contractor has requisitioned and been paid for the sub's work. The general contractor may have requisitioned the electrical work as 100% complete, for example, and then the owner may have paid this requisition. If the electrical subcontractor later liens the project, the owner may feel that this portion of the work has been paid and the subcontractor lien is invalid. This situation is frustrating for an owner, since it is apparent that the general contractor diverted payments intended for the electrical subcontractor. The owner is not, however, entitled to this type of "line item" defense of payment. If the owner is indebted to the general contractor on the same contract for the same building or structure, then the electrical sub's lien will be valid. Regardless, the owner is not really damaged in this situation, since the owner is only required to pay for its total building once.[218]

If the drywall contractor later also files a lien, however, there may not be enough total indebtedness to satisfy all subcontractors. The drywall subcontractor may feel that its lien should be enforceable in its entirety, since the owner has not paid for any part of the drywall work. Again, however, there is no such line item defense of payment. All subcontractors who supplied on the same contract for the same building or structure will share in the owner's indebtedness.

Partial Defense of Payment

An owner often has some indebtedness to the general contractor but not enough to pay all subcontractor claims. The general contractor may have diverted some payments intended for subs, but the owner may still be partially indebted, often for retention. In this case, the owner has a partial defense of payment.[219] The owner can be required to pay for its building or structure only once. All subcontractors who have validly filed mechanic's liens will share pro rata in the fund held by the owner.[220]

With some exceptions discussed in the next section, all subcontractors on the same level of the payment chain, with valid mechanic's liens, have equal priority to the fund held by the owner. All such subcontractors will get the same percentage of their claim. Distributions are made pro rata based on each subcontractor's established claim.[221]

In order to share in this pro rata pay out, however, the subcontractor must have a valid mechanic's lien. Subcontractors without a valid mechanic's lien have no claim against the owner's property; they only have an unsecured subcontract claim against the general contractor. Accordingly, if the general contractor is insolvent, it is very important for the subcontractors to get their mechanic's liens filed in a timely manner in order to share in the fund held by the owner.

In a sense, subcontractor mechanic's liens are not so much about a battle with the owner or obtaining security in real property as they are about obtaining priority over the general contractor's other creditors. Subcontractors with valid mechanic's liens have first right to this particular receivable of the general contractor. Subcontractors without valid mechanic's liens are battling with every other unsecured creditor of the general contractor for the few assets not taken by secured creditors.

PRIORITY

Various types of liens can be placed on a piece of real estate. Some liens are "consensual," such as a deed of trust or mortgage, and are placed on the property purposefully by the property owner. Other liens are "involuntary" or "judicial," including judgment liens and mechanic's liens. Priority determines which lien gets paid first or paid at all after a foreclosure sale, which liens survive sale of the property or which liens survive a bankruptcy.

The general rule is that all liens have priority in the order that they are filed in the land records. The term "first trust" or "first mortgage" means simply that this was the first trust filed in the land records on that property. A "second trust" is the second trust to be recorded in the land records on that property. If the property is foreclosed upon, the first trust holder receives all of the proceeds of sale, until the first trust holder has been paid in full. If there are any sales proceeds left, they go to the second trust holder, until the second trust holder is paid in full, and so on.

---

[218] *See John T. Wilson Co. v. McManus*, 162 Va. 130, 173 S.E. 361 (1934); *Nicholas v. Miller*, 182 Va. 831, 30 S.E.2d 696 (1944).

[219] *Thompson v. Air Power, Inc.*, 248 Va. 364, 448 S.E.2d 598 (1994).

[220] Va. Code Anno. §43-23 (Michie 1950).

[221] Va. Code Anno. §43-23 (Michie 1950).

The priority of any type of lien is extremely important. Priority will determine whether or not the lien holder gets paid upon foreclosure. A lien with low priority can easily be worthless.

Priority between Mechanic's Liens and Other Liens

In Virginia, the mechanic's lien is an unusual exception to this priority scheme. A mechanic's lien can have priority over deeds of trust and other liens that were actually filed in the land records before the mechanic's lien.[222] This is why a mechanic's lien is so powerful in Virginia and why construction lenders are so concerned about mechanic's liens in Virginia.

In theory, a Virginia mechanic's lien is "inchoate."[223] This means that the lien exists on the property from the moment that a contractor supplies labor and materials.[224] When a contractor eventually files a mechanic's lien, the lien "relates back" in time to the moment work commenced. In general, therefore, the mechanic's lien has priority, on the building or structure, over all liens recorded after work is commenced.[225]

Liens recorded before new construction work commences have "partial" or "split" priority with mechanic's liens. In short, the deed of trust lien will have first priority on the land, while the mechanic's lien will have first priority on the building or structure constructed by the contractor.[226] The law, in essence, says that the deed of trust holder should have the same security as it would have had if the contractor had never supplied labor and materials. The contractor, on the other hand, should have first claim to the value added by its labor and materials.[227]

The lien recorded before work commences has priority to the extent of the value of the land, exclusive of the buildings or structures constructed by the contractor. An estimate of that value is made "at the time of sale." As a part of the proceedings in the Complaint to Enforce the Mechanic's Lien, an appraiser must normally provide estimates and the court must make a finding on the "value of the land, exclusive of the improvements."[228]

Repair or Renovation of an Existing Structure

A contractor supplying labor and materials "for the repair or improvement of any building or structure" (not new construction) has a lower priority. The mortgage lien recorded prior to the commencement of work has *complete* priority over a mechanic's lien.[229] This means that rehabilitation, remodeling or home improvement contractors have significantly weaker mechanic's lien rights.

In a Richmond, Virginia, case, a landowner purchased a large Masonic temple and decided to redevelop it as a retail and residential complex. This dramatically changed the use of the building. The value of the construction was significant compared to the value of the original building. The project was a victim of the real estate recession in the early 1990s, and the original purchase money lender was forced to foreclose. The bank had, in essence, made a bad loan decision, because the value of the property had dropped. The construction project had increased the value of the property substantially, but the court ruled that the bank would receive complete priority on foreclosure because this had been a "repair or improvement" of the building and not new construction. The court seemed most impressed with the fact that the exterior of the building had not changed.[230]

Impact on Lenders

Lenders can consider requiring that any general contractor and subcontractor on the project subordinate their mechanic's lien rights to the construction loan. Mechanic's liens would still be allowed in this instance, but the construction lender would have priority. This would put Virginia mechanic's liens on the same footing as other states, including Maryland and Pennsylvania.[231]

---

[222] Va. Code Anno. §43-21 (Michie 1950).

[223] *Hadrup v. Sale*, 201 Va. 421, 424-425, 111 S.E.2d 405, 407, 76 A.L.R.2d 1159 (1959).

[224] *Synchronized Constr. Servs. v. Prav Lodging, LLC,* 288 Va. 356, 764 S.E.2d 61 (2014).

[225] Va. Code Anno. §43-21 (Michie 1950).

[226] *Fidelity Loan & Trust Co. v. Dennis*, 93 Va. 504, 25 S.E. 546 (1896); *Hudson v. Barham*, 101 Va. 63, 43 S.E. 189 (1903).

[227] *Fidelity Loan & Trust Co. v. Dennis*, 93 Va. 504, 25 S.E. 546 (1896); *United Masonry, Inc. v. Jefferson Mews, Inc.*, 218 Va. 360, 237 S.E.2d 171 (1977).

[228] *Fidelity Loan & Trust Co. v. Dennis*, 93 Va. 504, 25 S.E. 546 (1896).

[229] VA. Code Anno. §43-21 (Michie 1950).

[230] *Hanson Assocs., P.C. v. Gallery Plaza Pshp*., 32 Va. Cir. 356, 359 (Va. Cir. Ct. 1994).

[231] *See* chapter, Mechanic's Liens in Maryland; section, Priority. *See also* chapter, Mechanic's Lien in Pennsylvania; section, Priority.

Before settling on any real estate loan, a lender should investigate whether any construction activity has recently occurred on the security property. Any mechanic's liens filed as a result of such improvements will have priority over the new deed of trust lien. This is why property owners are required to sign an affidavit at a loan settlement, stating that the owner has not ordered any improvements to the property in the 90 days prior to the loan closing.

Construction lenders will always perform a "bring down" title search on the property before making any construction draw. This is to check whether any mechanic's liens have been filed before additional money is advanced. Even with this precaution, construction lenders know that any mechanic's lien filed later will still be prior to all construction draws made since the purchase of the property.

Sale or Foreclosure of Property

The priority of various liens on real property also determines whether or not the liens survive foreclosure. Upon foreclosure by any lien holder, all inferior liens are eliminated. The inferior lien holders have no security interest in the property after foreclosure. When any lien holder forecloses on real property, all liens that are prior will survive the foreclosure. The foreclosure purchaser now owns the property "subject to" the prior liens.[232]

Since mechanic's liens are prior to most other liens, they survive most foreclosures. In fact, since a mechanic's lien is inchoate, it can actually be filed after foreclosure.[233] A first trust lender may foreclose on a piece of real estate, only to see a mechanic's lien filed after they have taken title. The mechanic's lien claimant must be certain to name the new property owner in the mechanic's lien, but lien rights otherwise still exist.[234]

Mechanic's lien rights similarly survive any other type of sale of the property.[235] Any real estate purchaser must be aware that mechanic's liens might be filed after they purchase the property, for labor and materials supplied to the prior owner. For this reason, real estate purchasers and title insurance companies always insist that the real estate seller sign an affidavit stating that no labor and materials have been supplied to the property in the last 90 days or that payment has been made for all such labor and materials. This may not be enough protection if the real estate seller is insolvent. Real estate purchasers, therefore, may want to make independent inquiries whether labor and materials have been recently supplied to the property and whether all persons supplying labor and materials have been paid.

Priority between Different Mechanic's Liens

In general, all mechanic's liens on the same tier of the payment chain have equal priority. A subcontractor lien has priority over a general contractor's lien[236], but all subcontractors will generally have equal priority. It does not matter which mechanic's lien is filed first, so long as all mechanic's liens are valid.[237]

The exceptions to this rule are (i) a subcontractor mechanic's lien claimant who also served a valid §43-11 Notice on the owner[238] and (ii) a subcontractor who obtained guaranty of payment from the owner as a condition of supplying labor or materials.[239]

The most obvious difference in priority will come from validity. If a mechanic's lien is invalid because it was not filed in a timely manner or named the wrong owner, then it has no priority at all. This contractor has no mechanic's lien and is just another unsecured creditor.

Lower tier contractors with valid liens are preferred over upper tier contractors with valid liens under the mechanic's lien statute. The lien of a sub-subcontractor will be preferred to the lien of the subcontractor.[240] The subcontractor's lien will be preferred over the general contractor's lien. Liens filed by persons performing manual labor also have a special priority over materialmen for the last 30 days of labor performed.[241]

---

[232] *See Hadrup v. Sale*, 201 Va. 421, 424-425, 111 S.E.2d 405, 407; 76 A.L.R.2d 1159 (1959).

[233] *See* subsection above, Priority between Mechanic's Liens and Other Liens.

[234] *Wallace v. Brumback*, 177 Va. 36, 12 S.E.2d 801 (1941).

[235] *Hadrup v. Sale*, 201 Va. 421, 424-425, 111 S.E.2d 405, 407, 76 A.L.R.2d 1159 (1959).

[236] Va. Code Anno. §43-23 (Michie 1950).

[237] Va. Code Anno. §43-23 (Michie 1950).

[238] *Schrieber, Sons & Co. v. Citizen Bank*, 99 Va. 257, 38 S.E. 134 (1901); *See* section below, Alternatives to Mechanic's Lien; subsection, The Section 43-11 Notice–Improving Subcontractor Lien Priority.

[239] *See* section above, Defense of Payment: Owner's Responsibility for Payment to Subcontractors; subsection, Cost of Completion; *Schrieber, Sons & Co. v. Citizen Bank*, 99 Va. 257, 38 S.E. 134 (1901).

[240] Va. Code Anno. §43-23 (Michie 1950).

[241] Va. Code Anno. §43-23 (Michie 1950).

Priority between Mechanic's Liens and Other Unsecured Claims

A general contractor may owe money to quite a variety of creditors, including subcontractors, its landlord for office space, lenders on trucks and equipment, its credit line bank, etc. A valid mechanic's lien holder will have complete priority (with other valid mechanic's lien holders) over all other creditors to the fund owed by the mechanic's lien project owner to the general contractor.[242] This complete priority applies only to this particular debt from the owner on this particular project. A contractor will be on an equal footing with all other unsecured creditors as to any other assets of the general contractor.

The owner has its defense of payment and must only pay for the construction project once. The fund owed by the owner will be split up pro rata among valid mechanic's lien holders. In a sense, therefore, a mechanic's lien action is not really an action "against the property owner" or even against the general contractor. It is an action by one subcontractor to obtain priority over unsecured creditors and other subcontractors on the project. Valid mechanic's lien holders have priority over the fund. All other subcontractors and unsecured creditors may not collect at all.

Bankruptcy

Because the lien is inchoate, the "automatic stay" provision of the United States Bankruptcy Code does not stay the perfection (filing in the land records) of the mechanic's lien. The lien filing is not a "preference" because the claimant always had the mechanic's lien from the moment labor and materials were supplied. The lien filing just gives public notice of this fact. The claimant is a secured creditor from the moment labor and material are supplied to the property and retains secured status even though lien enforcement proceedings are filed long after bankruptcy.[243]

This means that if the owner on the project files bankruptcy, a general contractor or subcontractor can still file their mechanic's lien without seeking the permission of the United States Bankruptcy Court.[244] If a general contractor files bankruptcy, a subcontractor can still file its mechanic's lien. In fact, it is important to keep in mind that the mechanic's lien *must* still be filed within the normal time limits.

The bankruptcy of the project owner,[245] the general contractor[246] or any other upstream contractor can delay the time for filing the lawsuit.[247] The automatic stay of the Bankruptcy Code means that any mechanic's lien claimant is not permitted to file their Complaint to Enforce a Mechanic's Lien if the owner of the real property, the general contractor, or any upstream contractor has filed for bankruptcy. The mechanic's lien claimant is provided additional time, however, to file later. The Complaint to Enforce Mechanic's Lien must be filed within 30 days after the automatic stay terminates.[248]

Priority between Mechanic's Lien and Tax Lien

A perfected Virginia Mechanic's lien will be prior to a United States tax lien, because it is inchoate.[249]

ALTERNATIVES TO MECHANIC'S LIEN

The Code of Virginia is clear that the mechanic's lien is not an "exclusive remedy."[250] This means that a contractor is not giving up any other rights by filing a mechanic's lien. The contractor has other options that it can pursue before, after or simultaneously with the mechanic's lien filing.

---

[242] *See Nicholas v. Harrison Bldg. & Supply Co., Inc.*, 181 Va. 207, 24 S.E.2d 452 (1943).

[243] *See generally In re Gem Construction Corporation of* Virginia, 262 B.R. 638 (2000); *M & T Electrical Contractors v. Capital Lighting and Supply, Inc*. (*In re M & T Electrical Contractors, Inc.*), 267 B.R. 434 (Bkcy Ct. D.C. 2001).

[244] *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).

[245] *McCoy v. Chrysler Condo Developers Ltd. Partnership*, 239 Va. 321, 389 S.E.2d 905 (1990).

[246] *Thompson v. Air Power, Inc.*, 248 Va. 364, 448 S.E.2d 598 (1994); *In re Richardson Builders,* 123 B.R. 736 (W.D.Va. 1990).

[247] *In re Concrete Structures, Inc.*, 261 B.R. 627 (2001); *Graybar Electric Company, Inc. v. Property Technologies, Ltd.* (*In re Property Technologies, Ltd.)*, 263 B.R. 750 (Bkcy Ct. E.D.Va. 2001).

[248] *McCoy v. Chrysler Condo Developers Ltd. Partnership*, 239 Va. 321, 389 S.E.2d 905 (1990); *See* section above, Time Limits for Memorandum of Mechanic's Lien; subsection, Effect of Bankruptcy.

[249] 26 U.S.C. 6323; *M & T Electrical Contractors v. Capital Lighting and Supply, Inc*. (*In re M & T Electrical Contractors, Inc.*), 267 B.R. 434 (Bkcy Ct. D.C. 2001); *Glen Construction Company, Inc. v. Bank of Virginia*, 410 F. Supp 402 (1976).

[250] Va. Code Anno. §43-23.2 (Michie 1950).

The Section 43-11 Notice—Improving Subcontractor Lien Priority

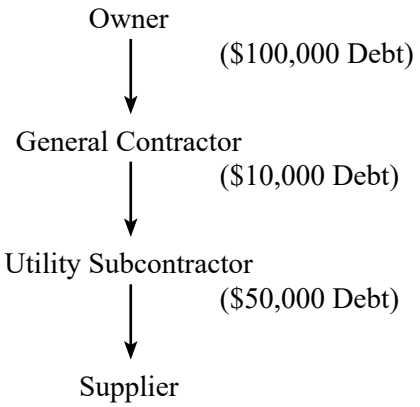
Section 43-11 of the Code of Virginia provides an alternative that has been largely ignored and underutilized by contractors. A subcontractor or any lower tier contractors can send a "preliminary" notice of intention to provide labor and material to a project. This "pre" notice does generate some administrative expense and political problems, but the benefits can be impressive.

Two notices are required. First, a preliminary notice is sent to the owner and/or the general contractor before labor and materials are supplied to the project. After labor or materials are supplied, the claimant must provide a second notice with a statement of account and affidavit. The claimant supplying a subcontractor can elect to send the notice only to the general contractor. This will not obligate the owner but will still obligate the general contractor. The potential benefits are:

1. The Section 43-11 Notice can partially take the claimant out of the defense of payment system.[251] The owner and general contractor become directly obligated for payment, to the extent they are holding money at the time they receive the second notice and statement of account. The owner and general contractor essentially provide an involuntary guaranty or joint check agreement after receipt of the second notice.
2. A Section 43-11 Notice probably will also provide priority over other mechanic's lien claimants.[252] In a partial defense of payment situation, the §43-11 Notice claimant can take the entire fund held by the owner and general contractor. Other mechanic's lien claimants will receive nothing until the §43-11 claimant is paid in full.
3. There also is an extended deadline for the Section 43-11 claim second notice. A claimant may still have Section 43-11 rights, even after the deadline for mechanic's lien filing. A claimant probably also still has Section 43-11 rights, even if the claimant has waived lien rights.
4. It is way to avoid problems and legal fees altogether. If the owner and general contractor know they may become obligated, the claimant is likely to receive payment without legal assistance. The owner and general contractor are aware of the players on the project and are motivated to see payments properly applied.

In Virginia, the owner and general contractor usually are only required to pay for a construction project only once.[253] Once they have paid in full for the project, they have a defense to any mechanic's lien filed. This is called the "defense of payment." The mechanic's lien will be invalid unless the claimant can "catch" money owed by the owner *and* general contractor. The claimant must file a mechanic's lien and give notice to the owner and general contractor while they are still holding money. This is the *true deadline* for a mechanic's lien filing.

The mechanic's lien is only as strong as the weakest link in the payment chain:



[251] *See* section above, Defense of Payment: Owner's Responsibility for Payment to Subcontractors.

[252] *Schrieber, Sons & Co. v. Citizen Bank*, 99 Va. 257, 38 S.E. 134 (1901).

[253] *See* section above, Defense of Payment: Owner's Responsibility for Payment to Subcontractors.

In this example, the supplier's mechanic's lien will be valid only to the extent of $10,000. This is called a "partial defense of payment." If a second supplier also files a lien for money owed by the same sub, the two suppliers will share pro rata in the $10,000 fund. The further removed from the owner, the more chance the claimant will have a problem.

One of the most interesting possibilities is that a mechanic's lien claimant that *also* had sent a Section 43-11 notice would have priority over other mechanic's lien claimants and may be able to claim the entire $10,000 fund, because of the personal obligation of the owner to pay.[254] In any event, a §43-11 notice claimant can freeze the status of payments from the owner or general contractor at an earlier stage in the project by sending the second §43-11 notice immediately after supply of labor or materials.

A contractor may still have rights under Section 43-11, even if mechanic's lien rights have been waived or even if it is too late to file a mechanic's lien. A Section 43-11 notice has similarities with a mechanic's lien, but nothing is filed in the land records and it may not be necessary to perform a title search. This means that a Section 43-11 notice is usually less expensive than a mechanic's lien.

Although this statute is quite old, there is very little Virginia Supreme Court case law interpreting §43-11.[255] This means that there is uncertainty about how this mechanism works.

The subcontractor or any lower tier contractors must "give notice in writing to the owner or his agent or the general contractor, stating the nature and character of his contract and probable amount of his claim." This notice should be sent by certified mail[256] before (or possibly soon after) the subcontractor begins work.[257] A suggested form for this notice is the Virginia §43-11 Notice is in the Appendices. The claimant is *not* accusing anyone of bad credit or failure to pay. The notice describes the "nature and character of the contract" and the "probable amount of the claim": in short, what the claimant will supply, to whom and for how much. This notice must, however, go certified mail return receipt requested or be served by the sheriff.

Another suggested form for this notice is the Virginia §43-11 Notice and MLA Notice in the Appendices. This is a "combination notice," which should comply with Section 43-11 and the notice to the mechanic's lien agent.[258] Like a mechanic's lien agent notice, the Section 43-11 Notice must be sent very early in the project. Both notices require very similar information; accordingly it should be possible to use a unified form to hit two birds with one stone.

It may be possible for a subcontractor or lower tier contractor to satisfy the requirements for the first Section 43-11 notice in the form of a "marketing letter" that will not irritate customers and may even be useful as a marketing tool. An example of such a letter may state only:

> We at Excavating Subcontractor, Inc., are pleased to announce that we have been awarded the subcontract from General Contractor, Inc., to perform the excavating portions of your project, including basement excavation, rough and final grading. Our subcontract is in the amount of $7,000. We are pleased that General Contractor has the confidence in us to perform this contract. Please contact General Contractor or this company immediately if you have any questions or problems with the excavation work performed.

This would seem to "give notice in writing to the owner ... stating the nature and character of his contract and probable amount of his claim" as required by Section 43-11. This marketing letter can be sent before any labor and materials are supplied, with less chance of irritating customers or other upstream contractors. It is not necessary to state that anyone is in default or that there are apprehensions about payment. The notice must still state the "probable amount of the claim" and be sent certified mail. At least one lower court has ruled that a Section 43-11 notice must state clearly that it is sent for the purpose of imposing personal liability on an owner pursuant to Virginia Code Section 43-11.[259] The safest course would be to send a more formal notice that meets this requirement and identifies Section 43-11 of the Code of Virginia, like the examples shown in the Appendices.

---

[254] *Schrieber, Sons & Co. v. Citizen Bank*, 99 Va. 257, 38 S.E. 134 (1901); *Thomas & Co. v. McCauley*, 143 Va. 451, 130 S.E. 396 (1925); *Nicholas v. Miller*, 182 Va. 831, 30 S.E.2d 696 (1944).

[255] *Penrod & Stauffer Bldg. Systems v. Metro Printing & Mailing Servs., Inc.*, 229 Va. 150, 326 S.E.2d 662 (1985); *Shenandoah Valley R.R. Co. v. Miller*, 80 Va. 821 (1885).

[256] Va. Code Anno. §43-14.1 (Michie 1950).

[257] *Stiegleder v. Allen*, 113 Va. 686, 75 S.E. 191 (1912); *Staples v. Adams, Payne & Gleaves, Inc.*, 215 F. 322, 327 (4th Cir. 1914); *Robinson v. Herrell Construction Co.*, 7 Va. Cir. 308 (Va. Cir. Ct. 1986).

[258] *See* section above, Prefiling Before Construction: Notice to the Mechanic's Lien Agent.

[259] *English's, Inc. v. McCrickard*, 7 Va. Cir. 218 (Va. Cir. Ct. 1984).

The claimant must send the second notice within 30 days after completion of the *entire* project. The subcontractor or any lower tier contractors must send this second notice "before the expiration of 30 days from the time such building or structure is completed or work thereon otherwise terminated." This can be much later than a mechanic's lien deadline of 90 days after completion of the claimant's work. The second notice must contain a "correct account, verified by affidavit." This notice should also go certified mail to the owner or upper tier contractors.

The greatest limitation on the Section 43-11 notice will be the status of accounts at the time the owner and/or general contractor receive the second notice and statement of account. Accordingly, the claimant will want to send this second notice as soon as there is any sign of trouble or as soon as all labor and materials are provided. Although the second notice is not "due" until 30 days after the entire project is complete, the claimant's Section 43-11 rights will erode with each payment that the owner makes to a general contractor and each payment that the general contractor makes to a subcontractor before the second notice and statement of account. If a claimant is concerned, it may be advisable to send multiple second notices and statements of account, with each delivery. There is no apparent prohibition to sending multiple statements of account.

The owner also has priority for costs of completion. The owner has the right to complete the project if the general contractor defaults: "Any bona fide agreement for deductions by the owner because of the failure or refusal of the general contractor to comply with his contract shall be binding on such subcontractor..."[260] The owner's costs of completion "shall have priority over all mechanic's liens..."[261] These concepts can collide. An owner may ignore or forget the second Section 43-11 notice and make payments, without ensuring that they are applied to the claimant. This would violate Section 43-11 obligation and create personal liability of the owner. The general contractor may later default or abandon the project. The increased costs of completion may be large enough to eradicate any debt and the misapplied payments. Is the owner obligated to pay again?

A Section 43-11 notice is less drastic than a mechanic's lien and is less likely to disrupt the construction project. The Section 43-11 notice does not need to be recorded in the land records, will not cloud title to the property or disrupt financing. This can be an advantage if a contractor wishes to preserve rights or freeze payments to a general contractor, but does not wish to sour relations with an owner. An owner may actually want a Section 43-11 notice, if the owner and/or subcontractor are concerned about default or the creditworthiness of the general contractor. A supplier to a subcontractor may also elect to send a Section 43-11 Notice *only* to the general contractor, avoiding disruption with the property owner. Once the notice has been received, the owner or general contractor has a basis to insist that payments be made by joint check. This may save future trouble.

Upon receipt of a Section 43-11 notice, an owner should probably not despair or get angry. Like a notice sent to a mechanic's lien agent, this notice provides the owner with information concerning the identity of persons supplying labor or materials to the project and the amount of their contracts. The owner will have the burden of making sure these persons are paid. The owner will only have to pay for the project once, however, as long as a mechanism is set up to make sure payment gets to all persons sending notice. The owner will not be damaged, and the risks of mechanic's liens from the claimants are eliminated.

Section 43-18—Claiming the Benefit of a General Contractor Lien

Under Virginia Code Section 43-18, a subcontractor or any person performing labor or furnishing materials to a subcontractor may "claim the benefit" of any lien filed by the general contractor. Section 43-18 states:

> The perfected lien of a general contractor... shall insure to the benefit of any subcontractor [or sub-subcontractor] who has not perfected a lien... provided such subcontractor [or sub-subcontractor] shall give written notice of his claim against the general contractor, or subcontractor, as the case may be, to the owner or his agent before the amount of such lien is actually paid off or discharged.

The code does not describe any particular form for such a notice; it can probably be as informal as a letter. This notice should be sent certified mail, regardless.[262] Like a Section 43-11 notice, however, there is very little case law

---

[260] Va. Code Anno. §43-11.

[261] Va. Code Anno. §43-16; *Nicholas v. Miller*, 182 Va. 831, 30 S.E.2d 696 (1944).

[262] Va. Code Anno. §43-14.1 (Michie 1950).

from the Virginia Supreme Court explaining exactly how to send the notice or exactly what benefits such a notice provides.[263]

It is certain that such a notice will do more good than harm for a claimant. It is also an easy and inexpensive way to obtain potential benefits. It may not be necessary to perform a title search. There is no time limit for sending such a notice, except that the owner must receive it before the general contractor's lien is actually paid off or discharged.[264] Accordingly, a claimant may have Section 43-18 rights long after the claimant's independent mechanic's lien rights have expired. A subcontractor that has missed their independent mechanic's lien deadline might even consider financing a general contractor to file a lien, so that the subcontractor can then claim Section 43-18 rights. Of course, other subcontractors also may benefit from this general contractor lien.

A subcontractor will be better secured and have a higher priority with its own independent mechanic's lien perfected, in addition to a Section 43-18 claim. A subcontractor should keep in mind that claiming the benefit of a general contractor lien does no good if the general contractor lien is invalid for any reason. This is the greatest limitation in Section 43-18 rights. If a subcontractor does not file its own independent lien or if the subcontractor's lien fails, however, a Section 43-18 notice may provide greater security and a higher priority over other unsecured creditors of the general contractor.

It is uncertain how Section 43-18 rights are enforced or when such an enforcement action is due. A claimant probably should enforce rights through a lawsuit naming the owner and general contractor as defendants, generally following the rules for enforcement of an independent subcontractor lien. It also is uncertain whether a general contractor can defeat the Section 43-18 rights of a subcontractor by voluntarily releasing the general contractor lien. A claimant should give notice of a Section 43-18 claim and intervene in a general contractor enforcement action as early as possible, so that the claimant can object to any settlement or release.

Sending a Section 43-18 notice should get a subcontractor "in the loop" or "on the mailing list" in any settlement discussions between the owner and general contractor. This will help ensure that the subcontractor can protect its interest, as the general contractor's dispute is resolved.

An owner need not be overly concerned about receipt of a Section 43-18 notice. Again, this only puts the owner on notice of other claims against the general contractor. The owner is still only required to pay for the project once, so long as the owner provides some mechanism to make sure that subcontractors sending a notice receive their share of payments from the general contractor.

Enforcing the Contract

A general contractor, subcontractor or lower tier contractor also has the option of simply enforcing its contract through litigation or arbitration. Such a contractor can "sue on the contract," seeking a money judgment against the person or entity who requested the labor or materials. This can be done instead of, before, after or simultaneously while enforcing mechanic's lien rights.[265]

Enforcing the contract often has the advantage of being cheaper and faster than mechanic's lien litigation. It is not necessary to perform a title search or file a mechanic's lien. It is not necessary to involve the owner, the deed of trust beneficiaries and the trustees. The only other party to the lawsuit is the contract debtor. This means that the owner will not have to incur expenses in defending the lawsuit. It also means that there will be fewer personalities involved in the lawsuit. Sometimes it is a good strategy for a subcontractor to get the owner involved, but other times it is not so important or it may actually be a problem.

If the contract debtor has adequate assets to pay the claim, enforcing the contract may be the best option. Mechanic's lien rights become critically important, however, if the contract debtor is insolvent. If there is any doubt about the contract debtor's ability to pay, mechanic's lien rights should be preserved.

It is often the best plan for a contractor to file a mechanic's lien to preserve security rights, and then immediately file suit to enforce the contract. In this manner, the contractor may be able to resolve the dispute and/or determine whether the contract debtor has assets before the expiration of the six-month deadline to file a Complaint to Enforce Mechanic's Lien. Contractors often wish to file their lien and then "wait a while to see what happens." A mechanic's lien alone may result in payment, but such a strategy more often only delays a resolution. Five months later, the

---

[263] *Knight v. Ferrante*, 202 Va. 243, 117 S.E.2d 283 (1960); *Shenandoah Valley R.R. Co. v. Miller*, 80 Va. 821 (1885); *VNB Mtg. Corp. v. Lone Star Indus., Inc.*, 215 Va. 366, 209 S.E.2d 909 (1974).

[264] Va. Code Anno. §43-18 (Michie 1950); *Shenandoah Valley R.R. Co. v. Miller*, 80 Va. 821 (1885).

[265] Va. Code Anno. §43-23.2 (Michie 1950); *Johnston v. Bunn*, 108 Va. 490, 62 S.E. 341 (1908).

contractor is faced with a decision whether to file an expensive Complaint to Enforce Mechanic's Lien without knowing if a contract action would be sufficient to obtain payment.

If a claimant does enforce the contract in a lawsuit before enforcing the lien, it may be important to make sure that the contract lawsuit does not conclude with a final judgment before enforcing the lien.[266] Once a contract action is "decided on the merits," the claimant may be barred from filing a lien action. As a practical matter, this means the claimant may not want to take a default judgment on the contract before enforcing the lien. There should be no problem if the contract lawsuit results in a fully performed settlement agreement with the contract debtor, because there would be no need to enforce the lien.

Enforcing Payment Bond Rights

A subcontractor or lower tier contractor also has the option of enforcing its rights on any payment bond provided by the general contractor or other intermediate contractors. This can be done instead of, before, after or simultaneously while enforcing mechanic's lien rights or contract rights.[267]

Enforcing bond rights is usually cheaper and faster than mechanic's lien litigation. It is not necessary to perform a title search or file a mechanic's lien. It is not necessary to involve the owner, the deed of trust beneficiaries and the trustees. The claimant has the right to sue either or both of the surety and the contract debtor. This means that enforcing bond rights is usually a better option than mechanic's lien litigation. Of course, on a larger case, it is important to preserve all rights.

Again, if the claimant files suit on the bond against the contract debtor, it may be important to make sure that the bond lawsuit does not conclude with a final judgment against the contract debtor before enforcing the lien.[268] Otherwise, the claimant may be barred from filing a lien action later. There should be no problem if the bond lawsuit results in a fully performed settlement agreement with the contract debtor, because there would be no need to enforce the lien.

Criminal Prosecution

Section 43-13 of the Code of Virginia states that:

> Any contractor, subcontractor or owner-developer ... or any officer, director or employee ... who shall, with intent to defraud, retain or use the funds, or any part thereof, paid ... by the owner or his agent, the contractor or lender ... for any other purpose than to pay [subcontractors] shall be guilty of larceny and may be prosecuted ...
>
> The use ... of any moneys paid under the contract, before paying all amounts due or to become due to [subcontractors] shall be prima facie evidence of intent to defraud.

Case law makes it clear that this statute does not create a trust fund[269] or provide additional grounds for a subcontractor to personally sue individuals for the liabilities of their former corporations,[270] but it can provide grounds for a criminal prosecution.[271]

MECHANIC'S LIEN WAIVERS

General problems in lien and bond waivers are discussed in greater detail in another chapter (Contracts and Preserving Rights, Contract Administration, Waiver Forms sections and subsections). Under Virginia law, however, mechanic's lien rights have special statutory protections.[272]

---

[266] *See* Rules of Virginia Supreme Court 1:6 regarding *Res Judicata* Claim Preclusion.

[267] *Phoenix Ins. Co. v. Lester Bros., Inc.*, 203 Va. 802, 127 S.E.2d 432 (1962).

[268] *See* Rules of Virginia Supreme Court 1:6 regarding *Res Judicata* Claim Preclusion.

[269] *See* chapter, Trust Fund Laws and Agreements.

[270] *Kayhoe Construction Corp. United Virginia Bank*, 220 Va. 285, 257 S.E.2d 837 (1979).

[271] *Overstreet v. Commonwealth*, 193 Va. 104, 67 S.E.2d 875 (1951); *Holloway v. Commonwealth*, 2014 Va. App. LEXIS 109 (Va. Ct. App. 2014); *Hinote v. Commonwealth*, 2011 Va. App. LEXIS 362 (Va. Ct. App. 2011).

[272] Va. Code Anno. §43-3(C) (Michie 1950).

Waiver in Contract

The Virginia Code protects contractors and suppliers by preventing waivers of lien rights in a contract signed in advance of furnishing any labor, services, or materials. The protections only exist in contracts signed in advance of furnishing any labor, services, or materials. In other words, it appears that a contractor or supplier could still waive these rights if their contract is not actually signed until after they have begun work on the project.

Similarly, it is still possible to waive lien and bond rights for past or even future deliveries in any other document signed after the claimant begins work. This includes progress payment waivers. General contractors, subcontractors and suppliers always have to be careful reviewing progress payment waivers to make sure they are not waiving rights for future deliveries, for change orders, or for retention.

A common problem involves "pass-through provisions" of a general contract. The general contract may contain a waiver stating that the general contractor *and any subcontractors* waive their right to lien. The general contractor then has a series of subcontracts that do not discuss mechanic's lien rights at all but do state that "all provisions of the general contract are passed through and binding upon the subcontractor." The Virginia Supreme Court has determined that the subcontractor has not waived mechanic's lien rights in this situation.[273] Any waiver must be "intelligently provided." This means that the subcontractor must understand specifically what is being waived or at least the subcontract document must be clear.[274]

The Virginia Code says a general contractor can subordinate its lien rights.[275] Accordingly, a general contractor cannot waive its own lien rights in a contract, but can subordinate (make the lien lower priority) to the construction lender or other liens on the property. This could effectively eliminate mechanic's lien protection, depending on the value of the property and the dollar amounts of other liens. However, it is respectfully submitted that this amendment to the Code was not necessary to make it possible for a general contractor to subordinate liens rights in a contract. A subcontractor could do the same thing in a contract, even without such a statute. All contractors should carefully notice any "subordination of lien rights" in a contract, as that may effectively eliminate mechanic's lien protection.

It is significant that these Virginia Code amendments void contract provisions that waive or *diminish* lien or bond rights. A "pay when paid" or "pay if paid" clause may *diminish* lien or bond rights of subcontractors. Are "pay if paid" clauses null and void in Virginia? We still need some court opinions to know the answer to this, but we should expect these arguments regularly until case law provides clarity. Other common contract terms such as those requiring written signed change orders or immediate written notice of any delay or other additional costs could similarly "*diminish* lien rights." Signed change orders are required by the Virginia Contractor Board Regulations. But are these contract terms void because they diminish lien rights?

The Virginia Code amendments also voided any pre-work subcontract provision that waives or diminishes a subcontractor or supplier's right to assert claims for demonstrated additional costs. Virginia Code §11-4.1:1, with the 2015 amendments, reads as follows:

Waiver of payment bond claims and contract claims; construction contracts

> A subcontractor as defined in §43-1, lower-tier subcontractor, or material supplier may not waive or diminish his right to assert payment bond claims or his right to assert claims for demonstrated additional costs in a contract in advance of furnishing any labor, services, or materials. A provision that waives or diminishes a subcontractor's, lower-tier subcontractor's, or material supplier's right to assert payment bond claims or his right to assert claims for demonstrated additional costs in a contract executed prior to providing any labor, services, or materials is null and void.

Just like it is difficult to say what contract terms would be void because they *diminish* lien or bond rights, it is hard to say what common contract terms would be void for *diminishing the right to make claims*. The conduit relationship and notice and claim requirements in a subcontract may do exactly this. These seem like reasonable contract terms. But the most common defense to a subcontractor's claim for extras is that the subcontractor failed to give notice of the claim within the time and in the manner required in either the subcontract or the general contract. A "pay when

---

[273] *VNB Mtg. Corp. v. Lone Star Indus., Inc.*, 215 Va. 366, 209 S.E.2d 909 (1974).

[274] *McMerit Constr. Co. v. Knightsbridge Dev. Co.*, 235 Va. 368, 367 S.E.2d 512 (1988).

[275] Virginia Code §43-21. Notwithstanding the provisions of subsection C of §43-3, a general contractor may, prior to or after providing any labor, services, or materials, contract to **subordinate** his lien rights to prior recorded and later recorded deeds of trust, provided that such contract is (i) in writing and (ii) signed by any general contractor whose lien rights are subordinated pursuant to such contract.

paid" or "pay if paid" clause diminish the right to make claims. So do contract terms requiring written signed change orders or immediate written notice of any delay or other additional costs.

Note, however, that Virginia Code §11-4.1:1 was NOT amended to extend these claim protections to general contractors as was Virginia Code §43-3. The words "general contractor" are conspicuously absent. The protection flows only to subcontractors and material suppliers. This may be in part, because general contractors do not need the protection of payment bonds. General contractors are providing payment bonds. However, the failure to extend to general contractors the protection of the right to assert claims for demonstrated additional costs in a contract can put a general contractor in a significant disadvantage compared to a subcontractor.

These conduit, notice and claim provisions may now be void in subcontracts, at least in diminishing subcontractor rights to assert claims. A general contractor may be barred by the general contract from passing on to an owner a late claim on behalf of a subcontractor, while the subcontractor still has a claim against the general contractor. This would significantly alter the relationship of subcontractors and general contractors and add greater risk to general contractors.

What if the subcontractor signs a waiver in a contract amendment or a separate document after the subcontract is signed and after work begins? What if a subcontract is simply not executed until after work begins? The new Virginia Code does not seem to void such waivers, as long as work has begun. General contractors may start to employ these techniques to reduce their risk.

As many of you know, mechanic's lien and bond claim waivers can appear in waiver forms for both progress and final payments. These waivers can permanently eliminate lien or bond rights under Virginia law, for retention and even for future work. General contractors, subcontractors and suppliers must still be careful to identify and eliminate waivers for future work in progress payment waivers. However, general contractors may no longer be able to require such progress payment waivers in advance by adding them as an exhibit to a subcontract. If the progress payment waiver attached to the subcontract diminishes the subcontractor or supplier lien rights for future work or retention, for example, then the subcontract provision requiring that waiver is now null and void.

Virginia is now in line with Maryland, which prohibits lien and bond waivers in contracts. Maryland is actually more protective, since such waivers are prohibited until work under the contract is complete. In other words, it does not matter whether the contract is signed after work begins. However, the Maryland provisions do not protect waivers of change orders or claims. The amendment also brings Virginia more in line with the federal Miller Act, which states that a payment bond waiver is void unless executed after the claimant has furnished labor or material.

Waiver for Partial Payment

Contractors are usually requested to sign waivers of lien at the time of each progress payment. Waiver forms presented for signature at that time vary greatly in their wording and effect.[276] Virginia Supreme Court case law would suggest that progress waivers can be effective to completely waive mechanic's lien rights that might otherwise exist in the future, even if the initial progress payment is very small.[277] Contractors often believe that if the waiver form recites a specific dollar amount as received, then mechanic's lien rights are waived only to the extent of that dollar amount.[278] This is not true, and a contractor should be careful to inspect the waiver form to determine the extent of rights waived.

RIGHTS AND OPTIONS OF OWNERS AND LENDERS

Right to Pay for the Project Only Once

The owner's defense of payment discussed above means that the owner will have to pay for the project only once, so long as a few simple rules are followed. Basically, the owner must only take some steps to protect the rights of lower tier contractors after certain notices are received. This may result in some additional administrative costs in managing the project, but will ensure that the owner incurs no additional damage, will reduce the chances of mechanic's liens or litigation, and will protect all parties from insolvent or unscrupulous contractors. An owner can

---

[276] *See* chapter, Contract Terms and Preserving Rights; section, Contract Administration; subsection, Waiver Forms.

[277] *See United Masonry, Inc. v. Riggs Nat'l Bank*, 233 Va. 476, 357 S.E.2d 509 (1987).

[278] *United Masonry, Inc. v. Riggs Nat'l Bank*, 233 Va. 476, 357 S.E.2d 509 (1987).

and should have provisions in the general contract allowing the owner to deduct the direct and indirect expenses of this process.

Right to Complete the Project

If a general contractor fails or refuses to complete a project, the owner is entitled to complete it. The amount expended, or to be expended, by the owner for such completion has priority over all mechanic's liens that may be filed.[279] The owner's costs of completion also have priority over personal obligations of the owner to a subcontractor or supplier through a Section 43-11 Notice.[280]

The owner can also legitimately prefer some contractors over others in order to complete the project through guaranties from the owner for completion[281] or through a Section 43-11 Notice.[282] In these circumstances, the owner may be able to make payments to a subcontractor or even the general contractor, thereby reducing the downstream debt and eliminating mechanic's lien rights in other contractors.

Receipt of First Section 43-11 Notice

Upon receipt of this notice, the owner may have an obligation to the subcontractor on receipt of a second notice. Although the owner has no strict obligation after the first notice, the owner may wish to insist upon joint checks or similar arrangement from this point forward. Owners may wish to have general contract terms stating that the owner may require payment bonds or may issue joint checks upon the receipt of such a notice.[283]

Receipt of Mechanic's Lien Agent Notice

This notice creates no additional liability or burden on the owner but may provide helpful information. This means that a subcontractor has preserved its rights to enforce a mechanic's lien. It puts an owner in a position to make sure this claimant is paid. It does not, however, *require* that the owner make sure the claimant is paid.

Receipt of Notice of Mechanic's Lien

Once an owner has received notice of a mechanic's lien filing in the form prescribed by the code, the owner must make sure that future payments to the general contractor are applied to the account of the subcontractor claimant. If there is any chance that there are additional subcontractors on the project, then the owner should simply refuse to make any further payment to the general contractor until the mechanic's lien has been removed. Again, it is important to have a contract term stating that the owner has the right to stop all payments as soon as a mechanic's lien has been filed.

Receipt of Section 43-18 Notice

Once an owner has received this notice, no payment should be made to discharge a general contractor mechanic's lien without making sure that the claim of this lower tier contractor is satisfied.[284]

In summary, the owner's rights and obligations are essentially the same no matter what option a contractor is pursuing to obtain payment. The owner has the right to complete its project and has the right to pay for the project only once, but may (depending on the type of notice) have an obligation to make sure that payments made are passed on to lower tier contractors.[285]

Rights and Options after Notices Are Received

It is very important to an owner to have general contract provisions to protect the owner once various notices are received from subcontractors. Failure to make timely payment to subcontractors should be a default on the part of

---

[279] Va. Code Anno. §43-16 (Michie 1950); *Henderson & Russell Assocs. v. Warwick Shopping Center, Inc.*, 217 Va. 486, 229 S.E.2d 878 (1976); *Knight v. Ferrante*, 202 Va. 243, 117 S.E.2d 283 (1960).

[280] Va. Code Anno. §43-11[Any bona fide agreement for deductions by the owner because of the failure or refusal of the general contractor to comply with his contract shall be binding on such subcontractor].

[281] *Thomas & Co. v. McCauley*, 143 Va. 451, 130 S.E. 396 (1925); *Nicholas v. Miller*, 182 Va. 831, 30 S.E.2d 696 (1944).

[282] *Schrieber, Sons & Co. v. Citizens Bank*, 99 Va. 257, 38 S.E. 134 (1901).

[283] *See* section above, Alternatives to Mechanic's Lien.

[284] *See* section above, Alternatives to Mechanic's Lien; subsection, Section 43-18—Claiming the Benefit of a General Contractor Lien.

[285] *See* section above, Defense of Payment: Owner's Responsibility for Payment to Subcontractors; subsection, Cost of Completion.

the general contractor. An owner should require the right to make payment by joint check once Section 43-11 Notices are received, even though the general contractor may not be in payment default with the subcontractor at this point.

Writing a few joint checks or demanding that the general contractor cure default may protect the owner when one or more notices are received from subcontractors. The risk changes, however, if notices are received from multiple subcontractors, if the owner is not holding enough money to pay the claims of all subcontractors, or if the general contractor is terminated. In these situations, the owner's options must be seriously considered and carefully exercised.

Settlement of Subcontractor Claims

Once an owner has received notice of subcontractor mechanic's liens, the owner should make sure that all subcontractor mechanic's liens are in and the project is fully complete before the owner makes any distribution to subcontractors. The owner wants to protect its right to complete the building, by making sure that the building is truly complete and all defective work is corrected while still holding the money. The owner must also wait long enough to be sure that all subcontractor liens have been filed. Accordingly, the owner must wait at least 90 days after the project is truly complete before offering any payment to subcontractors. This is often frustrating for a subcontractor who files a lien early in a project, but an owner really has no choice. An owner should make sure that it has provisions in the general contract to deal with this situation, including the right to withhold further payments to the general contractor.

Such cases can often be settled by some sort of voluntary payment by the owner, split up pro rata by all subcontractors. All subcontractor lien claimants normally must agree to take the same percentage partial payout to release their mechanic's liens, although this is a matter of business negotiations. All lien claimants must agree to release the owner and the property in exchange for the partial payout. If the lien claimants are satisfied that this is all the owner owes, then this is all they will receive in litigation because of the owner's partial defense of payment.

The general contractor, if it still exists, must also agree to this settlement. In fact, all possible players in future litigation must agree to a voluntary settlement. This is often the impediment to a settlement without litigation. All subcontractor claimants are actually adverse to one another, if there is not enough money to pay all subcontractor claimants in full. If there are more valid subcontractor mechanic's liens, each subcontractor will get a lower percentage payout. Each subcontractor mechanic's lien found to be invalid will leave more money for the valid mechanic's lien holders.

To get a voluntary settlement without litigation, all subcontractors often must essentially agree to treat all liens as valid. This may be worthwhile to avoid the costs and delay of litigation. If one subcontractor feels that another subcontractor's lien should be disregarded as invalid, it is unlikely that a voluntary agreement can be reached. It may be necessary to have a judicial determination as to the validity of the liens.

Payment of Indebtedness into Court

As described above, the owner has a defense of payment. The owner should only have to pay for the project once. All subcontractor mechanic's liens and Section 43-11 Notices will be valid only to the extent that the owner still owes funds to the general contractor. The owner should have the right to pay that indebtedness into court so that it may be split up among the various subcontractor competitors. This limits the owner's liability to what it should be and relieves the owner of the need to expend time and attorney's fees monitoring the litigation.

This resolution will be effective only if *all* subcontractors agree on the extent of the owner's total indebtedness.[286] If any subcontractor disputes the status of accounts between the owner and general contractor, the court will not release the owner without some further proceeding. It may still be possible, however, for the owner to request the court to hold an evidentiary hearing on this single issue, relieving the need for the owner to participate in further proceedings concerning the status of accounts between the general and subcontractors, the validity of all subcontractor mechanic's liens and other issues.

Right to Waivers and Affidavits

The owner can and should have a provision in any construction contract that the owner is not obligated to make any payment to the general contractor unless and until the general contractor provides an affidavit under oath that all

[286] *Goel v. Osage Contr., Inc.,* 62 Va. Cir. 335 (Va. Cir. Ct. 2003).

subcontractors have been paid and all subcontractors have provided waivers of mechanic's liens to the owner. The owner should be careful to exercise these rights by requiring that the general contractor identify all persons providing labor and materials on the project and making sure that mechanic's lien waivers have been received from all such persons.

It would be fraudulent for any person to knowingly make a false statement on such a payment affidavit. Any person relying on such a false statement may have a claim or cause of action to recover any damages incurred as a result of the fraud. Any owner or lender relying on a false payment affidavit to its detriment may have a personal claim against the person that signed the affidavit on behalf of a corporate contractor. This may "convert" a claim against an insolvent contracting corporation into a personal claim against the former owner of the company.

A fraud claim may also survive a bankruptcy. A bankruptcy debtor cannot "discharge" a claim for damage caused by the debtor's fraud. This may help an owner or lender recover some or all of the losses from dealing with a bankrupt contractor. There may be large contract claims that will be unrecoverable, but the portion of losses incurred that can be attributed to the fraud will survive.

In connection with the addition of mechanic's lien agent provisions in the Code of Virginia in 1992, the General Assembly added a provision that "owner-developers" of residential dwellings must provide such an affidavit in connection with the sale of residential properties. This will provide protection to purchasers of residential dwellings and their lenders against the selling entities, and perhaps also against the individual principals of those entities that developed the residential property.

Also in connection with the addition of mechanic's lien agent provisions in the Code of Virginia in 1992, the General Assembly amended Section 43-13 of the Code of Virginia to state that:

> Any contractor, subcontractor or owner-developer ... any officer, director or employee ... who shall with intent to defraud, retain or use the funds, or any part thereof, paid ... by the, owner or his agent, the contractor or lender ... for any other purpose than to pay [subcontractors] shall be guilty of larceny and may be prosecuted ...
>
> The use ... of any moneys paid under the contract, before paying all amounts due or to become due to [subcontractors] shall be prima facie evidence of intent to defraud.

Case law makes it clear that this statute does not provide a civil cause of action for a lender to recover moneys from the individuals who were the principals of a defaulting debtor. This statute does add criminal prosecution as an option for lenders, however.

Removal of Mechanic's Lien

Once a mechanic's lien has been filed, an owner has the important option of doing absolutely nothing. The owner has the duty *not* to pay the general contractor once subcontractor mechanic's liens are filed and served. The lien will stay on the property for at least six months. This may not cause a practical problem, however, if the owner does not intend to sell the property, refinance a loan or take construction loan draws. The mechanic's lien claimant must file a fairly expensive Complaint to Enforce the Mechanic's Lien within six months. This may never happen. If the lien is not enforced, it will extinguish or can be easily removed.

A mechanic's lien will not necessarily stop a construction project or keep an owner from selling the property. While these results are often the practical effect, the owner still has other options.

Construction lenders will be concerned about a mechanic's lien because it can have priority over a construction loan.[287] The construction lender can and often will inform the debtor that no further construction draws will be made until the lien is released or bonded off. If the mechanic's lien amount is very small in comparison to the construction loan, and the lender is well secured, however, the lender may not be concerned with the mechanic's lien.

Similarly, a real estate purchaser will usually insist that a mechanic's lien be removed before they will buy the property. This is by no means required, however. The property can be sold "subject to" the mechanic's lien, meaning that the mechanic's lien is still on the property after the sale. This will sometimes happen when a real estate seller and purchaser are closely related. This could also happen if the mechanic's lien amount is very small, and the purchaser is willing to take the seller's assurances that the seller will defend against the lien if necessary. If the purchase price is advantageous enough, a purchaser may simply decide to take the risk.

[287] *See* section above, Priority.

If a mechanic's lien must be removed from the property, there are three basic choices:

1. Negotiate a release with the mechanic's lien holder;
2. Request the court to release the mechanic's lien;
3. Provide a bond in place of the mechanic's lien.

Negotiated Release of Lien

If an owner must obtain a release of the mechanic's lien, the owner may simply telephone the mechanic's lien holder and negotiate a release. In the case of a subcontractor mechanic's lien, the owner may be willing to issue a direct check to the subcontractor or a joint check with the general contractor. If a general contractor has liened the property, the owner may now be willing to negotiate with the general contractor to reach an agreement on the status of accounts.

The mechanic's lien does provide the contractor some leverage and may help the contractor get a "better deal" than was previously offered. A contractor should be careful not to overuse this leverage, however, because the owner does have other options. If a contractor pushes too hard, an owner will decide simply to incur the expense of getting the lien released without the agreement of the contractor.

Court Ordered Release

Under Virginia Code Section 43-17.1, a property owner (or other person with an interest in the property) can request a "summary hearing" or a "quick hearing" on the validity of the mechanic's lien.[288] This will often succeed if there is a simple or easily understandable problem with the mechanic's lien. For example, the mechanic's lien claimant may have named the incorrect owner on the lien or may have signed mechanic's lien waivers or releases.

The owner need not wait for the case to mature on the normal trial docket, as this could take a year or more. An owner can often get a summary hearing within two weeks. If the issue is not clear cut, however, a court is likely to decide that a more complete hearing is necessary, and this will cause delay. The court may decide that the mechanic's lien claimant is entitled to pretrial discovery and time to prepare for a complete hearing.

In the case of a subcontractor mechanic's lien, the owner may be able to demand that the general contractor have the lien removed. The general contractor may prefer using a Virginia Code Section 43-17.1 summary hearing, instead of incurring a bond premium, as discussed below. An argument can be made, however, that a general contractor is not allowed to request such a hearing, because the general contractor does not have "standing" (insufficient interest in the property) under the code.[289] To avoid this problem, it is preferable to get the owner's permission to make the request in the owner's name.

Mechanic's Lien Bond

The fastest and surest way to remove a mechanic's lien from the land records is to "bond off" the lien pursuant to Virginia Code Section 43-70 or Section 43-71. The property owner, the general contractor or any other party in interest can accomplish this. General contractors do not have the same "standing" problem in this case. It is not necessary to prove anything, and the court need not make any hard decisions. In this procedure, the court will remove the mechanic's lien from the property, [290] but the mechanic's lien is replaced with cash or a surety bond, something just as good to the claimant.

The cash or surety bond assures the mechanic's lien holder of payment, if the mechanic's lien holder can prove that it had a valid, enforceable and collectable mechanic's lien. It will still be necessary for the mechanic's lien holder to prove all aspects of the mechanic's lien case, including the existence of a debt, timely filing of the mechanic's lien,

---

[288] § 43-17.1. Hearing on validity of lien.Any party, having an interest in real property against which a lien has been filed, may, upon a showing of good cause, petition the court of equity having jurisdiction wherein the building, structure, other property, or railroad is located to hold a hearing to determine the validity of any perfected lien on the property. After reasonable notice to the lien claimant and any party to whom the benefit of the lien would inure and who has given notice as provided in § 43-18 of the Code of Virginia, the court shall hold a hearing and determine the validity of the lien. If the court finds that the lien is invalid, it shall forthwith order that the memorandum or notice of lien be released from record. [Emphasis Added]. *See e.g.*, *Pic Constr. Co. v. First Union Nat'l Bank*, 218 Va. 915, 241 S.E.2d 804 (1978).

[289] *See e.g., Leesburg Building Partners, LLC v. Mike Berger Inc., d/b/a MBI Concrete, Inc.,* Civil No. CLI15479 (Loudoun Co. Cir. Ct. 2018); *Pic Constr. Co. v. First Union Nat'l Bank,* 218 Va. 915, 241 S.E.2d 804 (1978).

[290] *Synchronized Constr. Servs. v. Prav Lodging, LLC,* 288 Va. 356, 764 S.E.2d 61 (2014); *George W. Kane, Inc. v. Nuscope, Inc.*, 243 Va. 503, 416 S.E.2d 701 (1992).

the relative priorities of all enforceable liens against the property, etc.[291] The mechanic's lien holder must still file a timely Complaint to Enforce Mechanic's Lien.[292] It will be necessary to name the surety as a party defendant.[293] It is also necessary to name as a party defendant the person that acquired the bond (bond principal).[294] It will no longer be necessary to name the property owner or all lenders and trustees on deeds of trust recorded *prior* to commencement of the improvements on the property,[295] although these parties can be added if desired.[296] It is not clear, however, whether there are still other necessary parties such as the holders of other mechanic's liens,[297] judgment liens or any other liens attaching *after* the commencement of improvements on the property.

It is necessary to give the mechanic's lien holder at least five days notice before bonding off a mechanic's lien. Depending on how often the applicable court has "Motions Day," the process to release a mechanic's lien can be as fast as one week. If a cash bond is used, it should be an amount equal to the mechanic's lien claim, plus all "costs." If a surety bond is used, it must be in the penalty of double the amount of the lien, plus costs.

To bond off a mechanic's lien, a property owner or general contractor will incur the cost of petition filing, one attorney court appearance and a bond premium. Since this process is so fast and so certain to succeed, however, it is usually the best choice to get a mechanic's lien released.

COMPARISON OF DEADLINES AND OPTIONS

It is important for the contractor and owner to be aware of the various deadlines or "statutes of limitations" for mechanic's liens and other options. Contractors must be aware of the early steps necessary to preserve rights. They should also be aware of options that open later in the game, if mechanic's liens or other rights have expired. Owners should similarly be aware that some notices are required early from a contractor wishing to preserve rights. Such notices are not necessarily a sign of big problems. They may be a sign of a well-organized contractor seeking to keep options open and providing the owner with information that may be helpful in closing out the project. An owner will also want to know when it is safe to assume that all mechanic's liens and other rights have expired so that the project can be closed out without fear of additional mechanic's liens.

A "flow chart" list of deadlines appears on the next page. You should keep in mind that deadlines will not necessarily occur in this order. Some deadlines have reference from the start of work; some deadlines have reference from the end of work. Since these factors can vary, the deadlines can also vary.

First Section 43-11 Notice	Should be sent *before* contractor supplies labor or materials.
Mechanic's Lien Agent Notice	Must be sent within 30 days after contractor *begins* supply of labor or materials.
Payment Bond Claim Notice	Must be sent within 90 days after contractor *last* supplies substantial new labor or materials.
Mechanic's Lien	Must be filed before the *earlier* of: i. Ninety (90) days after the entire project is complete, or work is terminated.

[291] *York Federal Savings & Loan Assoc. v. Hazel*, 256 Va. 598, 506 S.E.2d 315 (1998); *George W. Kane, Inc. v. Nuscope, Inc.*, 243 Va. 503, 416 S.E.2d 701 (1992).

[292] *Johnson Controls, Inc. v. Norair Engineering Corp., et. al.* 86 Va.Cir.138 (2013).

[293] Va. Code Anno. §43-71.

[294] *Synchronized Constr. Servs. v. Prav Lodging, LLC,* 288 Va. 356, 764 S.E.2d 61 (2014); *Johnson Controls, Inc. v. Norair Engineering Corp., et. al.* 86 Va.Cir.138, 140 (2013); *ADS Constr., Inc. v. Bacon Constr*., Co., 85 Va. Cir. 456 (Va. Cir. Ct. 2012).

[295] *George W. Kane, Inc. v. Nuscope, Inc.*, 243 Va. 503, 416 S.E.2d 701 (1992).

[296] *George W. Kane, Inc. v. Nuscope, Inc.*, 243 Va. 503, 416 S.E.2d 701 (1992).

[297] *Synchronized Constr. Servs. v. Prav Lodging, LLC,* 288 Va. 356, 764 S.E.2d 61 (2014) [the general contractor is not a necessary party once the lien has been bonded off, at least where the general contractor had not preserved its lien rights. The general contractor had no interest in the bond, which was now the subject matter of the enforcement action. This case may imply that a general contractor would be a necessary party if it still had lien rights and a right to payment out of the bond].

	ii. Within 90 days after the last day of the month in which contractor last supplies labor or materials.
Second Section 43-11 Notice	Must be sent within 30 days *after* entire project is complete or work terminated and while a debt still exists upstream. Most effective if sent immediately after supply of labor and material.
Notice of Mechanic's Lien	Must be sent while a debt still exists upstream.
Section 43-18 Notice	Must be sent while a debt still exists upstream (and there must be a valid GC lien).
Complaint to Enforce Mechanic's Lien	Must be filed within later of: i. Six (6) months after Mechanic's Lien is filed; or ii. Sixty (60) days after the entire project is complete or work terminated.
Lawsuit to Enforce Payment Bond Rights	Must be filed within one year after contractor last supplies labor or materials.
Lawsuit to Enforce Verbal Contract Rights	Must be filed within three years after verbal contract was breached.
Lawsuit to Enforce Written Contract Rights	Must be filed within five years after written contract was breached.