

Key Points to Consider in Filing and Challenging a Mechanic's Lien

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Filling out a simple form on a few sheets of paper: that's all a mechanic's lien is, right? Not quite.

Even the most basic of mechanic's lien situations have challenges that require analysis of statutes, case law, calendars, invoices, chains of contract, and much more. There have been many excellent articles and presentations by Virginia State Bar Construction Law and Public Contracts Section members on the minefield of mechanic's lien law. This article consolidates many key points from existing literature and our experience. These points cover not only the statutory mandates required to perfect and enforce a mechanic's lien in Virginia, but also some practical considerations. The ideas presented will assist in challenging mechanic's liens.

These are not all of the issues you may encounter. Consult the statutes, read the case law and seminar materials, and discuss issues with other practitioners.¹

INITIAL STEPS AND CONSIDERATIONS

Involve the client. The chances of success increase when you involve the client and obtain the information to address the points set out in this list. An intake form is helpful. Also involve the client as your lien preparation proceeds.

Explain the process and the challenges to the client. Information that neither of you knows now could be fatal to the lien later. Consider these questions:

- Has the client signed lien waivers for any of the amounts it seeks either in its contract or in lien waiver forms?
- Is the lien for "repairs or improvement," and thus unlikely to have priority over a preexisting deed of trust?

Consider whether filing a mechanic's lien is the best or only option. Is pursuing the owner under Virginia Code § 43-11 an option? Is there a payment bond posted on the project?

Read the mechanic's lien portions of Title 43 of the Code of Virginia. It is absolutely imperative that you review the most recent edition of the Code, every time, before you begin your

evaluation of a lien claim. Start with the supplement, so you have the most up-to-date statutes. Use the annotated version of the Code so you get the benefit of the case law annotations.

CRITICAL ISSUES OF TIMING

Immediately check for the worst-case scenario as to the deadline for filing. Virginia Code § 43-4 provides a 90-day window for filing the memorandum of lien, running from the last day of the month in which the claimant last performed work or supplied materials; this window closes no later than 90 days from the completion of the project or termination of the general contract. The tricky part can be determining when that 90-day period begins to run. Key considerations include:

- When was the last day the client did substantive work on the project? Was it within 90 days? (Not three months. Ninety days.²)
- If not, does the client get the benefit of starting that 90 days running from the last day of the month in which it last did work?³
- As a last resort, can you extend the start of the 90-day period by including punch-list work? **Defense point: Warranty work cannot be used to extend the 90-day period.**⁴
- Is your client a material supplier on an open account, or is there a single contract in place? That can affect when the 90 days begins to run.⁵
- Get out the calendar and analyze the dates, then do it again. Do you have time to get the lien properly prepared? Discuss that with the client.

Determine how much of what your client is owed can be claimed in the memorandum of lien pursuant to the 150-day look-back provision of Virginia Code § 43-4. The look-back provision limits the amount a claimant may include in a mechanic's lien memorandum to amounts for work or materials provided within the 150 days prior to the last day the claimant last performed work or provided materials.

- Remember that the 150-day look-back starts on the last day the client performed labor or furnished materials. It does not start from the date of filing.⁶
- Use the most conservative date for starting the look-back period. Go to the last day of any punch-list work, even if after substantial completion. You can file a separate lien for any amounts performed or materials provided more than 150 days before the date of substantial completion.
- Inclusion of amounts more than 150 days back can be fatal to the entire lien.⁷ Examine the paperwork carefully. Pull together invoices, job cost reports, daily logs, and meeting minutes. Don't rely just upon the client's invoices for this analysis. You may need to determine when the work was actually done or the materials delivered, rather than when they were invoiced. A general contractor may need to obtain additional details from subcontractors about when work was actually performed or materials delivered. **Defense point:** Seek all of this information in discovery and analyze whether work being charged for was performed prior to the 150-day period. If the lien is overinclusive, it is subject to dismissal under the *Carolina Builders* line of cases.⁸
- You can include retainage that falls outside of the 150-day look-back period, up to 10 percent of the total contract price.⁹

WHAT ROLE DID THE CLIENT PLAY IN THE PROJECT? DOES IT HAVE LIEN RIGHTS?

Analyze and determine the chain of contract. Where your client is located in the chain and the identities or roles of others in the chain matter greatly. Your client's status as a lien claimant is determined by the chain of contract starting with the property owner.¹⁰

- Don't rely just on what the client tells you. Look at the project documents, research on the Internet, make phone calls, and look at building permits, for example.
- Check Virginia State Corporation Commission records, Virginia Department of Professional and Occupational Regulation information, and other liens that have been filed, to verify information about the other participants in the project.
- Examine the definitions in Virginia Code § 43-1. The definitions that apply do not necessarily track with how an entity might be described on the construction project, and they can affect the chain of contract analysis.
- Realize that the "general contractor" is defined under Title 43 of the Virginia Code as the person or entity "who contract[ed] directly with the owner."¹¹ Consider that a construction manager may be involved, or there may be more than one "general contractor."¹² The owner of the property could have set up a

separate limited liability company to develop the property. This could extend the chain of contract and affect your client's right to file a mechanic's lien.

- Draw the chain of contract on a sheet of paper and identify the unknown and questionable areas. **Defense point:** Virginia Code §§ 43-4, 43-7, and 43-9 limit who can file a mechanic's lien to those who supply labor or materials to a subcontractor. If the filing entity is further down the chain, challenge its right to file a lien.

Is your client afforded lien rights *at all* under Title 43 of the Virginia Code?

- Not all entities connected with a construction project can file a lien. In some situations a design professional may be entitled to a lien (consider on-site construction administration work), and in other situations may not be (consider pure design work, especially if the project is never built).¹³
- Virginia Code § 43-2 lists certain materials and services that are considered to be "furnished for the improvement of such building or structure and permanently annexed to the freehold," and are thus subject to lien.¹⁴

PROPERTY IDENTITY AND ALLOCATION ISSUES

Identify the property, the owner, and the building or structure that is subject to lien. Also, what interest in the property is subject to lien?

- Who contracted for the construction work to be performed? If it was not the owner, then is the project one for work on an existing structure, and did the owner or its agent order or authorize the work?¹⁵
- Is the lien limited to a claim on the tenancy or on an easement?
- A tenant cannot subject a landlord's interest in a structure to a mechanic's lien.¹⁶ The claimant may assert a claim only against the lessee's leasehold interest. The lessor's interest may be subject to a mechanic's lien claim if the lessee contracted for improvements to the structure while acting as the lessor's agent, or the lessor subsequently ratified the lessee's actions.¹⁷
- Who owns the property? Is it the person who contracted to have the work performed? For example, did the landowner set up a separate limited liability company to contract for the construction work on the project? If so, does that change the chain of contract and thus narrow who can file a lien?
- A lien cannot be filed against public property.¹⁸ In that instance, check your client's payment bond rights. (Note: Consider still filing in an instance in which a public entity

has leased to a private entity, or turned property over for private use.¹⁹

- Obtain the property address and consider just using that on the lien memorandum as the property description. Better practice is to analyze and understand the property location and more fully describe it in the lien. Remember that Virginia Code § 43-15 provides a savings provision if the property has not been adequately described, so long as it can be “reasonably identified” from the memorandum of lien.
- Identify the “building” or “structure” on which the work was performed or for which materials were supplied. If it was not for or on a building, then consult Virginia Code § 43-2 to determine what else is considered to be a “structure.” For example, is digging a trench for a drainage pipe subject to lien?
- Is the building a condominium or a subdivision? If so, consider unique issues under Virginia Code § 43-3 (see below). Did your client’s work involve the individual units or the common elements? Look at condominium documents and the construction drawings to determine the division between the individual units and the common elements.
- If the building is a condominium and the claimant performed work on common areas, consider preparing a single lien that encumbers all units to which the common areas pertain. Pay close attention to the apportionment and release requirements in Virginia Code §§ 43-3 and 55-79.83(D).
- If the property is a time-share, consider the particular notice and owner identification issues in Virginia Code § 43-7.
- To analyze these issues, creatively employ Internet mapping tools, city and county geographic information systems and tax records, property association and condominium filed declarations, and on-site visits, as well as traditional title information.
- Virginia Code § 43-3(B) provides the limitations applicable to apportioning lien claims among multiple parcels.²⁰
 - If the client’s work includes work related to site development, streets, stormwater facilities, sewers, or water lines, the client may perfect a lien against the lots served by the work, as apportioned pursuant to Virginia Code § 43-3(B).
 - Apportion the lien claim against the lots in the development so that you don’t overburden each lot.²¹
- Determine whether it is necessary to file a disclosure statement to have a valid lien prior to the sale of an affected lot.²²
- Did the client work on structures on separate but adjacent parcels as part of the same project? If so, apportionment is

required, except in a limited instance in which the following factors are all present:

- the claimant performs work or provides materials for multiple structures on multiple lots pursuant to a single lump-sum contract between the owner and the claimant;²³
- the claimant is unable to specify the amount of labor or materials supplied to each separate lot;²⁴ and
- there are not other liens on the property and at issue are only the owner’s rights and the claimant’s rights.

CALCULATION OF AMOUNTS TO LIEN

Analyze the amounts owed to include in the lien.

- Beyond the 150-day look-back analysis above, analyze the client’s documents to limit claims to work performed or materials provided that were incorporated into that particular site.
- Reasonable rental value and use value of equipment can be included in the lien.²⁵
- Include a claim for interest in the memorandum of lien, if the underlying contract provides for interest on unpaid amounts. If in doubt, consider filing a separate lien for interest, or just include a claim for interest in the complaint to enforce the mechanic’s lien.²⁶
- Exclude claims for attorney’s fees from the lien itself.²⁷ If permitted by contract, consider including a claim for attorney’s fees in the complaint to enforce the mechanic’s lien.
- Exclude “claim” type damages from the lien if they do not pertain to something provided that added value to the property. Again, consider filing a separate lien and including the damages in separate counts of the complaint.
- Consider the issues of stored materials and whether materials have actually been incorporated into the site, as discussed above, and are appropriately included in the amount of the mechanic’s lien. **Defense point:** Consider whether a material supplier that has only delivered materials to the site but whose materials have not been incorporated into the structure is entitled to a lien, or a lien to the extent claimed.
- Discuss with the client that ultimately the amount of the lien is limited by amounts owed in the chain of contract above the claimant. **Defense point:** Under Virginia Code § 43-7, in a suit to enforce a subcontractor’s lien, it is an affirmative defense, in whole or in part, that the owner is not indebted to the general contractor or is indebted to the general contractor for less than the amount claimed by the subcontractor.²⁸ Likewise, the

sub-subcontractor or supplier to the subcontractor, under Virginia Code § 43-9, is limited to the amount for which the subcontractor could file a lien.²⁹

- As long as the claimant does not violate the 150-day rule, the amount claimed does not have to exactly match the amount ultimately proved. The lien will not be enforced for more than the lien amount.

COMPILING AND FILING THE LIEN FORM

Use the appropriate form. Virginia Code §§ 43-5, 43-8, or 43-10 provide forms that can be used as a starting point.

- Refer to the discussion above about the importance of properly identifying the entities in the chain of contract.³⁰
- In preparing the description of materials and services, obtain information from the client, but be sure that it tracks with provisions of Virginia Code §§ 43-2 and 43-3 in terms of materials and labor that can constitute a lien.
- Include the mandatory statement that “It is the intent of the claimant to claim the benefit of a lien.”³¹
- Don’t gloss over the important issue of “who” can sign the lien under oath for the claimant. The memorandum (and accompanying affidavit) must specify that the signatory is an “authorized agent” of the claimant.³² Identify the title of the officer, director, or manager signing for a corporation. Avoid having persons not in one of these positions sign for the corporation. As the claimant’s attorney, you should avoid signing, if possible. If you sign, you could become a witness. If it is necessary for you to sign, do so as “attorney and authorized agent.”
- Accurately complete the affidavit that is a part of the lien memorandum form.
- Consider filing multiple liens, as allowed for under § 43-4, to address timing concerns such as:
 - certain amounts are inside or outside of the 150-day look-back period;
 - part of the services or materials may not be subject to lien;
 - part of the amount claimed is arguably outside of the most conservatively calculated time frames (either the 90-day filing deadline or the 150-day look-back period);
 - some of the materials were stored and not incorporated into the work; or

- there are questions about the chain of contract (does the landowner have a contract with the construction manager, which in turn hired the prime contractor, or is the construction manager not in the chain of contract at all?, for example).

- Indicate in the lien that the liens are intended to be complementary and not to charge the property or subject it to lien more than once for the same work.

Determine what certifications and notices must be provided.

The type of notice required depends upon where your client falls in the chain of contract.

- A “general contractor” (as defined by Virginia Code § 43-1) asserting a claim under § 43-4 must file with the memorandum a certification of mailing of a copy of the memorandum of lien on the owner to the owner’s last known address.³³
- A “subcontractor” (as defined by Virginia Code § 43-1) asserting a claim under § 43-7 must give written notice to the “owner” of the amount and character of its claim.³⁴
- A claimant under Virginia Code § 43-9 must give written notice to the owner and general contractor of the amount and character of its claim.³⁵
- If the client has performed work on a one- or two-family residential dwelling structure, check to see if the owner designated a mechanic’s lien agent on the building permit for receipt of notice, pursuant to Virginia Code § 43-4.01. If so, provide the notice per this Code section.

Note that, for residential projects for which a mechanic’s lien agent has been designated, an initial notice is required within the first 30 days of providing labor or materials, or a later-filed lien will be invalid.³⁶

Update the title search for the property just before filing the lien to ensure that nothing has changed.

FILING THE COMPLAINT TO ENFORCE A MECHANIC’S LIEN

Update the title search for the property just before filing your complaint. This will ensure that nothing has changed or that you can address any changes.

When filing a complaint to enforce the lien, consider some of the items that can cause a problem.

- Timing: The suit must be filed within the latter of either 6 months from the date the lien memorandum was recorded, or 60 days after completion or termination of the project.³⁷

- In the complaint to enforce the client's lien rights, plead compliance with the requirements of Title 43 of the Virginia Code, including compliance with the timing elements of lien perfection and the enforcement action.³⁸
- Attach a copy of the filed lien memorandum and an itemized statement of account. Virginia Code § 43-22 provides the elements of the statement of account, which must be "verified" by the claimant.
- Include all "necessary parties" as defendants in the complaint. Err on the side of caution. Check the cases on this, but consider including all of these: any beneficiaries and trustees of deeds of trust and judgment liens on the property; the owner, other mechanic's lien claimants; and others in the chain of contract above your client.³⁹

In determining "necessary parties," also consider that:

- recently, some lien claimants have begun including the commonwealth or a locality where there may be a lien for unpaid taxes, and
- consider the implication for who is to be named in the suit if the lien has been "bonded off" under Virginia Code §§ 43-70 or 43-71.⁴⁰

RESPONDING TO THE COMPLAINT

Defense points in responding to the suit:

- Is there an arbitration provision in the underlying contract? If so, consider having the complaint stayed while the arbitration is completed.
- Is there a pending bankruptcy case that may impact the prosecution of the lien enforcement suit?⁴¹
- Is the claimant required to be licensed in Virginia? If so, is it licensed? Is it authorized through the State Corporation Commission to do business in Virginia?⁴²
- Has the claimant materially breached the underlying contract? Is there some complete bar or set-off to the claim? Is there a counterclaim?
- Does the subject lien have priority over other liens? This is an issue that claimants should be aware of prior to filing a lien. Resolution might ultimately occur in the lien enforcement litigation. Virginia Code § 43-21 provides the applicable priority scheme.

Note: Pay close attention to the interplay of deeds of trust existing prior to construction. As a part of this, realize that a mechanic's lien for "repair or improvement" does not have

priority over the existing deed of trust, though a lien for new construction will have priority to the extent it has added value to the original value of the unimproved land.⁴³

- Analyze each of the steps in this article. Has the claimant complied?
- Consider filing a petition under Virginia Code § 43-17.1 to challenge the validity of the lien prior to the filing of a complaint to enforce if earlier determination is necessary.

CONCLUSION

Filing a mechanic's lien, especially on a large, multi-party construction project, is no easy task. Though the memorandum that you file is often only a few sheets of paper, there is intense and meticulous analysis that must be undertaken to ensure that the lien is as correct as possible and in compliance with the requirements of Title 43 of the Virginia Code. Even then, there are issues about which you and your client may not be aware, such as the facts related to a payment defense, which could derail the efficacy of the lien.

When defending against a mechanic's lien claim, it is essential to apply reverse engineering to the lien. Initially, this can be based upon all information available to you. There is much information you will not know, though, until you conduct discovery and obtain the underlying invoices and other details.

We hope this list will help you identify the major issues involved in your lien case. Realize, though, that each lien case is different and that your analysis may require consideration of issues not discussed above, or not yet encountered in the reported cases. ⚖️

Endnotes:

- 1 We commend as resources the articles and seminar materials that James L. Windsor, James R. Hart, and Robert K. Richardson prepared previously for the VSB Construction Law and Public Contracts Section. In addition, we thank Shannon Briglia, James Hart and Timothy R. Hughes for their valuable input into the preparation of this article.
- 2 See *A.E. Tate Lumber Co. v. First Gen. Serv. of Richmond Inc.*, 12 Va. Cir. 135 (Chesterfield 1988).
- 3 See Va. Code § 43-4.
- 4 See *Rountree Construction Co. V. Hillpoint Mo. Ltd.*, Ch. Nos. 94-371-94-375 (Suffolk Cir. Ct. Feb 9, 1999).
- 5 See *United Savings Ass'n v. Jim Carpenter Co.*, 252 Va. 252, 475 S.E.2d 788 (1996).
- 6 See 1986-87 Report of the Attorney General 228.
- 7 See *Carolina Builders Corp. v. Cenit Equity Co.*, 257 Va. 405, 512 S.E.2d 550 (1999).
- 8 See *Id.*
- 9 See Va. Code § 43-4.
- 10 See *West Alexandria Props. Inc. v. First Va. Mortgage & Real Estate Inv. Trust*, 221 Va. 134, 267 S.E.2d 149 (1980).
- 11 Virginia Code § 43-1.
- 12 See *Northern Va. Sav. & Loan Ass'n v. J.B. Kendall Co.*, 205 Va. 136, 135 S.E.2d 178 (1964).
- 13 See *Cain v. Rea*, 159 Va. 446, 166 S.E. 478 (1932).
- 14 See Va. Code § 43-2.

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- 15 See Va. Code § 43-3.
- 16 See Va. Code § 43-20.
- 17 See *Atlas Portland Cement Co. v. Main Line Realty Corp.*, 112 Va. 7, 70 S.E. 536 (1911), and *Carter v. Keeton*, 112 Va. 307, 71 S.E. 554 (1911).
- 18 See *Bowers v. Town of Martinsville*, 156 Va. 497, 159 S.E. 196 (1931).
- 19 See *TQY Invs. v. Rogers Co.*, 26 Va. Cir. 40 (Fairfax 1991).
- 20 For a more detailed explanation of these limitations, see JAMES L. WINDSOR, *THE VIRGINIA CONSTRUCTION LAW DESKBOOK* ¶ 18.304 (RICHARD F. SMITH ed., 2008).
- 21 See Virginia Code § 43-3(B).
- 22 See *Id.*
- 23 See *Sergent v. Denby*, 87 Va. 206, 12 S.E. 402 (1980).
- 24 See *Weaver v. Harland Corp.* 176 Va. 224, 10 S.E.2d 547 (1940) (*but see Addington-Beamman Lumber Co. v. Lincoln Savings & Loan Association*, 241 Va. 436, 403 S.E.2d 688 (1991)).
- 25 See Va. Code § 43-3; See also *Dean Steel Erection Co. v. Chelsea GCA Realty Partnership*, 50 Va. Cir. 311 (Loudon 1999).
- 26 See *American Standard Homes Corp. v. Reinecke*, 245 Va. 113, 425 S.E.2d 515 (1993).
- 27 See *Id.*
- 28 See also *Knight v. Ferrante*, 202 Va. 243, 117 S.E.2d 283 (1960).
- 29 See Va. Code § 43-9.
- 30 See *Davenport Insulation of Harrisonburg Inc. v. Aliff*, 50 Va. Cir. 314 (Rockingham County 1999).
- 31 See Va. Code § 43-4.
- 32 See *Clement v. Adams Brothers–Payne Co.*, 113 Va. 547, 75 S.E. 294 (1912)
- 33 See Va. Code § 43-4. For a standard format for the certification of mailing, see Virginia Code § 43-5.
- 34 See Va. Code § 43-7. For a standard format for this notice, see Virginia Code § 43-8.
- 35 See Va. Code § 43-9. For a standard format for this notice, see Virginia Code § 43-10.
- 36 See Va. Code § 43-4.01.
- 37 See Va. Code § 43-17.
- 38 See *Savings Bank v. Powhatan Clay Manufacturing Company*, 102 Va 274, 46 S.E. 294 (1904).
- 39 See *Walt Robbins Inc. v. Damon Corp.*, 232 Va. 43, 348 S.E.2d 223 (1986); *Mendenhall v. Douglas L. Cooper Inc.*, 239 Va. 71, 387 S.E.2d 469 (1990); *James T. Bush Construction Co. v. Patel*, 243 Va. 84, 412 S.E.2d 703 (1992); and *Finkel Outdoor Products Inc. v. Bell*, 205 Va. 927, 140 S.E.2d 695 (1965)).
- 40 See *George W. Kane Inc. v. NuScope Inc.* 243, Va. 503 (416 S.E.2d 701 (1992).
- 41 See 11 U.S.C. § 108(c); and *In Re Terry*, 262 BR. 657 (Bankr. E.D. Va. 2001).
- 42 In *All American Contractors Inc. v. Betonti*, 53 Va Cir. 24 (Fairfax County 2000), the Fairfax County Circuit Court invalidated a claimant's lien because the claimant exceeded the scope of its contractor's license on the basis that it could not maintain a valid contract to do work in excess of the limits of its license.
- 43 See Va. Code § 43-21; and *Federal Land Bank v. Clinchfield Lumber & Supply Co.*, 171 Va. 118, 198 S.E. 437 (1938).