VIRGINIA MECHANIC'S LIEN LAW
2018-2019

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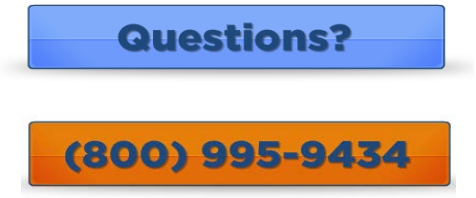

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General Notes

Be Careful: The courts consider a Virginia mechanic's lien to be a privilege and not a right. You receive its benefits only if you ***strictly adhere*** to the state law requirements. Bottom line: miss a deadline by one day and you have lost it. Unlike other areas of the law where you can argue equities, find technical exceptions, and lawful excuses, there is no forgiveness here. In this case, knowledge is not only power, it's a necessity.

In this State you will be writing down dates for at least four documents: a) Notice of Contract To Mechanic's Lien Agent ; b) Notice to Owner; c) Memorandum of Mechanic's Lien ; and c) lawsuit to foreclose the mechanic's lien. Write down all the deadlines in your calendar. Use a highlighter or red pen. If you have a staff, use a "fail safe" system by doubling up and putting it in their calendar also. This reminds you twice. The first calendar entry should be two weeks before the due date as a preliminary reminder.

On the second calendar entry, do a white lie to yourself. Put the due date as one week before it is actually due as insurance in case you get busy or need legal advice.

Time is money. You will waste a lot of valuable time running around and doing it at the last moment, as opposed to doing it early.

PRELIEN NOTICE--RESIDENTIAL PROJECTS ONLY

Virginia requires in certain circumstances that a Notice be sent out before the mechanic's lien is filed/recorded. For simplicity, this notice will be referred to as a "Prelien Notice". The basic information on this Notice is as follows:

VIRGINIA PRE-LIEN NOTICES FOR GENERALS

Name of Notice: **Notice of Contract to Mechanic's Lien Agent (General)**

Who Must Use This Notice:

This Virginia Notice is required only on residential projects which are defined as one to two family dwelling units. Unlike most states that required a prelien notice only for subs and suppliers, all persons who may eventually claim a lien, including a general, must service this notice. The only exception is that site improvement contractors (streets, storm water facilities, sanitary sewer, water lines, etc.) are not required to serve such a Notice (residential or commercial).

Mechanic's Lien Agent:

The Virginia Notice is served on the owner's "mechanic's lien agent" (MLA). Who in world is such a person? The statutes defines such a person as: 1) a bank or savings and loan as well as a service company affiliated with such institution, or 2) the owner's attorney who is licensed to practice in Virginia, or 3) a title insurance company or licensed title insurance agent. The statute does not allow the owner to designate anyone else, which is unfortunate, especially since owners are not always keen on the expense of appointing an attorney.

The owner may designate the MLA agent either verbally or in writing to so act. As of 7/1/2010, Section 43-1 has been amended to delete the requirement of written consent by the agent.

The Virginia MLA's only duties are to receive the Notice, and provide a copy of the Notice on request. But especially as the owner's attorney and the construction lender, they need to know who has sent the Notice to prevent the owner from having to pay twice and to secure lien waivers before payment.

The building permit, which must be posted in plain sight on the building site before work begins and during all phases of construction, must list the name and address of the MLA. If it does, the Notice must be served.

As of 7/1/2010 under Virginia Section 43-1 (C), if the permit is not posted or if it does not state the name of the MLA, the general is not relieved from sending the Notice. A court will require the contractor to then make a "reasonable inquiry". Under the statute, this means going to the "appropriate authorities" (the building inspection department that issues the permit) and examining the file to see who is designated. There is no authority for the proposition that the contractor would have to go to other agencies or take other steps to investigate the name of the MLA. Under prior law, some contractors argued that if the agent was not stated on the posted permit, no further inquiry was required and the pre-lien notice did not have to be served. This is no longer the case.

However, if the agent's name is neither on the posted permit nor designated with the building inspection department, there is no legal requirement of serving the Notice.

On the other hand, it is recommended you serve the Notice even if an agent is not identified in the building permit. Simply serve the Notice on the owner along with a letter indicating that when they designate an agent, please let the contractor know. If so disclosed, send the Notice immediately. Why? Because in Virginia the owner is only liable to subcontractors for the balance owed to the general contractor. Once all payments have been made to the general, there is no longer an obligation to pay the subs and suppliers. So, if the owner receives the Notice, they will take steps to make sure you are paid.

Amending the name of the MLA. As of 7/1/2010, new Virginia Section 43-1(A) allows the owner to amend a permit by inserting a new or different MLA, even after construction has begun. If a different MLA is designated, the contractor must send the same Notice to that person. Fortunately section 43-1(B) requires an amended permit be displayed at the premises and if not, the new agent need not be served. On the other hand, if you get wind of the fact that a new agent is out who it is--send a new Notice to that person.

If a contractor is local and within driving distance of the building inspection department, it is easy to check out the name of the MLA by going in person. But what about out-of-the-area contractors or suppliers? Many either use a notice service which compiles the names of the MLA's or simply place a call to the inspection department before sending out the Notice.

Before the new law, it was common for attorneys to advise their clients to send the Notice immediately after signing the contract or shipping the material—so they would not forget. But because an owner can now amend the MLA, it is more common to call the building inspection departments within a week of the expiration of the 30 day period, just in case there has been an amendment. Then send the Notice at that point.

What about commercial projects? The notice is not required but still recommended. And for the same reason as residential: if the owner receives the Notice they cannot claim the defense of full payment to the general contractor and must take steps to make sure you are paid.

When: See **Virginia Time Deadlines** table. Within a) 30 days of beginning work, or b) within 30 days of the date a building permit is issued, if the labor or materials are first furnished prior to the issuance of a permit. You may file after, but you get a lien only for the unpaid work incurred after service of this Notice.

For commercial projects, assuming you want to send a notice to be safe, there is no set time limit as in residential. However, the owner's liability for a lien is limited to the amount he or she owes the general contractor at the time of receiving the prelien notice. If, for example, a subcontractor delays giving the prelien notice, there is the risk that the owner will pay the general contractor the balance of the contract in the meantime. Once the balance of the contract is paid, the subcontractor will not have any lien rights left. Therefore, serving the prelien early is important.

The rule is different for residential construction, defined as a project that relates to one or two-family residential dwelling units. As of 1992, in Virginia the general contractor, subcontractor, and supplier must notify the MLA by certified mail within 30 days of the date the claimant first works on the property. If the claimant fails to give the Notice within 30 days, his or her lien is only valid as to work after the date the Notice is finally given to the MLA. In other words, the lien is only valid for the unpaid work done after the late service of the Notice.

What if the owner amends the permit to insert a new or different MLA and it over 30 days from commencement? Because it is beyond the 30 days, the time has expired to serve notice. The statute does not address this issue. It is recommended in those cases you immediately send a notice to the new MLA to prove due diligence.

How to Serve: These Virginia notices should be served certified, return receipt requested by on the mechanic's lien agent (see discussion below as to "RULES AS TO MECHANIC'S LIEN AGENTS"). The owner is not required be served, but some general contractors do so anyway to be safe.

If the certified mail was sent but unsigned, it is presumed service has been made even though you do not have the certificate returned. This is based on new section 43-1(B) that says proof of mailing by certified mail is presumed to have been received by the addressee (called a "prima facie" case of delivery).

Verified or Notarized?: A ***verified*** notice simply means you sign it and are representing the contents are true and accurate. A ***notarized*** notice is signed in front of a Notary Public or other official. Neither a ***verified*** or **notarized** notice is required in this state.

VIRGINIA PRE-LIEN NOTICES FOR SUBS AND SUPPLIERS

Name of Notice: **Notice of Contract to Mechanic's Lien Agent (Sub or Supplier)**

Introduction:

The same rules as to "When" and "How to Serve" in the section above as to general contractors apply to subs and suppliers. See also the section titled: "RULES AS TO MECHANIC'S LIEN AGENTS"

Who Must Use This Notice:

This Virginia Notice is required only on residential projects which are defined as one to two family dwelling units. This is a required notice for subcontractors, suppliers, and sub-

subcontractors, if they wish to preserve their lien rights. The only exception is that site improvement contractors (streets, storm water facilities, sanitary sewer, water lines, etc.) are not required to serve such a Notice.

The Notice is served on the owner's "mechanic's lien agent". There is no need to serve the general contractor or owner, although some people do so anyway to be safe. The statute defines such a person as 1) a bank or savings and loan as well as a service company affiliated with such institution, or 2) the owner's attorney who is licensed to practice in Virginia, or 3) a title insurance company or licensed title insurance agent. The agents only duties are to receive the Notice, and provide a copy of the Notice on request. But especially as the owner's attorney and the construction lender, they need to know who has sent the Notice to prevent the owner from having to pay twice and to secure lien waivers before payment.

RULES AS TO VIRGINIA MECHANIC'S LIEN AGENTS (Residential Projects)

As stated above, In most states, contractors and suppliers are required to serve prelien notices on the owner (if the claimant is a general contractor) or the owner and general contractor (if the claimant is a subcontractor or supplier). It accomplishes a salutary purpose in identifying potential lien claimants in lower tiers so the owner can prevent a mechanic's lien by utilizing lien waivers or joint checks. Not so in Virginia. Apparently because of the perceived problem of identifying the name and address of either the general contractor or the owner, service is only made on a person called the "mechanic's lien agent".

Although it sounded like a good idea, in practice it had the effect of reducing the number of mechanics' liens because contractors were not going to the trouble determining who the mechanic's lien agent was and not sending out the Notices. This is unfortunate because it has barred the door to many hardworking contractors who deserve a mechanic's lien.

The only role of the mechanic's lien agent is to receive notices and send copies presumably to the owner and general contractor.

Unfortunately for the owner, a mechanics' lien agent can only be a construction lender, title insurance company, or attorney. If the homeowner does not take out a construction loan or is not planning to use a title company, it may be considered too expensive to designate an attorney. The effect is notices will not be sent and there is more of a chance of a mechanic's lien—the very thing the legislature was trying to prevent in the first place.

A building permit for residential property must be posted on the property in clear view (conspicuously) and continuously until all the work is completed. It is to be posted before any work begins. Both the building permit located in the building inspector's office and the posting on the site must list the mechanic's lien agent.

As of July 1, 2010, Virginia Revised Statutes 43.4.01 states the building permit may be amended to list a new mechanic's lien agent if the original person dies, resigns, or becomes unable or unwilling to serve. If this happens, the owner or general shall immediately appoint a successor agent and the permit will be amended both at the building inspector's office and through a posting at the site.

Unfortunately, the new Virginia statute does not state what is to be done if there is an amended permit naming a new agent. Will the contractor be required to send out a second Notice? Is it to be sent out within 30 days of discovery? Are we to assume that the original agent will give copies of the Notice to the new agent to eliminate a second service? We do not know. But, to be safe, and because there will be a new posting at the site, it is recommended the Notice be sent immediately after discovery to the new agent.

There is also a fear owners may abuse the new statute. What if they were to purposely name another mechanic's lien agent and argue that the contractor did not send an amended notice to the agent, thereby defeating lien rights? For this reason, is always a good idea to send an amended Notice.

Although a bit of a hassle, is highly recommended the Notices be sent to the agent. A contractor needs to use all available weapons in his or her arsenal.

NOTICES THAT IMPOSE PERSONAL LIABILITY UPON THE GENERAL AND OWNER

Introduction: A Virginia mechanic's lien attaches to the owner's property. Although this rarely occurs (payment is made in settlement first), the property can be foreclosed upon and the proceeds distributed to the various lien claimants. But there is never a judgment personally against the owner—just the property.

But in Virginia, one can get both a lien and a personal judgment against the owner and general, even if you do not have a direct contract with the owner. Once judgment is rendered, one can go against the personal assets of the owner and general. The personal liability is to the extent of money not yet distributed to the general at the time the owner gets this special notice. For example, assume on the fourth progress draw that the owner

owes the general $50,000. You are the only one who serves the Notice described in this section and have a claim of $15,000. There are five other subs and suppliers whose claims total $60,000—well above the amount to be paid on this draw. You will get priority over the rest of the claimants and may receive a lien and a personal judgment for the full $15,000, with the rest of the claimants sharing proportionally for the remaining $45,000. But remember, this Notice is only as good as the money owed by the owner to the general at the time of service—if all money has been paid, you are too late. Serve early to prevent this harsh result.

To do so requires special notices. For some reason, most contractors either do not know about this avenue, or neglect to use it. Although not mandatory, it is recommended that you use it as a further weapon in your arsenal.

This Virginia Notice gives you clout. The owner may think twice in not taking steps to insure payment to you, not the least of which is the fear of personal liability and increased attorneys fees to defend any lawsuit. And, it shows you know what you are doing and are willing to assert your rights to the full extent of the law.

To accomplish this result, you need to serve two notices. One of them is already "built into" the "Notice of Contract to Mechanic's Lien Agent" form (which you have to serve for a lien anyway). The second notice is the one discussed in this section, titled: "Notice to Owner and General under Va. Code Section 43-11".

Name of Notice: **NOTICE TO OWNER AND GENERAL UNDER VIRGINIA CODE SECTION 43-11**

Who Must Uses This Notice?: It appliers only to subs, sub-subcontractors, and material/equipment suppliers to a general or sub. It is not available to the general.

How to Serve: These notices should be served certified, return receipt requested. There is no requirement of filing with the clerk of the court. Send a copy to the general, owner, and the mechanic's lien agent, if any (see building permit to see if listed).

When: This is the trickiest part. It can be sent anytime when you are owed money, but not later than 30 days after completion of the entire, overall project (not just your specific portion of the work).

The reason it is tricky is the politics of service. The Notice is required to state your intention to hold the general and owner personally liable. Most persons do not wish to send such a notice early in the project for fear of repercussions. But, the longer you wait, the less chance there will be money still owed by the owner to the general. So, the recommended time is no later than the last two progress payments on the job—well before completion. And, if you suspect problems are occurring sooner on the job—serve at the first hint of such problems.

If you are still unsure about serving the owner, you can serve the general only—however, the personal liability would only be upon the general and not the owner.

In a strange way, the owner may even welcome receiving such a Notice. If the project is troubled and the owner has doubts in paying the general, especially if there are breach of contract or defective construction issues, this will give the owner the excuse of paying you directly and getting money out of the hands of the general.

VIRGINIA MECHANICS' LIENS ("MEMORANDUM FOR MECHANIC'S LIEN")

Who is Entitled to a Lien: A Virginia mechanic's lien is primarily for general contractors, subcontractors, laborers, as well as material/equipment suppliers. But it also covers architects, engineers, and surveyors.

Prior to 2002, there was a serious question as to whether an equipment supplier would be entitled to a lien. However, with the Virginia legislative changes in 2002, it now appears that "the reasonable rental value or use value of equipment" may be subject to a lien. However, there are no cases yet interpreting this language.

Persons or entities that can file a lien are very wide and diverse, including not only the customary construction projects, but also persons who provide labor and materials to build "all shrubbery, earth, sand, gravel, brick, stone, tile, pipe or other materials, together with the reasonable rental or use value of

equipment, in any surveying, grading, clearing, or earthmoving required for the improvement".

Unlike most states, it is doubtful whether a "third-tier subcontractor" has lien rights. This applies to a sub-sub-subcontractor--a subcontractor who has a contract directly with a sub-subcontractor. Unfortunately, there is no case law or statute allowing a lien to be filed in this case.

When to File/ Record:

See **Time Deadlines** table. Virginia is different form most states in how one computes the time in which to file a lien. In most states, the time period (for example 90 days) starts from the overall completion of the project or the last day the lien claimant furnishes his or her work. You simply count forward 90 days. In Virginia, the 90 days to file starts from the last day of the month in which you last furnished labor or materials or 90 days after completion of the overall project, whichever is earlier. For example, if you last performed services on August 16, you start counting the 90 days from August 31 and must file the lien by November 29. This has the effect of giving yourself more than 90 days after the last of the services. Use this rule as long as there is work done by others after you have finished your work. But if you are the last one on the job—you have a shorter time. In such a case, it is 90 days from the last day on the job since that is defined as the date of completion of the overall job. In the example above, you would have 90 days from August 16 (not 3 months), or by November 14. In doing the counting, do not include the last day on the job, and count forward 90 calendar days. If the last day falls on a weekend or Federal holiday, you get the next business day.

Remember also that the completion of the project is not extended for trivial, or "call-back" work, defined as punch list items or warranty work—redoing what you have already done.

In a recent Virginia Supreme Court case, there has been further clarification. In that case, the general contractor completed its work under contract. But it's subcontractors continued to do some contract work, including demobilization. Because those subcontractors continued to do work, it extended the time. But you have to be very careful here--it's hard to predict how a trial court will rule and the best idea is to record if you have not been paid after 30 days.

Where to File/Record: The Virginia clerk's office of the circuit court in the city or county where the property is located.

How to Serve: After filing your Virginia lien, there can be the additional requirement of serving notice of the filing on the owner or general contractor. The Virginia statutes do not specify how to serve—but on analogy with other states, serve by certified mail, return receipt requested. The required notice depends on the nature of the project and who has filed the lien.

A subcontractor must give notice to the owner of the filing of an lien by a written form titled: "Notice to Owner (Sub)". There is no set time frame for service, but beware. The lien is good only for the amount due, at the time of service, from the owner to the general contractor. If you wait too long, you will be sending notice to the owner after he or she has paid the general the balance on the contract and you will have no lien rights.

As to a sub-contractor or supplier to a sub, the same rules above apply except the form is titled: "Notice to Owner and General Contractor", and appropriately, is served on the owner and general.

A general contractor (defined any contractor, sub, or supplier with a direct contract with the owner) is not required to serve a "Notice to Owner", but as explained in the next paragraph, must attach a Certificate of Mailing to the mechanic's lien when it is recorded.

All persons, whether a general contractor, subcontractor, sub-sub, or supplier, must fill out a Certificate of Mailing and attach it to the Virginia mechanic's lien when it is recorded. The certificate is automatically included in the mechanic's lien forms on this web site. This verifies that it has been served by certified mail on the owner, and when appropriate, the general contractor. The date of mailing is normally the data of recording. The statutes do not say how it is to be mailed, but is it is recommended to be by certified mail. The general contractor would only serve the owner. Although it is not specified in the statutes, it is recommended that a sub-contractor or supplier would serve the general and the owner.

License Status:

New law effective July 1, 2015 now requires that all Virginia mechanic's lien statements include the license or certificate number of the contractor, the date of the license or certificate

was issued, and the date it will expire. If no such license or certificate is included, there must be a certification it is not required for the work to be performed.

But if what if you are a licensed subcontractor and have actual knowledge that the general contractor is unlicensed? In the case of *Lower v. Cranch*, 32 Va. Cir. 110 (1993), the court held that with that knowledge, the subcontractor would be barred from recording a mechanic's lien. On the other hand, if the sub had no such knowledge, that rule would probably not apply. For example, a sub cannot be considered the "watchdog" of the licensing board.

False Liens: **New law effective July 1, 2015** now makes it a class 5 felony to maliciously file a false Virginia mechanic's lien. Punishment is not less than one year nor more than 10 years and a fine of not more than $2,500.

Amount of Lien: Primarily for unpaid labor, material, and equipment supplied. But it also covers interest. However, the lien cannot contain attorney's fees, even if they are called for in the contract. This is distinct from the allowable attorney's fees under a breach of contract lawsuit against the person with whom you have signed your contract. In other words, you might be able to get these fees against the person with whom you have a signed contract containing an attorney's fees provision, but never against the property under your lien.

The Virginia lien can only include unpaid sums due for the last 150 days prior to filing the lien. If you include more, the entire lien can be voided by the court. However, sums that are inadvertently (as opposed to intentionally) included beyond the 150-day time period will not invalidate the lien.

The lien may include retention, not to exceed 10% of the total contract price. It also includes sums that are due, but not yet payable, in cases in which the general contractor has not yet received funds from the owner.

Most importantly, the owner is not liable on a lien for any amount that is not owed the general contractor at the time the Virginia mechanic's lien is filed. This means that even though a subcontractor is owed money from a general contractor, if the owner does not owe the general, that subcontractor will have

no lien rights. For this reason, an owner's liability for the lien is limited to the amount owed the general contractor at the time of the lien filing, plus any amount that becomes due in the future. This also means that if the owner has offsets for the cost to repair defective work, this would probably reduce the lien of the subcontractor or supplier. Lost profits or other indirect or consequential damages cannot be included in a lien (delay damages, extended overtime, etc.). It is only the actual labor and materials unpaid and conferred upon the project.

In 2003, Virginia made a change as to the amount you can include in your lien. If your contract with a general or sub states that monies are not due until payment has been made: 1) by the owner to the general (if you are a sub and have a contract with the general) or 2) by the general to a sub (if you are a sub-sub), you can still include those unpaid amounts in your lien. In other words, you can claim all amounts for the services you have performed up to the time of recording the lien, even though some those monies are not technically due under a provision in your contract.

Property Subject to the Lien:

A Virginia mechanic's lien applies only to private projects. No lien is allowed in public projects against government property. It also covers the land surrounding the building which is necessary convenient use and enjoyment of the building.

A lien can be placed upon a non-profit organization such as a church.

A lien can be against a tenant's interest, both in the lease and trade fixtures. But it cannot go against the landlord's interest unless that person has caused the building to erected or improved, either itself or through an agent.

There are special problems as to building roads. To get a lien for such construction, you would have to show it was part of the overall project and not done in isolation.

Subdivisions & Condos

There has been an ongoing controversy as to the extent to which you can impose a Virginia mechanic's lien for off-site

utilities or street work benefiting the separate lots of a residential subdivision or condominium project. In other words, assume you do site work that benefits the entire complex. Does this mean the lien for unpaid services would be proportional to each unit? And would you also have to apportion it to the common areas? As to the latter, it would be somewhat unfair to the contractor because there is little likelihood of being paid for that proportion since common areas are not sold to third parties unless the entire project is sold.

Assume you have done off site grading and street work which benefits a 30 unit condominium complex as well as the common area consisting of the clubhouse. In the past, one would file a mechanic's lien pro-rata as to the number of units and including the common area because of fear that you may have over allocated to the various units. If the court finds that you have over allocated, the lien can be defeated. So, the lien would be placed pro-rata as to 1/31 interests. If one unit sold, they would have to pay 1/31 of your lien.

As of July 1, 2012, the Virginia legislature made a change pursuant to Section 43-3(B). In most cases the legislature benefits title and real estate companies. Believe it or not, in this case it benefits the contractor. You can now file your lien proportional to all units, to exclude the common areas. In the example above, your lien would be 1/30 as to each unit, which could mean the lien is slightly larger than before the new law.

But this benefit comes with added paperwork. Prior to any sale of a unit, you must record with the clerk of the circuit court a Memorandum of Disclosure setting forth the intended amount of your lien as to each unit. Call us and we can prepare the form for you. Then, you may follow-up with the actual mechanics lien.

If a unit is sold prior to the payment of your lien, then the lien will remain prorated against the remaining lots.

These new rules apply to grading, traffic signals, utilities (electrical, gas, cable, and other utilities), streets, storm water facilities, sewer, or water lines.

Note that if you are performing services for an individual unit, logically a lien can only be filed as to that specific unit.

Furnishing Information:

Upon request, the general should furnish others with information about the owner so the required notices and lien can be filled out properly.

Verified or Notarized?:

A ***verified*** notice simply means you sign it and are representing the contents are true and accurate. A ***notarized*** notice is signed in front of a Notary Public or other official. A mechanic's lien must be ***verified*** and ***notarized***.

Priorities:

When the property is foreclosed by a construction mortgage, there is always the danger the mechanic's liens will be wiped out. In general terms, most state statute indicates that if work commences before the recording of a construction mortgage, and there is a later for closure, mechanics lien claimants get priority.

Virginia addresses the subject in Section 43—21. Although poorly worded, it appears the legislature was intending to mean the following: If a construction lender forecloses, contractors get preference on the proceeds representing the value of the improved structure. This applies whether the construction deed of trust is recorded before or after commencement of construction. However, as to the value of the land, the construction lender gets preference in receiving those proceeds. But then in the third paragraph of the law, it reverses itself and gives preference to the construction lender, upon both the land and structure, if their deed of trust is recorded before commencement of construction! Because of the inherent confusion in the wording, competent legal advice should be secured.

Lien Release Bond:

An owner may petition the court after 5 days' notice to the lien claimant to "bond-off" the lien by recording a surety bond for double the amount of the mechanic's lien. After doing this, you continue with your usual court process, but you are now enforcing your rights against the bond.

Miscellaneous Issues:

Petition to Discharge: An owner or general contractor in Virginia may petition the court to discharge the mechanic's lien. This is usually done on procedural grounds by claiming it was not filed on time. If it is found invalid, it will be removed from the record. However, if it was filed on time and is otherwise valid, the owner or general contractor will have to wait until trial to dispute the underlying factual issues as to the amount owed.

Definition of Completion The date of completion of the project can determine the time limits for recording the lien. Cases in Virginia state that the completion date is the furnishing of the last labor and materials to complete the contract. This excludes remedial work, warranty obligations, and "call back" work. In other words, if you go back and repair what you have already done, this will not extend the time limit.

Late Mechanic's Lien: If you are a subcontractor or supplier and have failed to record your mechanic's lien on time, do not despair. Your due amount may be subsumed and included in the general contractor's valid lien. But, you must give the owner written notice that your claim is included in the general's lien. This has the effect of getting you paid when the general contractor is finally paid off.

No-Lien Contracts: Most states have strong statutory or case law authority prohibiting a subcontractor from waving his or her mechanic's lien rights before the work is performed. For many years, this was not so in Virginia. Those rights could be waived if they are contained in your contract.

But effective July 1, 2015, new Virginia Code Section 43.3 changed the law. Now, a subcontractor (including all lower tiered subcontractors) as well as equipment or material suppliers cannot be forced to waive their lien rights by the inclusion of a provision in your contract "in advance of furnishing any labor, services, or materials". In other words, before you start the work. If such a provision is present, it is void as a matter of public policy.

It is also unlawful as to change orders. For example, there cannot be a provision that subcontractors and suppliers waive their right to receive extra compensation through change orders.

The same rule applies to the inability to waive bond claims under Virginia Code Section 11-4.1:1.

There was a glitch in the law as general contractors. Technically, they could be required to sign no lien contracts with the owner. For this reason, **effective July 1, 2018**, Section 43-3 (C) has been amended to include them in this prohibition as well. Now general contractors cannot be forced to waive mechanic's liens in a contract with the owner before furnishing labor and materials. This means that waivers would be valid only for progress payments and final payments during the course of the project.

The only exception is that the owner may insert a provision in the contract with the general contractor to subordinate lien rights to both prior and subsequent deeds of trust. A deed of trust is like a mortgage and is typically used by construction lender. To be valid, this must be signed by the general contractor.

Subordination means that a mortgage or deed of trust will have preference over a mechanic's lien. And if that mortgage were to foreclose on the property, it would wipe out mechanics' liens. Most importantly, the subordination is allowed if the mortgage is recorded before work is started, as well as after the work is completed.

With this in mind, there are still some unanswered questions. What about pay if paid clauses? As is well known, the condition a subcontractor's payment upon a disbursement from the owner to general contractor. If there is no such disbursement, there is a defense to payment. With this also be unlawful? Legislature did not address this issue.

And what if there is a strict requirement of putting change orders in writing and submitting them within a certain period of time after performance? And if there is no compliance, the loss of the right to receive extra compensation? Will this also be void under the new legislation? In the opinion of National Lien Law, these provisions would be upheld. There is no reason the

owner or general contractor cannot have reasonable procedures to be followed in making a claim for extra compensation, as opposed to completely barring the claim.

LAWSUIT TO FORECLOSE VIRGINIA LIEN

Introduction: Your Virginia lien is not valid forever. Because it directly affects the owner's title, it has a limited shelf life and must be enforced within a short period of time. That enforcement is done by filing a lawsuit to foreclose. Just like the time deadlines for a Pre-Lien or Mechanic's Lien, the courts strictly construe these time limits which are called statutes of limitation. Again, if you are literally one day late, the lien is ineffectual.

When: The later date of 6 months from the date in which your lien was recorded or 60 days from the time the overall project was completed (not just your portion) or all work was terminated.

Where to File: In the Court of Equity where the property is situated.

Arbitration: Many construction contracts state that all disputes will be decided by binding arbitration, as opposed to a court proceeding by judge or jury. In fact, it has long been a tradition to do so in the construction industry. Arbitration is usually quicker and less costly, especially because it cuts down on expensive discovery. The decision is final and binding, with no right to appeal. You lose your right for a jury trial, but few contractors want that in the first place. You usually pick an experienced construction attorney or retired judge to hear the case in their conference room. It is just like a court proceeding with the same general rules of evidence, but more informal.

On the other hand, you can only foreclose your lien through a court proceeding, not arbitration. So, how do you keep your arbitration rights and at the same time preserve your lien rights? Simple. You bring a lawsuit to protect the lien and then immediately request the court to stay the court proceedings.

When arbitration is done, you go back to court and turn the arbitration award into a judgment.

Need a Lawyer?

In this country, every individual has the statutory right to represent themselves. This means they can prepare all necessary papers, appear at hearings, and actually try the case. In so doing, the court considers you to be acting either in "***pro se***" or "***pro per***". Before making this decision, consider the following factors:

1. You are a professional and thoroughly know the ins and outs of not only the construction industry but of the project itself. The best lawyer on his or her best day will probably not know more than 50% of what you know.

2. How is your public speaking abilities? If you are uncomfortable speaking to a group, you will even more uncomfortable in court or arbitration. You could be the "sharpest wit in town" but may not be able to present your arguments. Remember, appearing uncomfortable is perceived as having deficiencies in your case. People usually think that if you are not comfortable about your own facts, then they must not be that strong.

3. If the other side has a lawyer, you might want to think twice about representing yourself. You will certainly know the facts quite well, but you may be blindsided by legal technicalities.

4. You may also want to think twice if this is a really nasty and emotional case. In other words, if the other side is going for "blood". Having a lawyer can shelter you from this emotional trauma. No matter how strong you are, lawsuits are taxing not only on your time, but on your physical and emotional energies.

5. If you have a good case in which you have complied with technicalities and performed good work, you are essentially engaging in a collection action. These actions are typically very simple because there are few defenses or defects alleged by the other side. It makes it easier for you to represent yourself because it is more a question of when and how much they will pay as opposed to whether you will win at all.

6. If you have a binding arbitration provision, you may consider representing yourself. These proceedings are much more informal and the arbitrator tends to give you more leeway. There are also fewer rules and not they are usually not quite as strict.

7. You could consider representing yourself but get advice along the way from a lawyer. It is much cheaper that way. On the other hand, the lawyer cannot watch over every move and you might slip up. Many times lawyers can also help you with preparing the forms, simply putting your name on the pleading. You can also bring in your lawyer at the end to actually try the case.

8. Judges and courts do not give legal advice. They only help you with what forms to use. However, clerks can be invaluable in steering you in the right direction as far as where to file, time limitations, the nature of the form or pleading, etc. But, remember when it comes right down to the ultimate advice, they cannot help you.

9. Judges usually treat you the same as an attorney which means they expect strict compliance with the rules. Although some judges give you more slack, don't count on it.

10. The biggest dilemma is whether you should hire an attorney for a smaller case, typically in the $5,000 to $10,000 range. You have to watch this because you may eat up that amount in attorney's fees. *You* never make money on lawsuits, only l*awyers* do. Try to settle for the best price you can get and move on.

Prepared by:

NationalLienLaw Thank you for your business.