

The ABC's of Mechanic's Lien Enforcement in Virginia

If you have been in the construction business for years—or even months—, you have encountered several instances where your construction contract has been breached, you have not been paid, and you feel the need to file a mechanic's lien. After that throbbing vein in your neck settles down, you must correctly analyze your potential claim *prior to contacting* an attorney to advise you and to file and enforce the lien.

Filing a lien yourself can be fraught with peril. Enlisting the help of an attorney with experience in this highly technical area is the best way to protect your rights. Virginia Code Section 43-1, *et seq.* sets forth *very specific* requirements for the filing and enforcement of a lien. These requirements range from the timing of filing a lien memorandum and suing to enforce that lien to the particular content of a lien notice and the proper parties to receive it. Failing to meet any one of these requirements will lead to your losing your lien rights.

Additionally, some basic business practices will help ensure that your lien rights are maximized and your claim preserved.

I. Well-drafted contracts protect your rights from the outset

Many contractors simply take the standard American Institute of Architects ("AIA") form contract and either leave it unaltered or add language thoughts to be helpful. While the AIA contracts have their strong points, this method of drafting has two pitfalls which can lead to problems with enforcing a contractual obligation through the use of a mechanic's lien.

The first is that inevitable conflicts arise over time between the added language and the original document. The second is that many contractors fail to examine the language carefully because it is

already in the pre-printed text. Either of these circumstances can make your contract, and therefore any lien filed, problematic to enforce.

The best way to avoid these pitfalls is to consult with an attorney knowledgeable in the construction field to assist you in drafting a contract that fits your particular area of the industry and protects your rights. Once your contracts are properly drafted, the enforcement of your lien rights becomes an uncomplicated task *if* you follow the remainder of these recommendations.



Christopher G. Hill
Construction Law Attorney

II. Simple accounting steps can maximize your lien

The Virginia mechanic's lien statute allows a contractor to file a lien only for unpaid amounts *accrued within 150 days of either the date of the lien or the last day of work performed on the project*, whichever is earlier. Including amounts in the lien that violate this statute will in most cases *totally invalidate the lien*.

Because of the harsh consequences of including in your lien more than is allowed by law, accurate accounting is critical. While it seems logical to account for and pay by phases of the job (i. e. roofing, site work, etc.), such a practice can create a problem. The simplest and most effective way to avoid losing valuable receivables is to simply pay the oldest invoice first. This method "back loads" the amounts owed, thus pushing the receivables closer to the end of the project in time.

Additionally, the law allows you to file multiple liens. This tactic is especially valuable on

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year-long projects during which you may not receive payment on early invoices. In such a situation, coupling multiple liens with paying the oldest invoice first will keep you within the 150 day cutoff.

III. Implement systems and use them faithfully

A system is key to keeping your lien rights available and effective. Always begin with a check of the building permit for the project, especially on a residential project. Special rules apply to residential projects, and you will need to notify any mechanic's lien agent identified on the permit within 30 days of *beginning* work that you may have a right to a lien.

Thereafter, send collection letters at 30, 60 and 90 days from the time you are owed the money. The first is a friendly reminder, the second a less friendly demand, and the third essentially announces that you will be placing a lien the project. Using these letters will have a two-fold benefit. It keeps those up the line from you from forgetting the money is owed. Secondly, it keeps you from missing the other critical time limits found in the mechanic's lien statute.

Aside from the 150 day rule, the mechanic's lien statute requires that you file any memorandum of lien within *90 days of the last day of the last month* in which you performed work or provided materials. Missing this filing deadline will have the same effect as violating the 150 day rule -- your lien will not be enforceable. Having a 30, 60, 90 day system will act as a set of reminders to keep you from missing this important deadline.

DISCLAIMER

This newsletter is not intended to be an exhaustive explanation of every aspect of the law on this subject nor is it intended as legal advice. You should consult an attorney for specific advice.

IV. Consider the expense associated with various alternatives before you act

Mechanic's liens can be expensive to enforce. Regardless of the amount of the lien, enforcing it involves a circuit court lawsuit against all parties who have an interest in the property on which your construction was performed. Thus, the suit will pit you against the owner, any other mechanic's lien holder, and likely a bank that holds a mortgage on the property. Make sure before filing that the amount in question justifies the expense of a lien and its enforcement.

Remember also that a lien is not the sole remedy; a simple breach of contract suit may be more than adequate to force payment. Another option (and one that can be very effective, especially for a material man or sub-contractor) is to file a lien to bring pressure upon the owner of the project and any upstream contractors, and then file a breach of contract suit to collect the money. With the second of these options, make sure that you are ready either to file a suit to enforce the lien within 180 days of the filing of the memorandum or are ready to see the lien expire for lack of enforcement at the end of that 180 day period.

V. Summary

Remember that mechanic's liens in Virginia are very technical and highly time/amount sensitive. The process need not be scary so long as you have well drafted contracts, use proper office business procedures, and consult with an attorney experienced in the filing and enforcement of mechanic's liens to determine the best enforcement options. Follow these steps, and you should have few problems should the need to file a lien arise. ■

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