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PERFECTION AND ENFORCEMENT OF A MECHANIC'S LIEN IN VIRGINIA: A DEFENSE LAWYER'S PERSPECTIVE

James L. Windsor*

I. INTRODUCTION

The right to a mechanic's lien in Virginia is statutorily created and the Supreme Court of Virginia requires strict adherence to these statutes. During mechanic's lien litigation, the validity of the underlying indebtedness to the claimant or the quality of the claimant's work often has little bearing on whether the lien is valid or enforceable. Rather, the question revolves around whether the claimant or his attorney substantially complied with the procedures mandated by the statutes as interpreted by the courts. These procedural or "technical" defenses are usually raised in the initial or preliminary stages of the litigation, long before any issue regarding whether the amounts claimed by the claimant are properly due are addressed.

This article will examine the creation of mechanics' liens and the procedures for perfection, priority, and enforcement of mechanics' liens. Intertwined in these statutory requirements are defenses, both procedural and substantive, that will be explored from a defense lawyer's perspective. Throughout this article are war stories and caveats to assist those who practice in this relatively sophisticated area of the law. Emphasis in this article will be on Virginia statutory and decisional law, but not to the exclusion of important decisions in other jurisdictions.


3. See id. § 43-4.
4. See id. § 43-21.
5. See id. § 43-22.
6. See infra notes 183-96 and accompanying text.
7. See infra notes 197-202 and accompanying text.
8. The time-honored legislative policy in Virginia relating to mechanics' liens is based
Mechanic's lien statutes are strictly construed against the mechanic's lien claimant. Both the lien and the jurisdiction of the court depend upon the statutes, and not upon equitable or ethical rules. Neither the conscience of the chancellor nor "the length of his foot" can supplement the statutes. Although the Supreme Court of Virginia liberally construes provisions relating to the enforcement of the lien as opposed to the perfection of the lien, in practice, enforcement statutes are strictly construed as well. The court has repeatedly refused to "blue pencil" a mechanic's lien to cure a procedural defect which would cause a forfeiture. A thorough understanding of the basics of Virginia mechanics' lien law is essential prior to utilizing this extraordinary remedy. However, an acute appreciation of the pitfalls is equally paramount before traveling down such a treacherous path.

II. CREATION OF THE LIEN

The creation of a mechanic's lien is addressed statutorily and provides:

All persons performing labor or furnishing materials of the value of fifty dollars or more, for the construction, removal, repair or improvement of any building or structure permanently annexed to the freehold, . . . shall have a lien, if perfected as hereinafter provided, upon such building or structure, and so much land therewith as shall

upon the "New York system," under which the lien of a subcontractor or materialman depends on, and is limited by, the amount due the general contractor at the time the owner receives notice of the lien. See Nicholas v. Miller, 182 Va. 831, 834-35, 30 S.E.2d 696, 697 (1944); Robinson v. Herrell Constr. Co., 7 Va. Cir. 308, 311 (City of Winchester 1986); Note, Mechanics' Lien in Virginia, 29 VA. L. REV. 122-23 (1942). While Virginia's statutory scheme is patterned after the New York system, the Virginia statutes, as a whole, are unique. Therefore, no attempt will be made to examine the statutes regarding mechanics' liens in other jurisdictions. Thus, the persuasive value of any foreign decisions cited herein necessarily must be gauged only after comparing and contrasting the specific statute, or perhaps the entire statutory system, being construed or interpreted by such case with that of Virginia.

9. Cf. Liberty Perpetual Bldg. & Loan Co. v. Furbush & Son Mach. Co., 80 F. 631, 637 (4th Cir. 1897) (in order for a mechanic's lien to be valid, the claim must have been filed within forty days after work was done).


be necessary for the convenient use of enjoyment thereof. . . .

Numerous examples of improvements and types of materials and labor, which are deemed to be permanently affixed to the freehold and thus subject to a mechanic's lien, are statutorily defined. It is clear from these two statutes that the issue of whether a building or structure is "permanently annexed" or affixed to the land is a primary consideration in ascertaining the right to a mechanic's lien.

Early decisions by the Supreme Court of Virginia placed great emphasis on the extent to which the building or structure was affixed in determining whether it was "permanently annexed to the freehold" and thus subject to a mechanic's lien. Recent rulings by other courts construing Virginia law have also focused on the degree of affixation in determining whether a structure attached to realty is permanently annexed to the real property.

14. Section 43-2 of the Code of Virginia provides:
   For the purpose of this chapter, 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 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.
15. The statutory predecessors of section 43-3(a) of the Code of Virginia date to the original codification of the law of mechanics' liens in Virginia in 1843. See 1843 VA. ACTS, Ch. 76, § 1-6. The archaic language requiring the building or structure to be "permanently annexed to the freehold" should be read in conjunction with decisions regarding the law pertaining to fixtures rendered by the Supreme Court of Virginia in the nineteenth century and early twentieth century. See Haskin Wood Vulcanizing Co. v. Cleveland Ship-Bldg. Co., 94 Va. 439, 26 S.E. 878 (1897). The use of this phrase by the General Assembly of Virginia when the mechanics' liens statutes were originally enacted, seems to indicate that the necessary analysis is similar to the inquiry required to ascertain whether an item attached to realty remains personalty or is converted to a fixture.
16. Machinery and equipment which are of a permanent character and essential to the purpose of the building may be the subject of a mechanic's lien even though severable without lasting injury to the machinery or the building. Haskin Wood Vulcanizing Co., 94 Va. at 447, 26 S.E. at 880 (citing Morotock Ins. Co. v. Rodefer Bros., 92 Va. 747, 749, 24 S.E. 393, 394 (1896)); see Annotation, Air Conditioning Appliance, Equipment, or Apparatus as Fixture, 69 A.L.R. 4th 359 (1989).
17. In re Jessie's Paving Co., 39 Bankr. 265 (Bankr. W.D. Va. 1983) (sheet-metal storage shed mounted on asphalt base and structures consisting of cinder blocks mortared together and affixed to realty on poured concrete constituted fixtures). But see In re Concrete Struc-
Virginia courts apply a three-pronged test to determine whether an article of personal property affixed to realty is converted to a fixture. In the absence of any specific agreement between the parties, the following criteria should be considered: (1) the extent to which the building or structure is permanently affixed to the land; (2) whether the building or structure is essential to the use of the realty; and, (3) the intention of the owner of the building or structure to make it a permanent addition to the realty.\textsuperscript{18}

The intention of the annexing party is the chief and controlling factor in evaluating whether personalty affixed to realty is converted to a fixture.\textsuperscript{19} For example, the Supreme Court of Virginia enforced an agreement between the parties which provided that certain equipment would remain personalty even where it is clearly affixed to the real estate.\textsuperscript{20} Thus, if a claimant attempts to enforce a mechanic's lien, the owner of the encumbered property may argue that the claimant is not entitled to a mechanic's lien since the claimant retained title and ownership of the material such that it is not permanently annexed to the freehold. A conditional seller of materials to be used in the construction of a building or structure who reserves title to the materials is ordinarily not precluded from perfecting a mechanic's lien against the realty in which the materials are incorporated.\textsuperscript{21}

\begin{thebibliography}{99}
\bibitem{18}Danville Holding Corp. v. Clement, 178 Va. 223, 232, 16 S.E.2d 345, 349 (1941).
\bibitem{19}State Highway & Transp. Comm'r v. Edwards Co., 220 Va. 90, 95, 255 S.E.2d 500, 503 (1979) (citing Danville Holding Corp. v. Clement, 178 Va. 223, 232, 16 S.E.2d 345, 349 (1941)). For example, if the transaction involves a conditional sale, where the seller retains title and ownership of the materials used in constructing the building or structure until the seller has been paid, this arguably demonstrates an intent by the seller to characterize the materials as personalty, irrespective of whether they are "permanently annexed to the freehold." Therefore, the seller may not be entitled to file a mechanic's lien. Annotation, \textit{Claim of Lien By Conditional Vendors as Waiver of Title}, 45 A.L.R. 185 (1926); cf. Sharlin v. Neighborhood Theatre, Inc., 209 Va. 718, 167 S.E.2d 334 (1969) (tenant had right to remove items affixed to reality where lease provided items would remain property of tenant). The fact that a seller reserved the right to repossess the material in the contract, however, is not determinative since the legal right to remove the material is not synonymous with the intent to remove it. See Transcontinental Gas Pipe Line Corp. v. Prince William County, 210 Va. 550, 556, 172 S.E.2d 757, 762 (1970).
\bibitem{20}Tunis Lumber Co. v. R. G. Dennis Lumber Co., 97 Va. 682, 686, 34 S.E. 613, 614 (1899).
\bibitem{21}DeMarzo v. Gatto, 204 Misc. 691, ---, 125 N.Y.S.2d 229, 230 (1953); Annotation, \textit{Right of Conditional Seller of Chattels Attached to Realty to Claim Lien on the Realty}, 58 A.L.R. 1121 (1929). The rationale of the authorities supporting this general proposition is that the retention of title is not inconsistent with the lien given by a statute. As a matter of law, it does not show an intention to waive the lien, nor does it obligate the materialmen to
\end{thebibliography}
There is a difference of opinion as to whether the enforcement, or attempted enforcement, by a conditional seller of property of a mechanic's lien upon the property is a waiver of the reserved title. According to one line of authority, the mere attempt to enforce a mechanic's lien upon the property constitutes a waiver. Such an attempt is held to be inconsistent with the theory that title remains in the seller.\footnote{22} While there is no decision of record in Virginia directly on point, a statute provides that "[t]he remedies afforded by this chapter shall be deemed cumulative in nature and not be construed to be in lieu of any other legal or equitable remedies."\footnote{23} Arguably a conditional seller may be entitled to perfect and enforce a mechanic's lien; however, the claimant should be aware that there may be a defense raised regarding the title retention. The filing of a mechanic's lien where title has been retained may act as a waiver of the right to later repossess the materials or equipment furnished. Accordingly, the claimant runs a substantial risk of losing its right to repossess the property if it elects to file a mechanic's lien.

The applicability of a second defense is pegged to whether the property is publicly or privately owned and to the intended use of the property. Buildings or structures erected under a contract with the Commonwealth, cities, counties, political subdivisions and

\footnote{22. Annotation, \textit{Claim of Lien by Conditional Vendor as Waiver of Title}, 45 A.L.R. 185 (1926). This is true, even though the attempt to enforce the lien is unsuccessful. Barbour Plumbing, Heating & Elec. Co. v. Ewing, 16 Ala. App. 280, 77 So. 430 (1917). Even if the attempt to enforce the lien fails because the seller has not complied with statutory requirement it does not defeat the election. Hickman v. Richberg, 122 Ala. 638, , 26 So. 136, 137 (1897). An action to enforce a mechanic's lien by the conditional seller of property has been viewed to be an election to declare the title of the property to be in the buyer, and a judgment which establishes the mechanic's lien, an adjudication that title is the buyer. Bramhall v. McDonald, 172 A.D. 788, , 158 N.Y.S. 736, 738 (N.Y. App. Div. 1916); cf. Elwood State Bank v. Mock, 40 Ind. App. 685, 82 N.E. 1003 (1907). Other courts have held that "simply filing notice of a mechanic's lien fails far short of an election," even though complete enforcement of a mechanic's lien would probably result in a waiver of title. Warner Elevator Mfg. Co. v. Capital Inv. Bldg. & Loan Ass'n, 127 Mich. 323, 327, 86 N.W. 823, 830 (1901).}

\footnote{23. \textit{VA. CODE ANN.} § 43-23.2 (Repl. Vol. 1990).}
other quasi-public entities such as sanitary districts and water and sewer authorities “used for public uses or purposes” are exempt from the application of the Virginia mechanic’s lien law. Property is not subject to a mechanic’s lien if the building or structure erected on the property is “for public uses” of the Commonwealth, its counties, or cities. If the building or structure which was constructed by a public body will be privately used, the property is not exempt from mechanic’s lien law.

III. THE PLAYERS—DEFINITIONS AND DEFENSES

Inherent in determining the validity and enforceability of a mechanic’s lien is an understanding of who the players are and how their status affects a claimant’s ability to obtain a lien. The players’ posture may also serve as a defense to the mechanic’s lien.

A. Owner

The term “owner” is not defined by statute in Virginia, but it generally means the person having an interest in the property who, either directly or through an agent, causes labor or materials to be furnished or supplied in the erection or repair of a building or structure. Before a claimant can file, and thus perfect, a


25. See Phillips, 97 Va. at 474, 34 S.E. at 68. Where a municipality and a private developer enter into a joint venture whereby the developer constructs a building to be used for essentially private purposes on property owned by a municipality, can a person who performs labor or supplies materials for the construction of the building claim a lien against the building and so much of the land as is necessary for the convenient use and enjoyment thereof? See American Seating Co. v. City of Philadelphia, 434 Pa. 370, —, 256 A.2d 599, 601 (1969) (exception to the general rule that municipal property is exempt from mechanics’ liens was found where the municipality had given its tenant consent to improve the land necessary to subject it to a mechanic’s lien claim). See generally Annotation, Municipal Property as Subject to a Mechanics’ Lien, 51 A.L.R.3d 657 (1973).

mechanic's lien, the claimant must conduct a title examination of the records in the clerk's office of the circuit court where the property is located to determine the person or persons who own the property or have an interest therein to be affected.27

The claimant should not rely on property owner information obtained from real estate tax records or from an earlier title examination which was performed to prepare the memorandum of mechanic's lien when filing the mechanic's lien. Rather, the claimant should "update the title" to the date and time of the recordation. The claimant, or the claimant's attorney, should trace the title to the instrument to be recorded or which was recorded immediately prior to the recordation of the memorandum of mechanic's lien. This ensures that the owner has not conveyed the property or resubdivided the property against which the lien is sought in a manner which might affect the validity of the mechanic's lien.28

The claimant cannot simply name the person who owned the property at the time the building or structure was begun or the materials furnished.29 The claimant is required to use the correct legal name of the owner of the property as reflected in the records of the clerk's office where the property is located. It may be pru-

27. See Ulrich, VIRGINIA AND WEST VIRGINIA MECHANICS' AND MATERIALMENS' LIENS § 2.5 (1985).
28. Id.
29. Wallace v. Brumback, 177 Va. 36, 41, 12 S.E.2d 801, 803 (1941); see e.g. United Va. Mortgage Corp. v. Haines Paving Co., 221 Va. 1047, 277 S.E.2d 187 (1981); Loyola Fed. Sav. & Loan Ass'n, 218 Va. at 805, 241 S.E.2d at 753; Winder Plumbing, Heating & Air Conditioning, Inc. v. Kanawha Trace Dev. Partners, 19 Va. Cir. 333, 335 (City of Richmond 1990); Carpet Installation Assoc., Inc. v. Nestor, Ch. No. C78-2010 (City of Norfolk 1979); 1982-1983 Report of Attorney General, 85-86. The memorandum of mechanic's lien must be recorded and indexed in the clerk's office in the general index of deeds in the name of "the owner of the property" in order for the recordation to give constructive notice to interested parties. Wallace, 177 Va. at 42, 12 S.E.2d at 803; VA. CODE ANN. §§ 43.4-.5 (Repl. Vol. 1990). This approach conforms with the Virginia statutes governing the recordation of instruments. Id. §§ 55-96, -55, -105 (Repl. Vol. 1986 & Cum. Supp. 1990). Under the statutes, for example, a contract for the sale of real estate is void as to lien creditors until it is admitted to record. Id. at § 55-96 (Cum. Supp. 1990). A mechanic's lien claimant is a lien creditor. The lien arises from the performance of work for which the lien is claimed. A mechanic's lien is an inchoate lien which attaches when the labor is performed or the materials furnished and is not affected by a change of ownership, provided that the claimant perfects his lien as prescribed by statute. See Hadrup v. Sale, 201 Va. 421, 425, 111 S.E.2d 405, 407 (1959); R.C. Lee Carpet & Tile, Inc. v. Core Constr. Corp., 12 Va. Cir. 159, 162 (County of Spotylvania 1988). An inchoate mechanic's lien perfected subsequent to a foreclosure sale is not extinguished as to the purchaser at the sale. Richard Talbott, Inc. v. Swango, 18 Va. Cir. 5, 6-7 (County of Fairfax 1988).
dent to contact the State Corporation Commission or search the partnership or fictitious name records, as applicable, to verify the name of the owner or uncover any ambiguities which may exist. Where the wrong entity or person is identified as the owner of the property subject to a mechanic’s lien, this is not a mere misme


33. Willis, 230 Va. at 450, 338 S.E.2d at 845. The following are not entitled to protection from a mechanic’s lien unless the instrument evidencing such interest is recorded: (1) a beneficiary under an unrecorded assignment of a note; (2) a grantee under an unrecorded deed; or (3) a substituted trustee under a deed of trust. A purchaser under an unrecorded contract is not an owner for purposes of the mechanic’s lien statute. See R.C. Lee Carpet & Tile, Inc. v. Core Constr. Corp., 12 Va. Cir. 153, 162 (County of Spotsylvania 1988).
to the property sought to be liened as tenants by the entirety does not substantially comply with Virginia Code section 43-4, and the lien is invalid.\textsuperscript{34}

In order to subject a landlords' interest in a building or structure to a mechanic's lien, it must appear that the tenant made the improvements or repairs while acting as the agent of the owner, for that purpose, or that the owner caused the repairs or improvements to be made or that the owner ratified what the tenant had done.\textsuperscript{35} It may not, however, be necessary to specifically identify the property being liened as a leasehold interest.\textsuperscript{36} If Virginia Code section 43-20 were construed as authorizing a lien on the interest of a person not ordering the work to be done, the provision would be unconstitutional for taking private property without the owner's consent.\textsuperscript{37}

The "owner" is the person who requires, contracts for, or authorizes the work to be done or the materials to be furnished.\textsuperscript{38} By statute, only the owner's interest in the land shall be subject to a mechanic's lien. Therefore, the underlying fee simple estate is not subject to a lien if the owner has less than a fee simple interest.\textsuperscript{39} Unless the owner has the fee simple estate, a mechanic's lien claimant runs a risk of losing his lien rights because the claimant's

\begin{itemize}
  \item \textsuperscript{34} \textit{Wallace}, 177 Va. at 41-42, 12 S.E.2d at 803-04; Atkins v. Jim Carpenter Co., 18 Va. Cir. 432, 434 (County of Stafford 1990); Gunther v. Jennings Cantrell, 11 Va. Cir. 255, 258 (County of Fairfax 1988); Ko v. Stonehenge Constr., Inc., Ch. No. 7096-87 (County of Chesterfield 1988); Framesticks, Inc. v. O'Neal, Ch. No. CH-8438 (City of Virginia Beach 1985).
  \item \textsuperscript{35} Section 43-20 of the Code of Virginia provides:
    Subject to the provisions of § 43-3, if the person who shall cause a building or structure to be erected or repaired owns less than a fee simple estate in the land, then only his interest therein shall be subject to liens created under this chapter. When the vendee under a contract for the sale of real estate causes a building or structure to be erected or repaired on the land which is the subject of the contract and the owner has actual knowledge of such erection or repairs, the interest of the owner in the land shall be subject to liens created under this chapter. . . .
  \item \textsuperscript{36} Threesome, Inc. v. Contract Program Management, Inc., 18 Va. Cir. 290, 291 (County of Fairfax 1989).
  \item \textsuperscript{37} Feuchtenberger v. Williamson, Carroll & Saunders, 137 Va. 578, 586-87, 120 S.E. 257, 259-60 (1923).
  \item \textsuperscript{38} E.E. Stump Well Drilling, Inc. v. Willis, 230 Va. 445, 449, 338 S.E.2d 841, 843 (1986).
  \item \textsuperscript{39} Feuchtenberger, 137 Va. at 586, 120 S.E. at 263; Atlas Portland Cement Co., 112 Va. at 11, 70 S.E. at 539; Case Note, Atlas Portland Cement Co. v. Main Line Realty Co., 17 Va. L. REG. 217 (1911).
\end{itemize}
lien can only attach to the tenant’s leasehold rights.

When a mechanic's lien is asserted against an equitable estate, its validity depends upon continued vitality of the estate. Therefore, if the tenant’s leasehold rights in the property against which the lien is sought have already been extinguished due to a default, a claimant’s mechanic’s lien cannot attach to the property.\textsuperscript{40} The Supreme Court of Virginia is in accord with the majority of the jurisdictions which have addressed this issue.\textsuperscript{41}

B. General Contractor

The term “general contractor” includes any “contractors, laborers, mechanics, and persons furnishing materials, who contract directly with the owner.”\textsuperscript{42} By definition, the owner and the general contractor cannot be the same entity or person and there may be more than one general contractor on a project.\textsuperscript{43} The general contractor may, however, be regarded as the “alter ego” of the owner.\textsuperscript{44}

An owner may successfully defend against a contractor’s mechanic’s lien suit on the ground that the contractor failed to obtain a license from the State Board of Contractors, if the contractor had actual knowledge of the requirement to obtain a contractor’s license and failed to procure the license.\textsuperscript{45}

\begin{footnotes}
\item[40] Feuchtenberger, 137 Va. at 584, 120 S.E. at 261; see Carter v. Keeton, 112 Va. 307, 309, 71 S.E. 554, 555 (1911); see also Ulrich, supra note 27, §§ 2-4, at 20.
\end{footnotes}
C. Subcontractors, Materialmen, Laborers and Other Lower Tier Contractors

The term “subcontractor” includes any “contractors, laborers, mechanics, and persons furnishing materials, who do not contract with the owner but with the general contractor.”46 A particular claimant may, by definition, be a general contractor and a subcontractor on the same project. A sub-subcontractor is one who furnishes or supplies labor or material under a contract directly with a subcontractor.47 Any person who furnishes material or performs labor under a contract directly with a sub-subcontractor is not entitled to a lien under Title 43 of the Virginia Code.48 In short, the statutory remedy is available only to the top three tiers of persons providing labor or material to a particular project. If a subcontractor is a “mere instrumentality” or, in essence, the same party, it is arguable that a person supplying material or performing labor under a contract directly with a sub-subcontractor could be elevated a tier, thus creating lien rights.49

D. Mechanic’s Lien Claimant

The lien claimant must be the individual or entity that entered into the contract underlying the particular claim.50 A memorandum of mechanic’s lien is necessary to perfect a lien and will be invalid where the memorandum names as the claimant an entity other than that entering into the underlying contract.51 In addition, a memorandum of mechanic’s lien which fails to correctly name the claimant does not substantially comply with the statutes “because it does not provide sufficient notice as to the identity of

47. The term “sub-subcontractor” is not defined in the Virginia Code. However, a form of a memorandum of mechanic’s lien claimed by sub-subcontractor is set forth in Va. Code Ann. § 43-10.
49. Fidelity & Casualty Co. of N.Y. v. First Nat’l Exch. Bank, 213 Va. 531, 536-37, 193 S.E.2d 678, 682-83 (1973). Since a sub-sub-subcontractor is not entitled to claim the benefit of a mechanic’s lien, it is possible for the general contractor or owner to orchestrate the “tiers” or “chains” of contractors and subcontractors such that the owner or general contractor may intentionally cut off a sub-sub-subcontractor’s mechanic’s lien rights.
E. Architects, Engineers and Surveyors

Architects and engineers are entitled to liens under certain circumstances. In order for architects or engineers to claim the benefit of a mechanic’s lien, they must (1) put their labor into plans for the erection of a building; and (2) actually supervise its erection. Surveying services are eligible for mechanics’ liens under two possible statutory characterizations. If the services are required for the improvement of the grounds they are considered “material” and are lienable. In the alternative, the providing of surveying services constitutes “labor” and is lienable under a related statute. Thus surveying can be considered either a “material” or “labor” giving rise to a lien.

F. Utility and Paving Contractors

“Any person providing labor or materials for the installation of streets, sanitary sewers or water lines for the purpose of providing access or service to the individual lots in a development or for condominium units” has a lienable interest. The statute appears to

52. Vasquez, 16 Va. Cir. at 373.
54. Id. at 451, 166 S.E. at 480; see also Annotation, Architects’ Services as Within Mechanics’ Lien Statute, 28 A.L.R.3d 1014, 1032 (1969).
55. VA. CODE ANN. § 43-2 (Repl. Vol. 1990). “[S]urveying . . . required for the improvement of the grounds upon which such building or structure is situated is a ‘material’ giving rise to a lien.” Id.
56. Id. § 43-3. “All persons performing labor or furnishing materials . . . for the construction . . . of any building . . . shall have a lien . . . .” Id.
58. Section 43-3(b) of the Code of Virginia provides:
Any person providing labor or materials for the installation of streets, sanitary sewers or water lines for the purpose of providing access or service to the individual lots in a development or condominium units as defined in § 55-79.41(d) or under the Horizontal Property Act (formerly §§ 55-79.1 through 55.79-38) shall have a lien on each individual lot in the development for that fractional part of the total cost of such labor or materials as is obtained by using ‘one’ as the numerator and the number of lots as the denominator and in the case of a condominium on each individual unit in an amount computed by reference to the liability of that unit for common expenses appertaining to that condominium pursuant to § 55-79.38(c); provided, however, no such lien shall be valid as to any lot or condominium unit unless the person providing such labor or materials 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 docu-
apply only to lots in a development or to condominium units to be used for residential purposes. However, the statute is ambiguous on this point and the lien claimant should file a disclosure statement when working on lots in a commercial "development" or condominium units that are intended for commercial uses.

In order for the mechanic's lien to be valid under these circumstances, the lien claimant must: (1) file a disclosure statement prior to the sale of the lot or condominium unit against which the lien is sought and (2) file the memorandum of mechanic's lien pursuant to the requirements of Title 43 of the Virginia Code. The disclosure statement should be filed before the prospective claimant commences work. If any lots are conveyed prior to the filing of the disclosure statement, the claimant loses his lien rights for a fractional amount of the claim in proportion to the number of lots conveyed.

A claimant who provides "off-lot" improvements may also file a mechanic's lien under Virginia Code section 43-3(a). A contractor's lien rights cannot be extended to land upon which he performed no work. In Rosser v. Cole, the Supreme Court of Virginia noted that "the framers of the statutory scheme were careful not to extend a builder's lien rights beyond the 'building or structure' upon which he had worked," because they wanted to "minimize danger to purchasers without notice [of the lien] and other innocent third parties."

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59. Id.
60. Id. Section 43-3(a) of the Code of Virginia provides that a claimant "shall have a lien... upon such building or structure, and so much land therewith as shall be necessary for the convenient use and enjoyment thereof." Id. § 43-3(a).
61. Id. § 43-2; see also Rosser v. Cole, 237 Va. 572, 577, 379 S.E.2d 323, 326-27 (1989) (a lien would not be created unless another provision of the Code allowed it since the claimant did not do any work on the lots).
63. Id. at 576, 379 S.E.2d at 326.
If a subdivision road builder or utility contractor fails to apportion the lien or fails to file the disclosure statement as required by section 43-3(b) of the Code of Virginia, the claimant "is limited to the traditional lien rights conferred by § 43-3(a) . . . [which] grants him no lien rights beyond the confines of the road or streets on which he worked." In Rosser, an owner contended that the contractor's mechanic's lien was invalid because the contractor sought "a blanket lien for the total value of his services upon the entire property" since he failed "to apportion the amount claimed [in his memorandum] among . . . individual lots as mandated by Virginia Code section 43-3(b)." The court held that the contractor's lien was an invalid "extraterritorial lien" because the claimant purported to "cover" property to which his lien rights did not extend.

IV. THE PERFECTION OF A MECHANIC'S LIEN

A. The Ninety-Day Rule

In order to perfect a mechanic's lien, a claimant must file in the clerk's office a memorandum of mechanic's lien containing "the names of the owners of the property sought to be charged, and of the claimant of the lien, the amount and consideration of his claim, and the time." While all persons are "deemed to have notice" of the mechanic's lien from the time the memorandum of mechanic's lien is recorded and indexed, the lien is actually perfected upon filing. Although the lien may be filed within the prescribed time, the clerk may not record it until several days or weeks later in some jurisdictions.

The memorandum of mechanic's lien must be filed within "ninety days from the last day of the month in which [the claimant] last perform[ed] labor or furnishe[d] material, but in no event later than ninety days from the time such building or structure

64. Id. at 578, 379 S.E.2d at 326-27.
65. Id. at 574-75, 379 S.E.2d at 324-25.
66. Id. at 578, 379 S.E.2d at 326-27.
   [i]t shall be the duty of the Clerk in whose office such memorandum shall be filed as herein before provided to record and index the same as provided in § 43-4.1, in the name as well of the claimant of the lien as of the owner of the property, and from the time of such recording and indexing all persons shall be deemed to have notice thereof.
The later date "qualifies and limits" the former. Unless the "lien is perfected within the proper time and in the proper manner as outlined by the statutes, it is lost" and the court has no power to enforce it. Further, the prescribed time period is ninety days, not three months, and "[w]hen the last day for filing a memorandum of mechanic's lien falls on a Saturday, it may be filed on the following Monday."

The time limitations provided in Virginia Code section 43-4 are a trap for the unwary. In order to avoid questions being raised as to whether the lien was perfected in a timely manner, the lien claimant should file the lien well within the prescribed ninety-day period. This will insure that the lien is filed, recorded and indexed within the statutory period. The claimant should also make sure that the proper filing fee is paid at the time the lien is submitted for recordation because the clerk may refuse to record the lien until the full amount of the filing fee is paid. Since many lien claimants wait until the last day to file the lien, it is particularly critical that this administrative detail not be overlooked.

The general contractor and any subcontractors or sub-subcontractors who furnish material or labor at or near the completion of the building or structure may be subject when filing their liens to the measuring period commencing upon the completion of the building or structure rather than to the ninety-day period from the last day of the month in which they did work. In practice, since most claimants wait until the day before the limitations period expires to perfect the memorandum of mechanic's lien; however, the lien claimant should avoid the "end of the month mentality" and not assume that the measuring period that commences ninety days from the last day of the month in which the claimant worked will always be applicable. Frequently, construction that is abandoned or "otherwise terminated" prior to completion of the project will

69. Campbell v. Lanier, 12 Va. Cir. 85, 86 (County of Spotsylvania 1987).
72. Section 43-4.1 of the Code of Virginia provides that memoranda and notices of liens are to be recorded in deed books and indexed in the general index of deeds.
73. If a subcontractor last performed or furnished materials on November 15 and the structure was completed on November 15, the claimant would have ninety days from November 15 to perfect its lien rather that ninety days from the last day of November.
trigger the commencement of the ninety-day period from the date
the work on the building or structure is terminated. The prudent
contractor should monitor progress of the construction project,
particularly where the contractor worked early in the month and
should not assume that the measuring period to file a mechanic's
lien will commence on the last day of the month in which he
worked.

"A mechanics' lien, although a statutory creation, necessarily has
its foundation in a contract, . . . and it is a contractor's perform-
ance under the contract that gives rise to the inchoate lien." 74
Hence, the lien must correspond with the contract. 75 Where an
owner contracts with a general contractor for labor and materials
in phases, each of the contracts represent an independent under-
taking for separate and distinct compensation. 76

"A running account generally constitutes but one cause of action
and cannot be divided into separate claims so as to provide a basis
for several actions." 77 Where materials and labor are furnished for
the construction of a building or structure as they are ordered from
time-to-time and not in fulfillment of a single contract, the limitation
period for perfecting a lien begins to run against each item at
the time it is furnished. If the materials were furnished under a
single contract, the items of account would be continuous and the
mechanic's lien claimant would have to file the lien within the
ninety-day limitations periods. 78 On the other hand, if the several
items, or any of them, are furnished under separate contracts, such
as a running or open account, but not forming one continuous
course of dealing, the lien would have to be filed within the ninety-
day limitations period from the date of the last item under each
independent contract or invoice. 79 Virginia law conforms with the
majority of the jurisdictions that have considered the issue of con-
tinuous or separate contracts. 80 Extra work not covered or contem-

74. United Masonry, Inc. v. Riggs Nat'l Bank, 233 Va. 476, 480, 357 S.E.2d 509, 512
Gap Colliery Co., 96 Va. 58, 66, 30 S.E. 446, 449 (1898) (court held that a running account
"where nothing to the contrary appears, is to be considered as falling due at the date of its
79. Trigg Co., 106 Va. at 339, 56 S.E. at 162.
80. Southern Lumber Co. v. Riley, 224 Ark. 298, —, 273 S.W.2d 848, 850 (1954); Cal-
plated by the original contract, though performed by the same general contractor, is considered a separate and distinct transaction in a controversy between the owner and the subcontractor, and a separate ninety-day measuring period would exist.  

The “ninety-day periods” represent the maximum time within which the claimant must perfect the lien. From the claimant’s perspective, however, it may be wise to perfect the lien long before the expiration of the relevant statutory period. If the claimant files the memorandum of mechanic’s lien early in the statutory period while the owner is still receiving “draws” from the construction lender or before a closing of the property subject to the lien occurs, this significantly enhances the potential that the claimant’s lien will be satisfied without the necessity of filing a suit to enforce the lien. In addition, if there are any unresolved issues or defects that could render the lien invalid, the claimant should consider perfecting the mechanic’s lien and simultaneously filing and serving the bill to enforce the lien, along with interrogatories and requests for admissions or other forms of discovery early enough so that the answers to the bill and discovery are due before the expiration of the applicable ninety-day period. This is advisable since any defects in the memorandum of mechanic’s lien must be cured within the statutory period.

The discovery should be designed to uncover any defects in the lien so as to allow the claimant time to file an amended memorandum of mechanic’s lien before the expiration of the limitations period. From the defense lawyer’s perspective, if a defective memorandum of mechanic’s lien is filed and is not cured by amendment prior to the time the limitations period expires, the case is essentially over. An improperly perfected memorandum of mechanic’s lien may be attacked and removed before the claimant sues to enforce the lien by filing a petition under Virginia Code section 43-17.1.  


82. Section 43-17.1 of the Code of Virginia provides:

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
The time of completion of the building or structure as described in the Virginia Code section 43-4 may be fixed by contract (i.e., upon issuance of a Certificate of Substantial Completion) even though there are "finishing touches" remaining to be done. Such provisions may be binding upon subcontractors claiming through a general contractor. Abandonment of the project by the owner or general contractor will generally constitute the building or structure being "otherwise terminated" as defined in Virginia Code section 43-4 for purposes of measuring the limitations period. In addition, the bankruptcy or insolvency of the owner will "otherwise terminate" the work. Courts in other jurisdictions also deem termination the equivalent of completion. Mere sale of a building during construction however, does not "otherwise terminate" the work. The sale of the improved property by the owner-developer to a third-party purchaser does not extinguish a lien and has no effect on whether a lien can be filed by a person furnishing labor or materials to the owner-developer. "Confusion exists in the

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 removed from record.


83. Trustees Franklin St. Church v. Davis, 85 Va. 193, 196, 7 S.E. 245, 247 (1888) (even though "punch list items" are not finished, a building may be deemed completed); Smith v. Adams, 11 Va. Cir. 543, 544 (County of Rockingham 1984). But see Calcourt Properties, Inc. v. Barnes Constr. Co., 20 Va. Cir. 202 (County of Chesterfield 1990) (filing date under VA. CODE ANN. § 43-4 may be extended where repair work was: (1) done in good faith; (2) within a reasonable time; (3) in pursuance of the terms of the contract; and, (4) necessary to a finished job).

84. Maddux v. Buchanan, 121 Va. 102, 109, 92 S.E. 830, 831-32 (1917).

85. VA. CODE ANN. § 43-4 (Repl. Vol. 1990); see also Mills v. Moore's Super Stores, 217 Va. 276, 279, 227 S.E.2d 719, 722 (1976) (although a contractor abandoned a project when it was only partially completed, his work was considered "otherwise terminated"); Northern Va. Sav. & Loan Ass'n v. J.B. Kendall Co., 205 Va. 136, 147, 135 S.E.2d 178, 186 (1964).

86. Moore's Super Stores, 217 Va. at 279, 227 S.E.2d at 722; J.B. Kendall Co., 205 Va. at 148, 135 S.E.2d at 186; Furst-Kerber Co. v. Wells, 116 Va. 95, 81 S.E. 22 (1914).

87. See Hayward Lumber & Inv. Co. v. Graham, 104 Ariz. 103, ___, 449 P.2d 31, 33 (1972); Lamoreaux v. Andersch, 128 Minn. 261, ___ , 150 N.W. 908, 912 (1932); Stark-Davis Co. v. Fellows, 129 Or. 261, ___ , 277 P. 110, 112 (1929)(required intent to cease operations permanently with knowledge of abandonment by lien claimant); see also Byrne v. Forbes, 90 Kan. 557, ___, 135 P. 598, 598 (1926) (subsequent completion of a building by an owner after cessation of labor by the contractor or by his abandonment of his contract did not operate as an extension of time for the filing by subcontractors of liens claimed under and created by the original contractor); Tindell Home Center, Inc. v. Union People's Bank, 543 S.W.2d 843, 845 (Tenn. 1976).


89. R.C. Lee Carpet & Tile, Inc. v. Core Constr. Corp., 12 Va. Cir. 159, 162 (County of Spotsylvania 1988) (quoting JOINT COMM. ON CONTINUING LEGAL EDUC., MECHANICS' LIENS
owner-developer area because the construction industry considers the owner-developer to be a general contractor whereas under Title 43 he is an owner. . . . Payment by the third-party purchaser to the owner-developer [at closing] is not payment by an owner to a general contractor. . . .”

B. The 150-Day Rule

“The lien claimant may file any number of . . . memoranda [of liens] 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 to the job preceding the filing of such memorandum.” The 150-day look-back period for labor and materials to be included in a memorandum of mechanic’s lien relates to the last day on which labor was performed or material furnished to the job. The limitation does not refer to the date the memorandum was filed. Specifically, the measuring date is the last day on which labor was performed or materials furnished, not the last day of the month in which labor was performed or materials furnished or the date the project was abandoned or otherwise terminated.

C. Notice Requirements

A subcontractor is required to give notice to the owner of his mechanic’s lien claim. A sub-subcontractor is required to give notice to the owner and the general contractor that a lien has been perfected. A general contractor is not required to give notice to the owner, but rather may rely on the constructive notice which arises upon the recordation of the memorandum of mechanic’s lien. Service of the notices may be delivered by the sheriff, or by certified or registered mail with return receipt. There is no statutory time period within which the claimant must give the notice of

94. Id. at §§ 43-9, -10, -14.1.
95. Id. at §§ 43-4; Sands v. Stagg, 105 Va. 444, 449, 52 S.E. 633, 635 (1906).
the mechanic’s lien. Notice, however, must be given prior to obtaining a judgment. It is wise to give the statutory notice on the same date the claimant files the memorandum of mechanic’s lien, since the date the owner or general contractor receives notice of the lien is the measuring date to determine the extent to which the owner is indebted to the general contractor or the general contractor is indebted to the subcontractor. The status of accounts between the owner and general contractor or between the general contractor and the subcontractor establishes the amount for which a claimant can recover by its lien.

D. Slander of Title

The filing of a memorandum of mechanic’s lien is a “judicial proceeding” which may entitle the claimant to the defense of absolute privilege in a suit for slander of title. In light of Donohoe Construction Co. v. Mount Vernon Associates, the defense lawyer should only consider a slander of title suit against a mechanic’s lien claimant where no good faith basis for claiming a mechanic’s lien exists or where the claimant files the lien with the intent to cause injury, financial or otherwise, to the owner or under similar egregious circumstances. Under Donohoe Construction Co., a memorandum of mechanic’s lien is a “judicial proceeding” but any fraudulent misrepresentation in the memorandum could be grounds for a perjury charge against the claimant. Where a subcontractor files a mechanic’s lien before completion of the work, he may be liable for damages for injuries sustained by the contractor. In such an action, however, the suit should charge some special damage to the contractor.

97. Mills v. Moore’s Super Stores, 217 Va. 276, 279, 227 S.E.2d 719, 722 (1976) (“the risk of losing his lien is properly imposed upon the dilatory subcontractor”).
101. Moore v. Rolin, 89 Va. 107, 111, 15 S.E. 520, 521 (1892). Since the statute in effect when this case was decided provided that the lien could not be filed until the completion of the work, Moore may be of little precedential value.
E. Forfeiture of Lien

"Any person who shall, with the intent to mislead, include in his memorandum of lien work not performed upon, or materials not furnished for, the property described in his memorandum shall thereby forfeit his lien rights." 102 In short, a lienor may not enforce a lien against one lot or project for the cost of labor or material furnished on another. The defense lawyer may consider invoking the forfeiture provision, section 43-23.1 of the Code of Virginia, when it appears that the claimant has included amounts in its lien against Blackacre, which are attributable to labor performed or materials furnished on Whiteacre. A contractor may complete his work on Whiteacre and allow his lien rights to expire, but continue to work on Blackacre and later file a lien against Blackacre for all amounts attributable to Blackacre and Whiteacre. If this is done with the intent to mislead, the claimant forfeits his lien rights. The defense lawyer should be cognizant of the fact that it is frequently difficult to prove that the inclusion of the improper amounts was not done negligently, but rather with the intent to mislead. 103

F. The Amount of the Lien

In West Alexandria Properties, Inc. v. First Virginia Mortgage & Real Estate Investment Trust, 104 the claimant included amounts in the mechanic’s lien attributable to work done on a road which had been dedicated to the government and could not be subject to a mechanic’s lien. The court enforced the lien to the extent that value had been added to the privately held property adjacent to the public road and reduced the amount of the lien to the extent allocable to the work done on the exempt dedicated road. 105

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103. When the General Assembly amended this provision by substituting the words “with the intent to mislead” for the word “knowingly” the amendment did not constitute a substantive change in the statute. Rather, the amendment was enacted simply to reinforce the original legislative intent by clarifying an after-discovered semantic ambiguity. Prior to the amendment, “ knowingly” meant more than “ with knowledge.” Rather, “ knowingly” in this context was “ an antonym of ‘ innocently’ and a synonym of ‘ designedly’ and ‘ with intent to mislead’.” First Nat’l Bank of Martinsville & Henry County v. Roy N. Ford Co., 219 Va. 942, 945, 252 S.E.2d 354, 356 (1979); see James River Bldg. Supply Co. v. Residential Innovation, Inc., 20 Va. Cir. 156 (County of Chesterfield 1990) (where the facts of a case do not establish any intent to mislead on the part of the claimant, the claimant’s lien should not be forfeited).
105. Id. at 142, 267 S.E.2d at 154.
land upon which the claimant performed labor and furnished material was sought to be impressed with a lien claiming an amount greater than permitted by law.\textsuperscript{106} It is the traditional role of courts reviewing a mechanic's lien suit to decide whether all or part of the amount of the claimed lien is appropriate.\textsuperscript{107} The amount of a mechanic's lien may be reduced where a claimant claims a greater amount than his proof can support.\textsuperscript{108} While the Supreme Court of Virginia has shown a willingness to reduce the amount of the lien, it will be shown later that the court will not reduce or excise the amount of land subjected to a mechanic's lien.\textsuperscript{109} If it can be shown that materials for which a mechanic's lien is sought were not actually used on a project, then the lienor may not be entitled to his lien.\textsuperscript{110} Delivery of materials to a lot creates a presumption of incorporation into that lot which must be rebutted by the person seeking to defeat the lien.\textsuperscript{111} Arguably, the amount claimed in the mechanic's lien should only include amounts attributable to labor performed or materials furnished which were "permanently annexed to the freehold." Intrinsic in a strict reading of the relevant statutes is the implication that amounts attributable to tools or certain materials which are not incorporated in the building or structure should not be included in the lien.\textsuperscript{112}

G. Affidavit and Statement of Intent Required in Memorandum of Mechanic's Lien

An affidavit must accompany a memorandum of mechanic's lien and the person signing the affidavit on behalf of a corporation, partnership or other entity claiming a mechanic's lien must state that he is executing the lien as an agent of the entity (i.e., "John A."

\textsuperscript{107} Id.
\textsuperscript{108} Id. at 633, 385 S.E.2d at 876.
\textsuperscript{109} See infra notes 144-48 and accompanying text.
\textsuperscript{110} Gilman v. Ryan, 95 Va. 494, 498, 28 S.E. 875, 876 (1898). \textit{Contra} Solite Masonry Units Corp. v. Piland Constr. Co., 217 Va. 727, 731-32, 232 S.E.2d 759, 762 (1977). The supplier delivered materials to the job site and believed the goods were to be used in the project located on that site. The court recognized the validity of the lien even though the materials were not actually used on that project. \textit{Id}.
\textsuperscript{112} \textit{But see} VA. CODE ANN. § 43-2 (Repl. Vol. 1990) (stating, in part, that "the reasonable rental or use value of equipment . . . shall be deemed to be materials furnished for the improvement of such building or structure and permanently annexed to the freehold").
Smith, President and Agent”). If the affidavit is signed by the secretary or a credit manager of the corporation, there must be a special authorization permitting the person signing to execute affidavits or the lien may be held invalid. If an affidavit omits the amount claimed, but the memorandum of mechanic’s lien includes the amount, the lien may be valid. The claimant must include a “statement declaring his intention to claim the benefit of the lien.” Because mechanics’ liens are strictly construed, the failure of a claimant to include a statement declaring his intention to claim the benefit of the lien in the memorandum of mechanic’s lien could render the lien invalid.

H. Lower-Tier Contractors May Rely Upon Lien of General Contractor

The perfected lien of a general contractor on any building or structure inures to the benefit of any subcontractor or sub-subcontractor who has not perfected a lien on the same. If the subcontractor or sub-subcontractor intends to rely upon the general contractor’s lien, he must “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 the lien is actually paid off or discharged.” Therefore, failure to give notice in writing to the owner or his agent before the general contractor’s lien is paid off is an affirmative defense to the claim of the subcontractor or sub-subcontractor who relies upon and attempts to enforce the lien of the general contractor.

113. See Clement v. Adams Bros.-Payne Co., 113 Va. 547, 553, 75 S.E. 294, 296 (1912) (president of corporation not necessarily agent; mechanic’s lien held invalid); Threesome, Inc. v. Contract Program Management, Inc., 18 Va. Cir. 290, 292 (County of Fairfax 1989) (memorandum signed by “Surcle as President” and affidavit signed by “Surcle as claimant” held defective). But see John Diebold & Sons' Stone Co. v. Tatterson, 115 Va. 766, 771-73, 80 S.E. 585, 587 (1914) (court will look to paper to which affidavit is attached to determine sufficiency of affidavit).

114. VA. CODE ANN. § 49-7 (Repl. Vol. 1989) (“An affidavit filed for a corporation or other entity may be made by its president, vice-president, general manager, cashier, treasurer, a director or attorney without any special authorization therefor, or by any person authorized by a majority of its stockholders, directors, partners or members to execute affidavits.”).


119. Id.

120. See Shenandoah Valley R.R. v. Miller, 80 Va. 821, 826 (1885).
V. JOINT OR BLANKET MECHANIC'S LIEN

A joint or blanket memorandum of mechanic's lien is defined as a lien against two or more buildings or structures on separate parcels of land and which fails to allocate the specific amount or value of the labor or materials furnished by the claimant to each specific building or structure. A memorandum of mechanic's lien should contain a statement of the amount claimed for work done and materials furnished for improvement of the identical lot upon which the lien is claimed and a description of that very property.

In Virginia, a memorandum of mechanic's lien, asserting a single joint or blanket lien against several separate and distinct lots or parcels of land en masse, without apportionment to each lot, is valid only under the following circumstances:

(1) There is a single contract between the owner and the mechanic's lien claimant for the claimant to supply all of the labor or materials for all of the buildings or structures on the various lots for a single, unapportioned, lump sum price; and,

(2) the claimant is unable to specify the amount of labor or materials supplied to each separate lot; and,

(3) There are no other outstanding liens on the property subject to the lien; that is, only the rights of the owner and the mechanic's lien claimant are involved, and not the rights of other third-party lienholders (e.g., noteholders and trustees under a deed of trust, other mechanics' lien claimants).


124. Weaver v. Harland Corp., 176 Va. 224, 233, 10 S.E.2d 547, 550 (1940). However, in order to preserve its inchoate lien rights a mechanic's lien claimant has a duty to determine the specific lot on which the materials are to be furnished or the work performed. Each invoice, delivery ticket, or work order should identify the specific lot to be improved. See J.B. Kendall Co., 205 Va. at 145, 135 S.E.2d at 178.

All three of these requirements must be met for a memorandum asserting a joint lien to be valid. This seldom occurs. With the exception of Sergeant v. Denby, in cases in which the Supreme Court of Virginia has considered the question, the court has held that a memorandum asserting a joint or blanket lien did not constitute "substantial compliance" with the Virginia statutes governing the perfection of mechanics' liens, and therefore, the joint liens were ruled unenforceable. Several Virginia circuit courts have addressed the joint or blanket lien issue and have uniformly declared blanket liens to be invalid. The reason that the joint or blanket lien is prohibited under Virginia law, except in the limited circumstances set out above, is that the lien claimant is entitled to a lien only to the extent that the claimant has added value to the individual lots by the investment of his labor and materials. "The theory of the law is that credit is given to the identical building for which the materials are furnished or upon which the work is done. Each building represents a distinct and separate security." In short, Blackacre cannot be lienable for claims relating to Whiteacre and vice versa.

Where a contract estimates or fixes the price of materials furnished and work done upon each of two or more buildings on disconnected lots, a memorandum of lien which claims the aggregate price as a lien upon all of the lots is not in substantial compliance with the statutes. A partial release of one of two or more parcels from a joint lien will cause the lien against the remaining parcel or parcels to be “released” de jure and deemed invalid, if the rights

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126. 87 Va. at 209, 12 S.E. at 402.
of competing lien claimants could be affected. Where lenders, competing mechanics' lienors, or other third-party lien claimants are also looking to the individual lots for security for their claims, a mechanic's lien claimant is not allowed to release an individual lot for an arbitrary amount unrelated to the actual amounts invested by him in that lot, and enforce his lien for the remainder owed against the unreleased lots. Otherwise, a claimant could recover more by his lien on a particular lot than the claimant has invested in the lot and thereby deprive junior lienholders of part, or all, of their security. The fact that the structures may be townhouses or contiguous units does not mean that they constitute one structure; although they may have party walls, the buildings may be constructed upon separate individual lots and therefore, a blanket lien will be invalid.

VI. OVERINCLUSIVE AND UNDERINCLUSIVE LIENS

A. Overinclusive Liens

If a mechanic's lien claimant attempts to assert one lien against several parcels of land, where the mechanic did not work or add value to all parcels against which the lien is sought, the entire lien is rendered invalid. In Woodington Electric Inc. v. Lincoln Savings & Loan Association, the mechanic's lien claimant only performed labor or furnished materials on two of the nine parcels included in the property description attached to the memorandum of mechanic's lien that was sought to be enforced. On appeal, the court held that the lien was overinclusive and thus invalid. In United Masonry, Inc. v. Jefferson Mews, Inc., a mechanic en-

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133. See Weaver, 176 Va. at 233, 10 S.E.2d at 551.
137. 218 Va. 360, 366, 373 S.E.2d 171, 180 (1977). One contract was for masonry work on 132 of a total of 264 condominium units. The second contract was for work on a club house which would be a common element of the condominium regime. When the owner did not pay, the mechanic filed one blanket lien on the entire condominium regime for the work it had done. The lower court sustained the defendant's demurrer which charged that the lien was invalid because it failed to apportion the total amount claimed under each of the two
entered into two contracts with a condominium developer. The court noted that because the first contract was for work only on 132 units of 264 planned units, it was manifest that there could be no lien against the planned but unbuilt 132 units because those units received no benefit from the work done under the first contract. The court reasoned that "[t]he memorandum does not seek to secure the claim to the extent that the plaintiff has added value to the individual units worked on, but attempts to lien other property not benefited by such work. Consequently, the memorandum fails to substantially comply with Code section 43-3. . . ." Thus, in Jefferson Mews, Inc., it was indicated, without expressly holding, that an overinclusive lien was invalid.

The Supreme Court of Virginia also addressed the overinclusive lien question in Rosser v. Cole. Rosser, the owner of a 450 acre tract, subdivided it into seventy-seven lots which were served by a network of subdivision streets. Rosser then entered into a contract with Cole for general clearing and grading in connection with the construction of the roads. Cole later filed a memorandum of mechanic's lien against the entire 450-acre tract, although he had done no work on any of the seventy-seven lots, but had worked only on the roads. Rosser challenged the validity of the lien under section 43-17.1 of the Code of Virginia. The trial court held that the lien was valid. The Supreme Court of Virginia reversed and reasoned that "[b]ecause the contractor's memorandum of mechanic's lien failed to correspond with his contract, failed to describe the land and improvements upon which his lien rights existed, and purported to cover property to which his lien rights did not extend, it was invalid."

The proper description of lienable property relates to the overinclusiveness issues. Section 43-15 of the Code of Virginia states that "[n]o inaccuracy . . . in the description of the property to be covered by the lien shall invalidate the lien." "The property to be covered by the lien is the property on which the mechanic has

138. Id. at 378, 237 S.E.2d. at 182.
139. Id.
141. Id. at 573-74, 379 S.E.2d at 324.
142. Id. at 574, 379 S.E.2d at 324.
143. Id. at 578, 379 S.E.2d at 327.
worked and none other." If the mechanic worked on parcel A but imposed a lien on parcels A, B and C, the Supreme Court of Virginia does not consider that an inaccuracy in describing Parcel A. In the view of the court, "such a description improperly reaches beyond the required description of the property to be covered by the lien to include property which, in law, cannot be covered by the lien." A claimant may not file an overinclusive lien and then leave it to the trial court to excise any excess property. The mechanic must place his lien only upon the property on which he worked. The property description in a memorandum of mechanic's lien must reasonably identify the property covered by the lien. The Supreme Court of Virginia has found the "brief description of the property" to be sufficient where the claimant included the street address and made reference to a deed book and page number of an instrument in the clerk's office where the property was listed. However, describing the property to be covered by the lien in this manner is a very dangerous practice since the deed may include multiple parcels; arguably, by merely referencing the deed book and page number, the claimant has attempted to lien all parcels shown on the plat. If the claimant has not worked on all of the parcels, then the lien may be held invalid.  

146. Id.
147. Id.
148. Id.; see Homecraft Corp. v. Criswell & Assoc., 6 Va. Cir. 412 (County of Spotsylvania, 1986) (claimant intended to lien Lot 231, but due to a scrivener's error, liened Lot 230; this was fatal defect and lien was held invalid.). Where a claimant liened all forty lots which constituted a city block but only performed labor and furnished materials for the improvement of a building or structure located on a portion of the city block, the lien was declared invalid. Masterclean, Inc. v. Spinnazzolla Sys., Inc., Ch. No. 19226-S (City of Newport News 1990). Where a subcontractor used the name of a farm which had been subdivided into eight different lots and did not describe the particular lot upon which the subcontractor performed the work, the court ruled that the lien overburdened the property and was invalid. Jung v. Valley Redi-Mix Co., 14 Va. Cir. 344 (County of Clarke 1989). If the lien overburdens the property, then the lien cannot be saved by a subsequent release of the overburdened property. Woodington Elec., Inc., 238 Va. at 634, 385 S.E.2d at 878; see also Bay Tile Corp. v. Blue Phoenix Corp., Ch. No. C85-355 (City of Norfolk 1985); Woodington Elec., Inc. v. Blue Phoenix Corp., Ch. No. C85-399 (City of Norfolk 1985); G & V Gen. Contractors, Inc. v. Blue Phoenix Corp., Ch. No. C85-435 (City of Norfolk 1985); Waterfront Marine Constr., Inc. v. Blue Phoenix Corp., Ch. No. C85-337 (City of Norfolk 1985).
151. Woodington Elec., Inc., 238 Va. 623, 634, 385 S.E.2d 872, 878 (1989). A mechanic's lien may be held invalid where the property description fails to reasonably identify whether the claimant intends to lien an entire shopping center or just a single space within the
B. Underinclusive Liens

A mechanic's lien may also be deemed invalid where the claimant does not include all parcels of land upon which the building or structure is located.\textsuperscript{152} Although there is no published authority in Virginia directly on point, the tenor of thought of the court can be gleaned from the cases involving overinclusive liens.\textsuperscript{153} There are also cases in other jurisdictions where a mechanic's lien has been held invalid because the claimant failed to lien all of the land upon which the building or structure was located.\textsuperscript{154}

VII. Defenses to Personal Liability

The personal liability statute of mechanic's lien laws\textsuperscript{155} is grossly underutilized by contractors in Virginia either because they are unaware of its provisions or for business reasons. A subcontractor or sub-subcontractor "may give notice in writing to the owner or his agent or the general contractor stating the nature and character of his contract and the probable amount of his claim."\textsuperscript{156} After the subcontractor or sub-subcontractor has completed its work and before the expiration of thirty days from the time the building or structure is completed or the work is otherwise terminated, the subcontractor or sub-subcontractor must provide an account of its claim, verified by affidavit, to the general contractor and to the owner or his agent, as applicable.\textsuperscript{157} According to the statute, if the above requirements are complied with, the owner, or the general

\textsuperscript{152} Annotation, Sufficiency of Notice, Claim, or Statement of Mechanics' Lien with Respect to Description or Location of Real Property, 52 A.L.R.2d 12, 72-75 (1957).


\textsuperscript{154} Annotation, supra note 152, at 72-75. A lien describing the property as "lot eight (8) and block forty-eight (48), City of Omaha" was held invalid where the evidence disclosed that the hotel upon which the lien was sought to be enforced was constructed partly on the above lots but also partly upon an adjoining parcel of land. Western Cornice & Mfg. Works v. Leavenworth, 52 Neb. 418, 72 N.W. 592 (1897). A mechanic's lien was also held invalid where the lien described the property as consisting of a building on lot 18 and 5 feet of lot 19 when in fact the building actually occupied 20 feet on lot 19 and 15 feet on lot 20. Powers v. Brewer, 238 Ky. 579, 38 S.W.2d 466 (1931); see also Muto v. Smith, 175 Mass. 175, 55 N.E. 1041 (1900) (description held insufficient because it excluded a part of the land on which the building was located).


\textsuperscript{156} Id.

\textsuperscript{157} Id.
contractor, if he was the only party notified, will be personally liable to the claimant. 158

The preliminary notice stating the probable amount of the claim must be given before or during the period the contractor is performing labor or furnishing materials under the contract. If the preliminary notice is given after the work has been completed, the notice does not substantially comply with the statute and will not personally bind the owner or general contractor. 160 A photocopy of an affidavit furnished with the second notice required substantially complies with the statute. 160 The notices should specifically refer to section 43-11 of the Virginia Code and clearly indicate that the claimant is seeking to establish personal liability on the part of the owner or the general contractor. The notice may be defective if it is too courteous or equivocal. 161 In order for the owner or general contractor to be personally bound, the notice must be recorded and indexed in the appropriate clerk's office or "mailed by registered or certified mail to and received by the owner or general contractor upon whom personal liability is sought to be imposed." 162 The owner or general contractor shall be personally liable to the claimant provided the claim

[D]oes not exceed the sum in which the owner is indebted to the general contractor at the time the notice is given or may thereafter become indebted by virtue of his contract with the general contractor, or in the case the general contractor alone is notified, the sum in which he is indebted to the subcontractor at the time the notice is given or may thereafter become indebted by virtue of his contract with the general contractor. 163

158. Id. Section 43-11 of the Code of Virginia provides a two-step notice procedure in order to impose personal liability upon an owner. Failure to give one of the two notices required by the statute is fatal to a claim under the statute. Lanmor Corp. v. BM & K Builders, Inc., Ch. No. 90-67 (County of Caroline 1990). There have been various additions and deletions to section 43-11 and its predecessors since the statute was enacted over a century ago. Therefore, in analyzing any decision interpreting the statute, it is necessary to examine the specific language of the statute being construed in the particular case.


161. See English's, Inc. v. McCrickard, 7 Va. Cir. 218 (County of Campbell 1984).


163. Id.
It is an affirmative defense to a claim by a subcontractor against an owner, that the owner is not indebted to the general contractor or is indebted to the general contractor for less than the amount of the subcontractor's claim. A claim which has been perfected under the statute is a personal obligation of the owner. It has priority over claims of all subcontractors who have obtained their mechanics' liens without perfecting a claim under the statute.\(^\text{164}\) In short, a subcontractor, laborer or materialman who has complied with the statutory provisions required to fix personal liability on the owner is to be paid in full before those who claim mechanics' liens on the property are paid.\(^\text{165}\)

If the owner is compelled to complete his building or structure, or any part thereof, undertaken by a general contractor in consequence of the failure or refusal of the general contractor to do so, the owner is entitled to deduct the amounts expended for the completion of the building or structure from the amounts for which the owner may have become personally liable.\(^\text{166}\) Likewise, the owner has the right to guarantee the payment to a subcontractor without notice to other creditors, and the owner is entitled to a credit for the amount so guaranteed and can defend on this basis any mechanics' liens filed after the guarantee.\(^\text{167}\) A subcontractor whose account is guaranteed is entitled to first priority in the distribution of the owners' funds. After the amount of the subcontractor's claim is deducted, the owner is liable only to the extent of the remaining funds, which should be applied ratably to the liens of the other subcontractors.\(^\text{168}\) If the owner is compelled to guarantee payment to the subcontractor, the owner is entitled, both as against the general contractor and against other subcontractors, to deduct the amount for which he has thus become responsible from the amount available to pay any liens.\(^\text{169}\) Other jurisdictions which have addressed this issue are in accord with Virginia law.\(^\text{170}\)

\(^\text{165}\) Burks, supra note 35, at 896; Ulrich, supra note 27, at 41.
\(^\text{168}\) Nicholas, 182 Va. at 836, 30 S.E.2d at 699.
\(^\text{169}\) Burks, supra note 35, at 897; see also Burton Lumber Co. v. Aughenbaugh, 223 Va. 491, 290 S.E.2d 853 (1982); McCauley, 143 Va. at 456, 130 S.E. at 401.
\(^\text{170}\) Annotation, Amount of Owner's Obligation Under his Guaranty of Subcontractor's or Materialman's Account, as Deductible from Amount Otherwise Due Principal Contractor, as Against Claims of Other Subcontractors or Materialmen, 153 A.L.R. 759 (1944).
III. MECHANIC'S LIEN WAIVERS

In Virginia, the right to file or enforce a mechanic's lien may be waived in whole or in part at any time by any person entitled to the lien.\textsuperscript{171} A contractor or materialman may waive its right to a mechanic's lien by executing a mechanic's lien waiver. In order to be enforceable, the lien waiver must be supported by consideration.\textsuperscript{172} For example, payments received by a contractor in exchange for a waiver of lien rights, coupled with an inducement to a lender to continue construction advances, may constitute sufficient consideration for a contractor's lien waiver.\textsuperscript{173} Sufficient consideration exists if the promisee is induced by the waiver to do something that he is not legally bound to do or refrains from doing anything that he has a legal right to do, or if the promisee acts in reliance upon the waiver to his detriment.\textsuperscript{174} Not only is the rule in Virginia, but it is the majority view of the jurisdictions which have considered the issue.\textsuperscript{175} However, even in the absence of consideration, a lien waiver may be valid where the owner has paid for the work to which the lien waiver relates or otherwise changed his position to his detriment in reliance on the waiver. The supporting principal for this rule is in effect one of estoppel.\textsuperscript{176} A "contractor's affidavit of payment" which did not clearly state that it was a lien waiver, did not effectively waive lien rights.\textsuperscript{177} A lien waiver limited to the amounts actually paid will not constitute a waiver of a contractor's right to additional sums that were due as of the date of the prior payment. A lien waiver must be express, or, if it is to be implied, it must be established by clear and convincing evidence.\textsuperscript{178}

\textsuperscript{171} VA. CODE ANN. § 43-3(c) (Repl. Vol. 1990).
\textsuperscript{173} Id. at 484, 357 S.E.2d at 514.
\textsuperscript{175} Beebe Constr. Corp. v. Circle R. Co., 10 Ohio App. 2d 127, 226 N.E.2d 573, 576 (1967) (where a waiver was executed in consideration of payments the owner was legally required to make was not a bar to the assertion of a lien for any amount remaining unpaid); see also In re Woodcrest Homes, Inc. 11 B.R. 342 (Bankr. D. Colo. 1981) (payments made by debtor to mechanic's lien claimant could not be consideration since debtor was merely doing that which it was legally obligated to do).
\textsuperscript{176} Mid-West Engr. & Constr. Co. v. Campagna, 397 S.W.2d 616, 629 (Mo. 1965); Giammarino v. J.W. Caldewey Constr. Co., 72 S.W.2d 159 (Mo. App. 1934) (owner allowed credit for $250 paid to the general contractor in reliance upon a lien waiver, but impressed a lien in favor of the claimant against the property for the balance owed of $300).
\textsuperscript{178} Id. at 374, 367 S.E.2d at 516.
Usually, the waiver not only waives all rights to file a mechanic's lien, but also includes an affidavit stating that all subcontractors or materialmen contracting with the contractor have been paid in full through the date the waiver is executed. A subcontractor or sub-subcontractor may not be deprived of his independent lien unless he expressly waives his lien rights, or by clear implication, agrees to be bound by the general contractor's waiver of his lien rights.¹⁷⁹

A partial or final mechanic's lien waiver is usually required (1) when the general contractor submits a requisition to the owner for payment; (2) when an owner requests a draw on a construction loan from a lender; and (3) when a title insurance company issues a "date down endorsement" to insure the construction advance made to the owner by the lender. The use of false affidavits and lien waivers by a developer to obtain draws on a construction loan could act as a bar to a discharge of those debts in bankruptcy.¹⁸⁰ A general contractor may by contract expressly waive his right to file a mechanic's lien even before work begins; such a waiver may later be binding upon him even if he is not paid.¹⁸¹ A defense lawyer should always attempt to obtain any lien waivers executed by the claimant through discovery or otherwise. Partial lien waivers often can be used to reduce the amount which may be recovered under a mechanic's lien. In the alternative, if a final lien waiver has been executed, partial lien waivers can constitute a complete defense to a mechanic's lien claim.

IX. Defenses Involving the Priority of Mechanics' Liens

Virginia statutory law affords no priority among mechanics' liens except that: (1) the lien of a subcontractor shall be preferred to that of his general contractor; (2) the liens of sub-subcontractors are preferred to that of subcontractors; and (3) the liens of manual laborers have priority over those of materialman to the extent of labor performed during the thirty days immediately before the date of the performance of the last work.¹⁸² Therefore, the date on which a memorandum of mechanic's lien is perfected by recordation is irrelevant in determining the priority among several

¹⁷⁹. Id.
mechanics’ liens. The statutory priority among competing mechanics’ liens claimants becomes important where there is a limited fund of money available for all lien claimants. For example, based on the statutory priority of section 43-23 of the Virginia Code, an owner could pay a lower tier lien claimant in full prior to paying any amount to a general contractor who may have also filed a mechanic’s lien.

A mechanic’s lien has a preference over other liens and encumbrances. Supra 3 When another lien or encumbrance is created before the claimant commences work or furnishes materials, it does not operate on the building until the mechanic’s lien is satisfied. If the other lien or encumbrance is created after the claimant commences work or furnishes materials, it does not operate on the land or the building until the mechanic’s lien is satisfied. Supra 8 This priority reflects the underlying premise of Virginia mechanic’s lien law, that the mechanic have the benefit of a lien to the extent he improves the property. A mechanic’s lien filed for the repair or improvement of any existing building or structure is subject and subordinate to any encumbrance against the land and building or structure of record prior to the commencement of the improvements or repairs. Supra 8

183. Id. § 43-21.

During the 1991 session of the General Assembly of Virginia, House Joint Resolution No. 418 was offered, which established a joint subcommittee to study the existing mechanic’s lien laws. The priority of mechanics’ liens over liens securing construction loans was one of the concerns expressed in the Resolution. The Resolution also states that the joint subcommittee will consider whether the mechanic’s lien statutes need to be revised or amended and submit its findings and recommendations to the Governor in the 1992 session of the General Assembly. H.J.R. 418, 1991 Sess. Va.

185. VA. CODE ANN. § 43-21; see also Strauss v. Princess Anne Marine and Bulkheading Co., 209 Va. 217, 193 S.E.2d 199 (1968). On a related issue, section 43-3 of the Virginia Code provides that “when the claim is for repairs or improvements to existing structures only,” the lien will not “attach to the property repaired or improved unless such repairs or improvements were ordered or authorized by the owner or his agent.” Therefore, in defending against a mechanic’s lien claiming amounts attributable to repairs or improvements to existing structures, a primary inquiry should be whether the owner, or its agent, ordered or
Whether the mechanic's lien has priority over or is subordinate to a deed of trust or other lien or encumbrance against the property will have a profound effect upon the defense of the lien. For example, if the mechanic's lien is subject or subordinate to the deed of trust, the lender may not defend the mechanic's lien since in any sale of the property to satisfy the mechanic's lien, the lender's prior lien would have to be paid in full. On the other hand, if the mechanic's lien is attributable to labor performed or materials furnished in connection with "new" construction and has priority over the construction loan deed of trust, the extent of the lender's interest in its collateral is threatened and the lender should vigorously defend the lien.

X. STATUTORY DEFENSES TO MECHANICS' LIENS

A. Priority Given Owner by Statute

If the owner is compelled to complete the structure undertaken by a general contractor as a result of the failure or refusal of the general contractor to do so, the amount expended by the owner for such completion shall have priority over all mechanics' liens which have been or may be placed on the structure. The burden is on the owner to adduce evidence as to the cost of completion. If the owner completes the building and shows that the cost of doing so has exhausted the fund, this will constitute a complete defense to the mechanic's lien of a subcontractor. But where the owner does not complete the building and does not offer any evidence as to the cost of completion, the owner cannot use section 43-16 of the Code of Virginia to claim a set off or counterclaim against the funds which he is withholding from the general contractor.

B. Limitation on Amount for which Claimant may Perfect Lien

The amount for which a subcontractor may perfect a lien cannot exceed the amount for which the owner is indebted to the general contractor at the time the notice is given, or shall thereafter be-

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186. VA. CODE ANN. § 43-16; Nicholas v. Miller, 192 Va. 831, 839, 30 S.E.2d 696, 699 (1944). A mere estimate will be sufficient to meet the owner's burden of showing that the cost to complete exceeds the amount due the general contractor. See Henderson & Russell Assocs., Inc. v. Warwick Shopping Center, 217 Va. 486, 229 S.E.2d 878 (1976).

come indebted to the general contractor through his contract with
the general contractor. 188 It is an affirmative defense to a suit to
enforce the lien of a subcontractor that the owner is not indebted
to the general contractor or is indebted to the general contractor
for less than the amount of the lien sought to be enforced. 188 The
statutory limit on the owner's liability is designed to relieve the
owner of the possibility of having to make a double payment under
the contract. 190 Assume the owner owes the general contractor
$10,000 and the general contractor owes the subcontractor $30,000.
The amount for which the subcontractor can perfect a lien is lim-
ited to $10,000. The owner would have an affirmative defense
under section 43-7 of the Code of Virginia in a suit to enforce the
lien, and the lien could only be enforced to the extent of $10,000.
The subcontractor may, of course, have a cause of action for
breach of contract against the general contractor for the full
$30,000; however, frequently, the general contractor has diverted
the funds received from the owner and is insolvent, leaving en-
forcement of the mechanic's lien as the only method of payment
available to the subcontractor.

The amount for which a lien may be perfected by a sub-subcon-
tractor cannot exceed the amount for which the subcontractor
could file a lien under section 43-7 of the Code of Virginia. 191
Therefore, under the statute, a sub-subcontractor is not entitled to
a lien unless the general contractor is indebted to the subcontrac-
tor at the time notice is served, or thereafter becomes indebted to
the subcontractor under the contract. 192 In short, the maximum
amount for which the subcontractor, and in turn the sub-subcon-
tractor, is entitled to claim a lien is governed by the condition of
accounts between the owner and the general contractor at the time
notice is given. 193

188. VA. CODE ANN. §§ 43-7 to -9 (Repl. Vol. 1990); Waterval v. William Doolan Elevator
Serv., Inc., 212 Va. 114, 181 S.E.2d 637 (1971); Monk v. Walters, 195 Va. 246, 78 S.E.2d 202
(1953); John T. Wilson Co. v. McManus, 162 Va. 130, 173 S.E. 361 (1934); Maddux v.
Buchanan, 121 Va. 102, 107, 92 S.E. 830, 831 (1917).
1982).
192. Id.
193. Id.
C. Procedure to Challenge Validity of Lien

Although not necessarily a substantive defense under the foregoing statutes, Virginia Code section 43-17.1 provides a very useful mechanism for aggressively defending an improperly or wrongfully filed mechanic’s lien. The owner, or any party having an interest in the real property against which a lien has been filed, may, upon a showing of good cause, petition the court where the property 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 by section 43-18 of the Code of Virginia; the court will hold a hearing to determine the validity of the lien.

The Supreme Court of Virginia interprets broadly the standing of a “party in interest in real property” when the validity of a lien under the statute is being challenged. If the court finds that the lien is invalid, it must immediately order that the memorandum of lien be removed of record. The intent of this statute is to provide the owner or any other party in interest in the property with a means to immediately attack a mechanic’s lien without having to wait to assert a defense to a suit to enforce the lien, which the claimant is not required to bring until six months from the date the memorandum of mechanic’s lien is filed.

A petition may also be used to raise defects in a mechanic’s lien as a substitute for a demurrer, where matters outside the four corners of the pleading must be relied upon in demonstrating that the claimant failed to state a claim upon which relief can be granted or that the lien is otherwise defective. A petition may be filed at any time after the memorandum of mechanic’s lien is filed or during the proceedings to enforce the mechanic’s lien.

195. Id. § 43-18 (notice provisions).
196. Id. § 43-17.1.
199. Id. §§ 43-17.1, -17.
XI. NONSTATUTORY SUBSTANTIVE DEFENSES TO MECHANICS' LIENS

A bill to enforce a mechanic's lien is an *in rem* proceeding against the owner of the property which has been improved by the labor and material of a mechanic. While a lien is a liability *in rem*, a claim is a liability *in personam* and is much more comprehensive than a lien.\(^{200}\) Claims among the parties to a mechanic's lien suit may be asserted as defenses to the lien. A common law defense or cause of action relating to the contract that is the subject of a mechanic's lien can be asserted by the owner of the property at a hearing on the bill to enforce the lien.\(^{201}\)

In a suit to enforce a mechanic's lien, the owner is entitled to set off against the contractor's claim the sum which it would take to complete the contract, and any damages sustained by the owner by reason of the delay in the completion of the contract.\(^{202}\) These damages will not necessarily be confined to a penalty or forfeiture stipulated for in the contract.\(^{203}\) In a mechanic's lien suit, the owner may be permitted to set off the amount of any provable damages occasioned by the general contractor's faulty construction work.\(^{204}\) In addition, the owner may offset damages due to a breach of contract by the general contractor.\(^{205}\)

XII. DEFENSES TO THE ENFORCEMENT OF A MECHANIC'S LIEN

A. General Requirements

A bill or petition to enforce a memorandum of mechanic's lien must be filed in the chancery court where the building or structure,
or some part thereof, is located, or where any owner of the prop-

erty resides. The suit to enforce the lien must be filed within six

months from the time of the filing of the memorandum of lien, or

within sixty days from the time the building or structure is com-

pleted or the work is otherwise terminated, whichever occurs

last.

The bill of complaint must affirmatively allege that the bill was

filed within six months from the date the lien was filed or sixty
days from the day the building was completed or the work was

terminated, otherwise it may be dismissed on demurrer. Usually,
a defense based upon the expiration of a limitations period is a

personal one, and can be relied upon only by the debtor, but Vir-

ginia courts have held in a suit to enforce a mechanic’s lien that

one creditor may set up the statute of limitations against the

claims of another. The bill should also allege, inter alia that the

memorandum of mechanic’s lien was filed within the ninety-day

period mandated by the Code of Virginia section 43-4, that the lien
does not contain amounts outside the 150-day period prescribed by

Virginia Code section 43-4, that notice was given and that the

claimant has complied with all other requirements of Title 43 re-
lating to mechanics’ liens. While the memorandum of mechanic’s

lien may be filed by the claimant, a bill to enforce the lien must be

filed and signed by a lawyer authorized to practice in Virginia.

Since the statute creates the right as well as the remedy, upon

the expiration of the limitations period, the right to a mechanic’s

lien expires as well. The ordinary rules or maxims of equity re-
garding statutory compliance are not applicable to a bill in equity
to enforce a mechanic’s lien. The limitations periods set forth in

Virginia Code section 43-17 sets forth the maximum time within

which the mechanic’s lien must be enforced. However, there are


207. Id. § 43-17.


210. A bill to enforce a mechanic’s lien was held unenforceable where the president of the

corporate lien claimant filed the suit because the corporate president’s action constituted

the unauthorized practice of law. Crump Floor & Tile, Inc. v. Churchill/Fairmount Bldg.

Co., 8 Va. Cir. 375 (City of Richmond 1987).

211. The defense of expiration of the time limitations is an absolute bar to the enforce-

ment of the mechanic’s lien. See Neff v. Garrard, 216 Va. 496, 496 S.E.2d 878 (1975).

212. H.L. Coleman, Stone Tile & Supply Co. v. Pearman, 159 Va. 72, 82, 165 S.E. 371, 374

(1932).
several factors which favor filing a suit to enforce the lien well before the expiration of the statutory periods. In practice, if the mechanic's lien has not been satisfied within two months from the date of filing, it is unlikely that payment will be forthcoming in the next four months. The claimant should file and serve a suit to enforce the lien early to force the owner, general contractor and other parties to respond to the lien. In addition, the claimant may consider initiating discovery so that the responses to the discovery are made within the six-month period. This will give the claimant an opportunity to cure any defects in the suit prior to the expiration of the limitations period.

Further, the existence of several mechanic's lien claimants seeking to secure their claims with the property of the owner due to the failure or refusal of the general contractor to pay the claimants often indicates that a bankruptcy is looming ahead. Once the owner files bankruptcy, the claimant must obtain relief from the automatic stay to file a suit to enforce the lien. This increases the cost of litigation and serves to delay enforcement of the claimant's lien. From the defense lawyer's perspective, the longer the claimant waits to enforce the lien, the better. There are many potential jurisdictional defects in the suit to enforce a mechanic's lien which could be cured by amending the suit within the limitations period. Any jurisdictional defects in the suit must be cured by amendment within the limitations period. In practice, many claimants wait until the last day of the limitations period to file the suit to enforce the lien. If this is the case and jurisdictional defects appear on the face of the pleading, the defense lawyer should file a demurrer since the claimant has failed to state a claim upon which can be granted.

B. Effect of Bankruptcy

Bankruptcy laws protect rather than defeat lienholders and potential lienholders. The filing of a memorandum of mechanic's lien is not prohibited by the automatic stay since the filing of the mem-

214. For example, as discussed infra pp. 333-36, the failure of a claimant to name all necessary parties to the suit within the limitations period will cause the enforcement suit to be dismissed. 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, 76, 387 S.E.2d 468, 471 (1990).
215. Mendenhall, 239 Va. at 76, 387 S.E.2d at 471.
orandum is merely designed to perfect the mechanic’s lien rather than to enforce the mechanic’s lien against the property of the debtor. The filing of a bankruptcy petition by a general contractor operates to stay an action to enforce a mechanic’s lien brought by a subcontractor.

[If applicable nonbankruptcy law... fixes a period for commencing... a civil action in a court other than a bankruptcy court on a claim against the debtor,... and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) thirty days after notice of the termination or expiration of the stay under § 362... with respect to such claim.

It is clear that a lien claimant can institute an enforcement suit at any time within thirty days after notice of the termination or expiration of the stay. Other courts which have construed the above statute, or its statutory predecessors, have held that a claimant has thirty days from the date of the termination of the automatic stay in which to file a bill to enforce a mechanic’s lien.


218. Middleton & Dugger Plumbing & Heating, Inc., v. Richardson Builders, Inc., No. 89-01393 (Bankr. W.D. Va.). Judge William E. Anderson reasoned in this Lynchburg case that [b]ecause the subcontractor’s claims against the property are limited to the amount by which the owner is indebted to the general contractor, the amount the owner owes the general contractor will always be an issue in the subcontractor’s action. It is clear that any sums due from the owner to the general contractor-debtor at the time the bankruptcy petition was filed are the property of the estate. The fact that the subcontractors have liens on the owner’s real estate, not on the funds in the hands of the owner, does not mean that the enforcement action does not affect property of the estate. Although a lienor seeks to enforce the lien against the owner, the court may enter a personal decree against the owner and determine breaches of contract. Id.


220. Where a bankruptcy court order does not terminate the automatic stay, within the meaning of 11 U.S.C. § 108(c)(2), but merely modifies the automatic stay to allow a lien claimant to file a bill of complaint to enforce the lien, the thirty-day period under 11 U.S.C. § 108(c)(2) will not commence to run. McCoy v. Chrysler Condo Developers, Ltd., 239 Va. 321, 324, 389 S.E.2d 905, 907 (1990).

C. Multifariousness

Where multiple mechanics' liens are filed against several individual lots, each lot represents a separate and distinct security. In a sense, each lot stands as a separate debtor—an in rem defendant—against which liability for the labor performed or material furnished on that particular lot can be enforced. A demurrer may be sustained due to multifariousness where a claimant seeks to enforce several mechanics' liens affecting several different lots in a single suit; several distinct and disconnected claims are asserted against several in rem defendants, but all the in rem defendants are not interested in the matters litigated. Multiple mechanic's lien claims cannot be combined, established or reduced to one judgment in the aggregate amount of the liens. Each claim, if established, must be made effective as a separate in rem judgment. If, however, the equities can conveniently be administered in a single suit, the court may, in its discretion, overrule an objection to multifariousness and permit the bill of complaint to stand.

Other jurisdictions are divided on the issue of whether it is proper to seek to enforce multiple mechanics' liens in a single suit. The confluence of Virginia statutory and decisional law and

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223. Shelton, 201 Va. at 420, 111 S.E.2d at 410.


225. Shelton, 201 Va. at 420, 111 S.E.2d at 410.


227. The following cases from other jurisdictions hold that multiple liens can be enforced in a single suit: Richardson Lumber Co. v. Howell, 219 Ala. 328, 122 So. 343 (1929); Wade v. Wyker, 171 Ala. 466, 55 So. 141 (1911); Williams v. Judd-Wells Co., 91 Iowa 378, 59 N.W. 271 (1894); ACME Lumber Co. v. Cope, 321 Mich. 198, 203 N.W. 659 (1925); Aimee Realty
authorities from other jurisdictions mandates that multiple liens cannot be enforced in a single bill where: (1) there is not a single or "one piece of work" contract; (2) all lots are not owned by a single owner; (3) the lots liened are not contiguous; (4) various owners, trustees and beneficiaries under deeds of trust are involved; and (5) individual liens have been filed against individual lots involving amounts due for materials furnished or labor performed in connection with specific improvements on each of the individual lots.

D. Necessary Parties

If an individual is in actual enjoyment of property subject to a mechanic's lien, or has an interest in it (either in possession or expectancy) which is likely either to be defeated or diminished by the claimant's lien, all persons who have such immediate interest are necessary parties to the suit to enforce the lien.228 A necessary party's interest in the property against which the lien is sought, and in the relief sought in the suit to enforce the lien, is so bound up with that of the other parties that its legal presence as a party to the proceeding is an absolute necessity, without which the court cannot proceed.229

In the context of Virginia Code section 43-17, the Supreme Court of Virginia held that when an amendment introduces a new claim or makes new demands, the statute continues to run until the time of the amendment.230 An amended bill bringing in a beneficiary and trustee under an antecedent deed of trust presents a new question, concerning the priority of the lien created by the antecedent deed of trust.231 Where new defendants are added to a bill to enforce a mechanic's lien which also presents new and dif-

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different claims, the enforcement suits against the new defendants are deemed to have been commenced at the time of the amendments. In short, if the enforcement suits are not brought against the new, necessary defendants within the time required, the suits to enforce the mechanics’ liens will be dismissed.

The owner of record of the property at the time the bill to enforce the mechanic’s lien is filed is a necessary party to the suit, and the failure to timely name the owner will render the suit unenforceable on demurrer. A general contractor may be a proper and necessary party to a suit to enforce a mechanic’s lien. The trustee or trustees and beneficiary under an antecedent deed of trust recorded on unimproved land are necessary parties to a suit to enforce a mechanic’s lien on the improvements. The presence of the trustees under a deed of trust as defendants in a mechanic’s lien proceeding is not sufficient to bind the beneficiaries. A bill to enforce a mechanic’s lien filed against an owner who is misde-

232. Mendenhall, 239 Va. at 76, 387 S.E.2d at 471; Damon Corp., 232 Va. at 45, 348 S.E.2d at 226-27 (a claimant may not amend its suit to add the trustee or beneficiary of an antecedent deed of trust after the expiration of the time prescribed by Va. Code Ann. § 43-17); American Sheet Metal Corp. v. Continental Diamond Springs Assoc., 10 Va. Cir. 451 (City of Va. Beach 1988).


scribed as a beneficiary of a deed of trust may be valid.  

Trustees and beneficiaries under a deed of trust recorded subsequent to the recordation of the memorandum of mechanic's lien sought to be enforced in the suit are not necessary parties. However, such parties should be made parties to the suit since their interests may be affected.  

Where a note has been assigned and the assignee has not recorded an assignment evidencing its interest or trustees have been substituted but no substitution of trustee has been recorded, these parties are not entitled to protection from a mechanic's lien because of their failure to record their interests, and therefore, they are not necessary parties to a bill to enforce a mechanic's lien.  

Judgment lien creditors should be made parties to a suit to enforce a mechanic's lien since the object of the suit is to ascertain the interests of all persons who claim an interest in the property and to determine a proper distribution of proceeds upon sale. Therefore, other claimants with mechanics' liens against the same property should also be made parties to a suit to enforce a mechanic's lien, even though they may not be necessary parties.  

If other claimants with mechanics' liens against the same property are named by a claimant in a suit to enforce its lien, however, this may reduce the amount ultimately distributed to the claimant filing the suit since involvement in the proceeding could "remind" the other claimants to file suit to enforce their liens. The claimant may consider naming the other mechanic's lien claimants as parties to the suit, but not serving them with notice of the suit until after the limitations period to enforce their liens has expired.  

If a bond is filed before the suit to enforce the lien is filed, the surety on the bond must be made a party to the suit. If, on the other hand, the bond is filed after the suit is filed, there is no requirement to make the surety a party.
E. Itemized Statement of Account

The claimant is required to file an itemized statement of account, verified by affidavit, with the bill to enforce mechanic's lien.\textsuperscript{244} The Supreme Court of Virginia has reasoned that it is difficult to conceive how, without items, there can be an account which is an itemized or detailed statement of the transaction to which it relates.\textsuperscript{246} However, the court held that a lack of particularity in a statement of account is not jurisdictional so as to cause the bill to be dismissed.\textsuperscript{244} If the defendant is not satisfied with the information provided in the statement of account, the defendant should file a bill of particulars.\textsuperscript{247}

A statement of account should set forth in detail the work done and materials furnished.\textsuperscript{246} The total failure of the claimant to file the itemized statement of account makes the bill demurrable, and the suit may be dismissed.\textsuperscript{249} Where an unverified itemized statement of account is filed with the bill of complaint, the claimant may file the verified affidavit after the defendant files a demurrer but before the court acts on the demurrer to overcome the objection.\textsuperscript{250}

\textsuperscript{244} Virginia Code section 43-22 provides that:

\begin{quote}
[t]he plaintiff shall file with his bill an itemized statement of his account, showing the amount and character of the work done or materials furnished, the prices charged therefor, the payments made, if any, the balance due, and the time from which interest is claimed thereon, the correctness of which account shall be verified by the affidavit of himself, or his agent.
\end{quote}


\textsuperscript{246} Shackleford v. Beck, 80 Va. 573, 577 (1885). (Note should be taken that \textit{Beck} was decided before the General Assembly of Virginia substantially revised the mechanic's lien statutes in 1919. Prior to the revision an account, including all invoices, delivery tickets and other related documents had to be filed in the clerk's office where the property was located to perfect the lien. After 1919, the memorandum of mechanic's lien, as prescribed by the forms as set forth in Virginia Code §§ 43-5, -8 and -10, were substituted for the account. Therefore, the precedential value of \textit{Beck} after this significant revision is questionable.)


\textsuperscript{247} Id.

\textsuperscript{248} \textit{Beck}, 80 Va. at 577.

\textsuperscript{249} Lowes, Inc. v. Lundbloom, Ch. No. 6760 (City of Chesapeake 1979).

\textsuperscript{250} See Herbert Bros., Inc. v. McCarthy Co. of Virginia-Maryland, 220 Va. 907, 265 S.E.2d 685 (1980); Trus Joist Corp. v. Sir Galahad Corp., 16 Va. Cir. 516 (City of Va. Beach 1982).
XIII. Conclusion

In decision after decision, the Virginia judiciary has demonstrated that strict compliance with the statutory procedures is a prerequisite to enforcement of a mechanic’s lien. Notwithstanding the equitable nature of the remedy, the failure to rigidly comply with the law often results in a total forfeiture of the lien. A thorough title examination of the property against which the lien is sought, and an analysis of the results of the title search prior to filing the lien is critical. Most of the potential procedural or technical defenses can be easily avoided by careful title work. These procedural defenses often overshadow any substantive defenses. The mechanic’s lien claimant should be particularly sensitive to: (1) the period in which the claimant must perfect its lien as prescribed by section 43-4 of the Code of Virginia; (2) the limitations period applicable to filing a suit to enforce the lien set forth in section 43-17 of the Code of Virginia; (3) naming all proper and necessary parties to the suit to enforce the mechanic’s lien within the period allowed by section 43-17 of the Code of Virginia, and (4) the principles relating to blanket and overinclusive liens. In sum, rigid adherence to the statutes provides “the way and the only way” to perfect and enforce a mechanic’s lien in Virginia.251

251. Beck, 80 Va. at 577.