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MECHANICS LIEN SURVEY

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The following is a survey of construction (mechanic's) lien law in New Jersey, Pennsylvania, Delaware, Maryland and Virginia. The scope is limited to the required steps for creating a lien on the subject property. Mechanic's liens are purely statutory in nature such that compliance with statutory requirements is necessary to give the lien validity.

New Jersey

I. New Jersey Construction Lien Law¹

A. Construction Lien Defined

New Jersey requires that everyone, whether general contractors, subcontractors or suppliers, have a written contract in order to have the right file a construction lien. A construction lien is limited to the value of the work or services already performed, or materials or equipment furnished, in accordance with the contract. The amount of the lien should be based upon the contract price, or any unpaid portion of the contract price, *whichever is less*. The amount of the lien does not include lost profits. As long as there is a written contract or a written contract amendment, almost any type of construction work will support a lien. For example, reconstruction work and additions are lienable in the same manner as new construction.

¹ New Jersey's Construction Lien Law, which became effective in 1994, replaced the State's existing Mechanic's Lien Law for projects having building permits issued on or after the effective date of April 22, 1994. If a building permit is not required, the new Construction Lien Law applies to projects upon which work or services commenced on or after April 22, 1994, and the old Mechanic's Lien Law applies if work or services were commenced before the effective date of the statute. Notably, the Construction Lien Law dispenses of any pre-filing requirement and bars the enforcement of contract clauses which prohibit the filing of lien claims. See N.J.S.A. 2A:44A-6, 38.

See N.J.S.A. 2A:44A-9.

i. Three tiers of lien claimants:

- 1. First Tier (General):** The prime contractor or construction manager, as well as architects, engineers, and surveyors whom have contracted with the owner, may file liens.
- 2. Second Tier (Sub):** Subcontractors or suppliers in an agreement with the contractor may file liens.
- 3. Third Tier (Sub-sub):** Subcontractors or suppliers having contracts with those subcontractors in Tier (2) may file liens.

Note: Suppliers to suppliers have no lien rights regardless of the tier they occupy.

N.J.S.A. 2A:44A-2.

B. Steps to Perfect the Construction Lien

- i.** File the construction lien no more than **ninety (90) days** after the claimant completes its work on the project. While the exact date of completion may be debatable, a court will generally limit the lien rights to a period of ninety (90) days measured from the logical and honest date one could establish as the end of its performance. If this deadline has passed, no lien may be filed.

Note: Filing a late or exaggerated lien can subject the filer to damages and other penalties.

N.J.S.A. 2A:44A-6, 15.

ii. Complete a standard form of the Construction Lien claim:

- (1)** Calculate the amount of the lien claim,
- (2)** Determine the owner of the property,
- (3)** Identify tenants, if any, for whom contractors perform work. The lien for this work will attach *only* to the property repaired or improved, unless such repairs or improvements were ordered or authorized by the owner, or the owner's agent in writing.

N.J.S.A. 2A:44A-3.

- (4)** Identify the block and lot number of the real estate on the tax map of the property,

- (5) Acknowledge that the work, services, material or equipment was provided pursuant to the terms of a written contract and the last date the work, etc. was provided, and
 - (6) Sign and verify the lien. This signature certifies the truth of the information set forth, including the amount presently due and owing, for work done within **ninety (90) days** from the last date work was actually performed.
- N.J.S.A. 2A:44A-6.

iii. File the Construction Lien

1. Under the “index requirement”, the lien must be filed, recorded, and indexed by the county clerk where the property is located.

iv. Serve the Construction Lien

1. The lien claim must be personally delivered or sent by registered or certified mail to the owner within **ten (10) business days** after filing. The lien must be similarly served on any affected contractor or subcontractor against whom the lien is asserted.
2. *Notice.* The notice provided may be served by first class, registered or certified mail on the owner or his agent or by an adult, or if service cannot be made by mail, then by posting upon a conspicuous public part of the improvement. Proof of timely mailing satisfies the service requirement.
3. While late service will not bar enforcement of the lien, unlike the above 90-day limit, service should be given within **ten (10) days** of the construction lien filing. Service is required to effectuate a valid lien foreclosure.

II. Enforcing the Lien

Once the lien is filed and served, the next step depends on the owners actions. If the owner does *not* take action, the lien claimant must start a lawsuit within **one year** or otherwise forfeit his rights. Further, if the claimant fails to perfect its lien, or if the lien is paid or otherwise abandoned, the parties subject to the lien may apply for an order discharging the lien in Superior Court.

Owners who want to force a lien claimant to court also have the right to make a written demand upon the lien claimant that an action must be started within **thirty (30) days** of the lien filing. Failure to sue within the thirty (30) days will result in the lien claimant's forfeiture of lien rights.

N.J.S.A. 2A:44-122, 14(a)(2).

Lien Amendments. Additionally, where necessary, to increase or change the amount of its lien, a claimant may file an amended construction lien. The rights of the claimant will be determined on the date of the amendment recording. The portion of the lien relating to the initial claim attaches at the earlier date and the amended portion attaches when the amended construction lien is filed.

If a lien is properly perfected, in that all the precise required procedural steps are satisfied, then a lien claimant must then prove the amount due in court. If the claimant succeeds, then the lien forecloses and the owner's real property may be sold at public auction to generate funds required to satisfy the lien.

III. Priorities of Construction Liens

The lien claim generally attaches to the owner's interest at the time of filing. Typically, a lien claim does not attach unless it is recorded or lodged for record *before* a bona fide purchaser, mortgage, judgment or other lien.

N.J.S.A. 2A:44A-20

Mortgages have priority over liens under the Construction Lien Law where the mortgages secure funds applied to:

- (1) The payments of amounts due to any claimants who have filed a lien claim or a Notice of Unpaid Balance and Right to File Lien;
- (2) The payment or the securing of payment of all or part of the purchase price of the land covered
- (3) The payment of any valid lien or encumbrance which is, or can be established as, prior to a lien provided;
- (4) The payment of any tax, assessment or other State or municipal lien or charge due or payable at the time of such payment;
- (5) The payment of any premium, counsel fee, consultant fee, interest or financing charges, or other cost related to the financing, any of which are required by the lender to be paid by the owner, provided that the total of same shall not be in excess of 10 percent of the principal amount of the mortgage securing the loan upon which they are based.
- (6) Payment to the owner of that portion of the purchase price of the real property on which the improvements are made or to be made which have previously been paid by the owner, exclusive of any interest or any other carrying costs of such real property, provided, however, that at the time of the payment of such funds to the owner, the budget upon which the loan was made indicated that the amount of the loan is not less than the total of: (1) the purchase price of the real property, (2) the cost of constructing the improvements, and (3) any cost listed in subsections 1, 4 and 5 of this section; or
- (7) An escrow in an amount not to exceed 150% of the amount necessary

to secure payment of charges described in subsections 1, 3, 4 and 5 of this section.

This section affords priority to a construction lender over a lien claim if monies are disbursed for any of the enumerated purposes.

N.J.S.A. 2A:44A-22.

IV. Special Rules for Residential Liens

A. Residential Lien Pre-Filing Requirements

i. *Prelien Notice of Unpaid Balance and Right to File Lien.*

Residential construction is defined as construction or improvement to a one- or two-family dwelling, condominium, cooperative, townhouse, subdivision, or other planned unit development.

- 1.** Notice of Unpaid Balance ("NUB") is required for a residential lien. NUB should be served within **ten (10) calendar days** after filing with the county clerk. The prelien notice is good for **ninety (90) days** after labor and materials were furnished for the project.
- 2.** Within this same time ninety (90) day time period, a **construction lien** must also be filed if payment has not been received.

ii. *Demand for Arbitration.* A claimant must file this demand with the prelien notice. Then, an arbitrator will determine if the claim is proper and valid and will address any counterclaims within **thirty (30) days** of the receipt of claimant's demand for arbitration.

- 1.** If the aggregate sum of all lien claims attaching to any real property that is the subject of a residential construction contract *exceeds* the amount due under a residential purchase agreement, the amount due under any previously recorded mortgages or liens, other than construction liens, will be subtracted. Each lien claim will then be reduced pro rata.
- 2.** Each lien claimant's due share will be equal to the monetary amount of the lien claim, multiplied by a fraction. The denominator is the total monetary amount of all valid claims on the owner's interest in real property against which judgment has been entered, and the numerator is the amount of each particular lien claim for which judgment has been entered.

N.J.S.A. 2A:44A-21

Pennsylvania

I. Pennsylvania Mechanic's Lien Law²

A. Mechanic's Lien Defined

Pennsylvania mechanic's liens are primarily for unpaid labor, material, and equipment supplied and/or performed by general contractors, subcontractors, and sub-subcontractors. Unlike New Jersey, this also includes the **lost profits** on the work performed. In other words, the claimant receives not only the actual cost of the labor and materials conferred, but also the profit and overhead. "Change order" work can also be included in the lien. However, the lien is not available for lost profits on other jobs, "impact damages", or delay damages caused by breach of contract.

i. *The three tiers of lien claimants:*

1. **First Tier (General):** The person that has a contract with the owner (written or verbal) which can be a general contractor, subcontractor, supplier of material or equipment, may file a lien.
2. **Second Tier (Sub):** A person that has a contract with the first tier company, which can be either a subcontractor or material/equipment supplier, may file a lien.
3. **Third Tier (Sub-sub):** A person that has a contract with the second tier company, which can be either a subcontractor or material/equipment supplier, may file a lien.

- a. *Note:* If the contract was entered into **before** January 1, 2007, sub-subcontractors do not have a right to file liens.

- ii. Architects and engineers are entitled to a lien if they: 1) have a direct contract with the owner; and 2) in addition to preparing drawings, specifications and contract documents, they also provide additional services such as supervision of construction.

B. Steps to Perfect the Mechanic's Lien

- i. File a claim with the Court of Common Pleas within **six (6) months** after the completion of the work or of the last day on which substantive contract work was performed.
 - a. If the improvement is located in more than one county, the claim may be filed in one or more of

² This section includes the 2007 amendments to Pennsylvania law which are applicable to contracts entered into on or after January 1, 2007.

those counties, but will be effective only as to the part of the property in the county in which it has been filed.

- b.** *Note:* If the contract was entered into **before** January 1, 2007, the lien claimant must file a preliminary intent to file a mechanic's lien that must be delivered to the owner of the work.

2. *The claim must state:*

- a.** the name of the party claimant, and whether he files as contractor or subcontractor;
- b.** the name and address of the owner or reputed owner;
- c.** the date of completion of the claimant's work;
- d.** if filed by a subcontractor, the name of the person with whom he contracted, and the dates on which preliminary notice, if required, and of formal notice of intention to file a claim was given;
- e.** if filed by a contractor under a contract(s) for an agreed sum, an identification of the contract and a general statement of the kind and character of the labor or materials furnished;
- f.** in all other cases than that set forth in (e), a detailed statement of the kind and character of the labor or materials furnished, or both, and the prices charged for each;
- g.** the amount claimed to be due; and
- h.** a description of the improvement and of the property claimed to be subject to the lien as may be reasonably necessary to identify them.

Pa. Stat. Ann. tit. 49, 1503.

- ii.** Serve written notice of the filing upon the owner within **one (1) month** after filing, giving the court, term and number, and date of filing of the claim.

1. The **formal notice** must state:

- a.** the name of the party claimant;
- b.** the name of the person with whom he contracted;
- c.** the amount claimed to be due;
- d.** the general nature and character of the labor or materials furnished;

- e. the date of completion of the work for which his claim is made;
- f. a brief description sufficient to identify the property claimed to be subject to the lien.

See Pa. Stat. Ann. tit. 49, 1501.

iii. File an affidavit of service of notice, or the acceptance of service, within **twenty (20) days** after service stating the date and type(s) of service(s).

1. Service of the notice of filing of claim must be made by an adult in the same manner as a writ of summons in assumpsit, or, alternatively, by posting notice upon a conspicuous public part of the improvement.
2. *Note:* The claim will fail if the claimant does not serve the requisite notice, file the affidavit, or file the acceptance of service within the specified time period.

Pa. Stat. Ann. tit. 49, 1502.

iv. *Subcontractors. Formal Notice of Intention.* A subcontractor is additionally required to give the owner of the property at least **thirty (30) days** formal written notice of his intention to file a claim (a “Formal Notice of Intention”), whether the claim is for construction, alterations or repairs.

1. This applies to **all** subcontractors, laborers, and material/equipment suppliers who do not have a direct contract with the owner and, instead, have a contract (oral or in writing) with the general contractor.
2. In other words, a subcontractor is required to make **two separate notices** in claims for alterations and repairs, and only one notice in claims for new construction.

II. Enforcing the Mechanic’s Lien

Time for Commencing Action. An action to obtain judgment upon a claim filed shall be commenced within **two (2) years** from the date of filing unless the time be extended in writing by the owner. A verdict must be recovered or judgment entered within five (5) years from the date of filing of the claim. Final judgment must be entered on a verdict within five (5) years. If a claim is not prosecuted to verdict or judgment the claim shall be wholly lost.

See Pa. Stat. Ann. tit. 49, 1701(b).

III. Priorities of the Mechanic's Lien

For contracts entered into on or after January 1, 2007, mechanic's liens will *always* be subordinate to mortgage loans that finance the purchase of the property or the improvements being constructed.

IV. Special Rules on Mechanic's Lien Waivers

- A.** *Mechanic's Lien Waiver.* A contractor may file a waiver of mechanic's liens that binds its sub-contractors and materialmen without a need to bond the job for *residential* construction projects costing **less** than one million dollars. For a homeowner to obtain this waiver, he or she must obtain a signed mechanic's lien waiver from the contractor.
- B.** *Notice.* Additionally, this waiver form must be filed with the prothonotary within **ten (10) days** after the execution of the general contract or at least ten (10) days *before* the commencement of the work.

Delaware

I. Delaware Mechanic's Lien

A. Mechanic's Lien Defined

Generally, Delaware law permits any person who performs or furnishes labor or material in excess of **\$25** in value for the erection, alteration, or repair of any structure under written or express contract with the structure's owner, contractor, or subcontractor, to obtain a lien for the value of labor or materials provided.

25 Del.C. 2702, 2703.

A contractor who has made his contract directly with the owner or reputed owner of any structure, and has furnished both labor and material in and for the structure, or has provided construction management services in connection with the furnishing of the labor and material, is entitled to file a lien.

B. Steps to Perfect the Mechanic's Lien

In Delaware, the mechanic's lien is known as a "Statement of Claim."

25 Del.C. 2711.

a. Statement of Claim Time Requirements

i. *General contractors:* To be subject to this section, a claimant must contract **directly** with the owner or reputed owner. A statement of claim is timely if it is filed within **180 days** of any of the following:

- (1) The date of purported completion of all the work called for by the contract;
- (2) The date when the statute of limitations commences to run in relation to the particular phase or segment of work performed pursuant to the contract, to which phase or segment of work the statement of claim relates, where such date for such phase or segment has been specifically provided for in the contract itself;
- (3) The date when the statute of limitations commences to run in relation to the contract itself where such date has been specifically provided for in the contract itself;
- (4) The date when payment of ninety percent (90%) of the contract price, including the value of any work done pursuant to contract modifications or change orders, has been received by the contractor;
- (5) The date when the contractor submits his final invoice to the owner or reputed owner of such structure;
- (6) With respect to a structure for which a certificate of occupancy must be issued, the date when such certificate is issued;
- (7) The date when the structure has been accepted, as provided in the contract, by the owner or reputed owner;

(8) The date when the engineer or architect retained by the owner or reputed owner, or such other representative designated by the owner or reputed owner for this purpose, issues a certificate of completion; or

(9) The date when permanent financing for the structure is completed.

- *Note:* The contractor can take any of these dates, including the last date on the calendar, to start the running of the 180 days.

25 Del.C. 2711.

ii. *Subcontractors, Suppliers and Others:* If a claimant does not have a contract directly with the owner or reputed owner, the claim must be filed within **120 days** from the date they last performed work on the project, which can be:

1. the date when final payment is due; or
2. the date final payment is made to the general contractor.

25 Del.C. 2711.

b. The *Statement of Claim* must include:

1. the names of the party claimant,
2. the owner or reputed owner of the structure or bridge,
3. the contractor and the kind of labor done and whether the contract was with the owner or his agent or with the contractor,
4. the amount due (to exceed \$25),
5. the time when the labor was commenced and finished,
6. the location of such structure or bridge,
7. the ground upon which the same is situated, and
8. a description sufficient to identify the same.

Note: Joint claims. In every case in which 1 claim for labor or materials is filed by the same person against 2 or more structures owned by the same person for building, altering or repairing, the claimant shall, at the time of filing such joint claim, designate the amount which he claims to be due to him on each of such structures.

25 Del.C. 2733, 2713.

II. Enforcing the Mechanic's Lien

- a. *Option to File Claim Before a Justice of the Peace.* The Statement of Claim may be enforced before the Justice of the Peace. To do so, however, a claimant must file before a Justice of the Peace no earlier than

twenty (20) days and no later than **thirty (30) days** from the time the work was last done or completed. The claim must be filed within this time frame with any Justice of the Peace in the county where the structure is located. This claim must be filed under oath.

- i. If a statement of claim is properly filed before a Justice of the Peace, the Justice will issue a summons to all parties, render a judgment, and issue a transcript to be entered in Superior Court. This transcript becomes a lien on the property within two days of its entry.

25 Del.C. 2732.

III. Priorities of the Mechanic's Lien

In the case of new construction or additions, the claimants are treated equally, such that all mechanic's liens become effective as of the date of visible commencement of the work (e.g., grading, grubbing, staking, trenching).

In the case of alteration or repair of existing structures, the lien takes effect separately as to each claimant as soon as they file their individual liens. The first persons to file their liens generally take priority over other contractors or suppliers.

If there are mortgages, encumbrances, or judgments already on record prior to starting the work or the date on which a mechanic's lien was filed, they would take preference over the contractor. As to construction lenders on and after January 1, 2007, they would take preference over a mechanic's lien claimant.

Maryland

I. **Maryland Construction Lien Law**

A. **Construction Lien Defined**

Every building newly erected and every building repaired, rebuilt, or improved to the extent of fifteen percent (**15%**) of its value is subject to establishment of a lien for the payment of all debts. In the case of a building repaired, rebuilt, or improved to the extent of fifteen percent (15%) of its value, one actor under one contract need not improve the building fifteen percent (15%) in order to claim a lien. In addition, the amount of the lien is immaterial.

Maryland law very broadly provides that “liens may be established for work contracted for or about the building and for materials furnished for or about the building,” including, but not limited to, the drilling and installation of wells to supply water; the construction or installation of any swimming pool or fencing; the sodding, seeding or planting in or about the premises of any shrubs, trees, plants, flowers or nursery products; the grading, filling, landscaping, and paving of the premises; the provision of building or landscape architectural services, engineering services, or land surveying services; and the leasing of equipment, with or without an operator, for use for or about the building or premises. In addition, site development work, machines, wharves and bridges may be subject to a mechanic’s lien. However, land or buildings owned by the State are not subject to mechanic’s liens.

Md. Code Ann., Real Prop. § 9-102(a) (2008).

Site Development Work. If the owner of land or the owner's agent contracts for the installation of waterlines, sanitary sewers, storm drains, or streets to service all lots in a development of the owner's land, each lot and its improvements are subject, on a pro rata basis to the number of lots being developed, to the establishment of a lien for all debts for work and material in connection with the installation.

B. **Steps to Perfect the Construction Lien**

- i. To establish a lien, a person entitled to a lien shall file proceedings in the Circuit Court for the county in which the land or any part of the land is located within **180 days** after the work has been finished or the materials furnished.

Md. Code Ann., Real Prop. § 9-105 (2008).

- ii. *Form of Claim.* A petition to establish the mechanic's lien shall set forth *at least* the following:

1. The name and address of the petitioner;
2. The name and address of the owner;
3. The nature or kind of work done or the kind and amount of materials furnished;
4. The time when the work was done or the materials furnished;

5. The name of the person for whom the work was done or to whom the materials were furnished;
6. The amount or sum claimed to be due, less any credit recognized by the petitioner;
7. A description of the land, including a statement whether part of the land is located in another county, and a description adequate to identify the building;
8. If the petitioner is a subcontractor, facts showing that the notice of intention to claim a lien was properly mailed or served upon the owner, or, if so authorized, posted on the building;
9. An affidavit by the petitioner or some person on his behalf, setting forth facts upon which the petitioner claims he is entitled to the lien in the amount specified; and
10. Either original or sworn, certified or photostatic copies of material papers or parts thereof, if any, which constitute the basis of the lien claim, unless the absence thereof is explained in the affidavit.

Md. Code Ann., Real Prop. § 9-105 (2008).

- iii.** *Necessary Parties.* The plaintiff must bring an action to establish a mechanic's lien against all owners of the land against which the lien is sought to be established. The plaintiff may join, but is not required to join, any other person who has or may have an interest in the land and who may be entitled to share in the proceeds of a sale of the land.

Md. Rule 12-302 (2008).

- iv.** *Subcontractors. Notice of Intention to Claim a Mechanic's Lien.*

1. A subcontractor doing work or furnishing materials or both for or about a building is not entitled to a lien under this subtitle unless, within **120 days** after doing the work or furnishing the materials, the subcontractor gives written notice of an intention to claim a lien.

Md. Code Ann., Real Prop. § 9-104(a) (2008).

2. *Service.* The notice to owner of intention to claim a lien is effective if given by registered or certified mail, return receipt requested, or personally delivered to the owner. If there is more than one owner, the subcontractor may comply with this section by giving the notice to any one of the owners. If notice cannot be given on account of absence or other causes, the subcontractor or its agent, in

the place of a competent witness, may place the notice on the door or other front part of the building.

Md. Code Ann., Real Prop. § 9-104(c)(d)(e) (2008).

3. *Purpose of Notice/Withholdings.* Upon receipt of notice, the owner may withhold, from sums due the contractor, the amount the owner ascertains to be due the subcontractor by virtue of the notice. If the subcontractor giving notice establishes a lien in accordance with this subtitle, the contractor shall receive only the difference between the amount due him and that due the subcontractor giving the notice.

Md. Code Ann., Real Prop. § 9-104(f) (2008).

II. Enforcing the Lien

Once the lien is established, the right to enforce a lien expires at the end of one year from the day on which the petition to establish the lien was first filed. During this time, the petitioner may file a petition in the lien proceedings to enforce the lien or execute on any bond given to obtain a release of the land and building from the lien. As a matter of practice, a petitioner should include a request to enforce the lien with the original petition to establish lien to avoid potential loss of lien rights.

Md. Code Ann., Real Prop. § 9-109 (2008).

III. Priorities of Construction Liens

- a. *Priority of Mechanic's Liens vs. Other Liens.* A prior recorded lien, such as a mortgage or judgment, has priority over a mechanic's lien. A mechanic's lien does not attach to the property until it is established by order.

Md. Code Ann., Real Prop. § 9-108 (2008).

- b. *Priority of Mechanic's Liens vs. Other Mechanic's Liens.* As a general rule, there is no priority among mechanic's liens (i.e., the first to file its Complaint to Establish Mechanic's Lien does not gain priority over other mechanic's lien claimants). If the proceeds of a sale are insufficient to satisfy all mechanic's liens, then the available proceeds shall be disbursed pro rata to all mechanic's lien holders without regard to priority.

Md. Code Ann., Real Prop. § 9-108 (2008).

IV. Special Rules for Single Family Dwellings

- a. *Single Family Dwelling Limitation/Payment Defense.* The lien by a subcontractor against a single family dwelling being erected on the land of the owner for his own residence cannot exceed the amount by which the owner is indebted under the contract at the time the notice is given.

- i.** The terms “residence” includes a secondary, vacation home.
- ii.** The purpose of the single family dwelling limitation is to protect the owner of a single family dwelling from double payment to the contractor and subcontractor.
- iii.** Commercial property owners are not protected from double payment to the contractor and subcontract.

Virginia

I. Virginia Mechanic's Lien Law

A. Mechanic's Lien Defined

Any person performing labor or furnishing materials of a value of **\$50** or more, including the rental value of equipment, shall be entitled to a lien "upon such building or structure, and so much land therewith as shall be necessary for the convenient use and enjoyment thereof."

When the improvements are done to existing structures only (e.g., tenant build-out), then the lien attaches to the property repaired or improved, unless such repairs or improvements were ordered, or authorized by the owner, or the owner's agent.

Va. Code 43-3(A).

Site Development Work. For site development work, such as streets, stormwater management facilities, sewer lines, etc., the lien must be allocated on a per-lot basis, using the total cost of the improvements as the numerator, and the number of lots as the denominator.

Va. Code 43-3(B).

B. Steps to Perfect the Mechanic's Lien

Any claimant may file a Memorandum of Mechanic's Lien with the Clerk of the Circuit Court where the property is located, not later than **90 days** from the last day of the month in which he last performs labor or furnishes material, but in no event later than **90 days** from the time the building is completed.

i. The Memorandum of Lien must contain:

1. Name of the Owner
2. Name of the Lien Claimant
3. The amount and consideration of the claim
4. The time or times when such will be due and payable
5. Verified by the oath of the claimant
6. A declaration that it is his intent to claim the benefit of a lien
7. A description of the property on which he claims a lien

The Memorandum of Mechanic's Lien may only include sums due for labor or materials furnished within **150 days** preceding the filing of the Memorandum of Lien (plus any retainage, not to exceed ten percent (**10%**) of the total contract price).

Lien claimants may file any number of Memoranda of Mechanic's Lien, but each Memorandum can only go back the stated 150 days (plus retainage up to 10%).

In addition to the Memorandum of Lien, any claimant that is a general contractor must also file, along with the Memorandum of Lien, a **certification of mailing** of a copy of the Memorandum of Lien to the owner of the property, at the owner's last known address.

Further, in addition to the Memorandum of Lien, for site development improvements (defined above) for lots in a development, or for condominium units, the claimant must, prior to the sale of the lots or condominium units, file with the Clerk of Court a document setting forth a full disclosure of the nature of the lien to be claimed, the amount claimed against each lot or condominium unit and a description of the development or condominium.

Va. Code 43-3, 4.

- ii. *Sub-contractors and Sub-sub-contractors.* Sub-contractors and sub-sub-contractors are entitled to a like lien for labor and materials, perfected in the same manner.
 - 1. *Subcontractors.* In addition to the Memorandum of Mechanic's Lien, the sub-contractor **must give notice in writing to the owner** of the amount and character of his claim.
 - 2. *Sub-sub-contractors.* In addition to the Memorandum of Mechanic's Lien, the sub-sub-contractor must **provide notice in writing to the owner and to the general contractor** of the amount and character of his claim.

Va. Code 43-7, 43-9.

- iii. *Payment as a Complete Defense to Sub-contractor and Sub-sub-contractor Liens.* Virginia Code 43-7 (Sub-contractors) specifically provides that it is an affirmative defense to a mechanic's lien that the owner has paid the amounts to the general contractor.
 - 1. Similarly, 43-9 (Sub-sub-contractors) provides that the amount for which a lien may be perfected is limited to the amount that can be claimed by the sub-contractor under 43-7.
 - 2. For these reasons, payment is a complete defense to a mechanic's lien claim.

Va. Code 43-7, 9.

II. Enforcing the Mechanic's Lien

- a. *Complaint to Enforce the Lien.* Enforcement of the lien is done by the filing of a Complaint to enforce the lien, filed in the Circuit Court where

the property is located. The suit must join all parties with an interest in the property, *including*:

- i. The Owner
- ii. Any lender with a recorded Deed of Trust
- iii. The Trustees named in any lender's Deed of Trust

The failure to name any party with an interest in the property can result in a dismissal of the Complaint to enforce the lien. Once the six month statute has run, the failure to name a necessary party is a defect that cannot be cured by an amendment to the pleadings, because the case is considered to be time-barred.

The Complaint to enforce a lien must contain an **itemized statement of account**, showing the amount and character of the work, the price charged, the payments made, the balance due, and the time from which interest is claimed, which account shall be **verified by the affidavit of the claimant or his agent**.

Va. Code 43-22.

- b. *Time Limit for Filing Complaint to Enforce the Lien.* The Complaint to Enforce the Lien must be filed within *the later of six months* after the Memorandum of Mechanic's Lien is filed, or **60 days** from the time that the building or structure is completed, or work otherwise terminated.

Va. Code 43-17.

III. Priorities of the Mechanic's Lien

- a. *Priority of Mechanic's Liens vs. Other Liens.* A prior recorded lien, such as an acquisition or construction loan Deed of Trust, has priority *only as to the value of the land*, and a *perfected mechanic's lien has priority as to the value of the improvements*.

This means, as a practical matter, that mechanic's liens can **prime** prior recorded liens, as to the value of the improvements.

Va. Code 43-21.

- b. *Priority of Mechanic's Liens vs. Other Mechanic's Liens.* As a general rule, there is no priority among mechanic's liens (i.e., the first to file its Memorandum of Lien does not gain priority over other mechanic's lien claimants), subject to the following rules:
 - i. Subcontractors have priority over their general contractors
 - ii. Sub-subcontractors have priority over their subcontractors
 - iii. Liens filed by persons performing manual labor have priority over materialmen, to the extent of labor performed during the 30 days immediately preceding the date of performance of the last labor.

Va. Code 43-23.

IV. Special Rules for One or Two Family Residential Units: The Mechanic's Lien Agent

- a. *Appointment of a Mechanic's Lien Agent.* Each owner who secures a building permit for a one- or two-family residential dwelling unit is required to appoint a mechanic's lien agent. The mechanic's lien agent must be:
- i. An attorney licensed to practice law in Virginia
 - ii. A title insurance company authorized to write title insurance in Virginia, or one of its subsidiaries or licensed title insurance agents
 - iii. A financial institution authorized to accept deposits, or a service corporation, subsidiary or affiliate of such financial institution

The name and address of the mechanic's lien agent is to be conspicuously and continuously posted on the building permit, at the job site.

Va. Code 43-1; 4.01.

- b. *Duties of Mechanic's Lien Agent.* The mechanic's lien agent's duties are:
- i. to receive notices of mechanic's liens; and
 - ii. to provide, upon request, copies of the notices of mechanic's liens to settlement agents involved in the sale of the residential units.

Mechanic's lien agents may enter into agreements for the disbursement of funds to contractors and sub-contractors.

Va. Code 43-4.01.

- c. *Additional Requirements for Lien Claimants.* In addition to the requirements of the filing of a Memorandum of Mechanic's Lien where the property is located (Part I(B), above), any person claiming a lien on a one or two family residential unit **must notify the mechanic's lien agent** that he or she seeks payment for labor performed, or materials furnished. The notice to the mechanic's lien agent must be by certified mail or by physical delivery.
- i. The notice to the mechanic's lien agent must contain:
 1. The name, mailing address and phone number of the claimant
 2. The building permit number on the building permit
 3. A description of the property as shown on the building permit
 4. A statement that the person seeks payment for labor performed or materials furnished.

This notice to the mechanic's lien agent must be provided within (i) **thirty (30) days** of the first date that he or she first performs labor or furnishes materials, or (ii) within **thirty (30) days** of the date that a building permit is issued, if the labor is

performed, or the materials supplied, prior to the time of the issuance of the building permit.

Note: this additional notice requirement does not apply to claimants who furnish site development improvements (e.g., streets, stormwater facilities, sanitary sewers or water lines), under Va. Code 43-3(B), because their work is often completed before the issuance of building permits.

Va. Code 43-4.01.

- d.** *Affidavit Required of Owner Who is Also a Developer, Contractor or Subcontractor.* Each person who is the owner of a one or two family residential dwelling unit, and who is either the developer, or a contractor or subcontractor, must provide the purchaser with an affidavit stating either:
 - i.** that all persons performing labor or furnishing materials with whom the owner is in privity of contract, have been paid in full; or
 - ii.** the name, address and amount payable or claimed to be payable to any person performing labor or furnishing materials, with whom the owner is in privity of contract.

The willful failure to provide this affidavit, or any willful misstatement, is a Class 5 felony.

Va. Code 43-13.2.

- e.** *Affidavit of Payment Required of Owner Prior to Sale or Refinance.* Any person who is the owner of a one or two family dwelling unit (other than those described above) must provide the purchaser, or the lender in the case of a permanent loan or refinance, with an affidavit stating either:
 - i.** that all persons performing labor or furnishing materials within 120 days prior to the settlement, and with whom the owner is in privity, have been paid in full; or
 - ii.** the name, address and amount payable or claimed to be payable to any person with whom the owner is in privity.

The failure to provide this affidavit, or any willful misstatement, is a Class 3 felony.

Va. Code 43-13.3.