



# COMMONWEALTH OF VIRGINIA

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July 8, 2009

The Honorable Ken Cuccinelli, II  
Member, Senate of Virginia  
10560 Main Street, Suite 218  
Fairfax, Virginia 22030

Dear Senator Cuccinelli:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## **Issue Presented**

You inquire concerning a notice stating that the owner is notified of the filing of a lien which is recorded with a general contractor's mechanic's lien. Such notice shows on its face that it is addressed to the owner at its last known address and lists the certified mail number, but it does not expressly state that the claimant certifies that the lien was mailed to the owner. Specifically, you ask whether such notice is sufficient to satisfy the statutory requirement of § 43-4 that "[a] lien claimant who is a general contractor ... also shall file along with the memorandum of lien, a certification of mailing of a copy of the memorandum of lien."

## **Response**

It is my opinion, based upon a recent decision of the Supreme Court of Virginia upon which I am bound to rely,<sup>1</sup> that a notice stating that the owner is notified of the filing of a lien which is recorded with a general contractor's mechanic's lien which merely indicates on its face that it is addressed to the owner at its last known address and lists the certified mail number is not sufficient to satisfy the strict statutory requirement of § 43-4 that "[a] lien claimant who is a general contractor ... also shall file along with the memorandum of lien, a certification of mailing of a copy of the memorandum of lien."

## **Background**

You seek an interpretation of § 43-4 regarding whether a lien can be invalidated for not containing particular certification language if the actual notice is received by the property owner. You relate that a notice, which stated the owner was notified of the filing of a lien, was recorded with a general contractor's mechanic's lien. Further, the notice shows on its face that it was addressed to the owner at

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<sup>1</sup>See *Britt Constr. v. Magazzine Clean, LLC*, 271 Va. 58, 623 S.E.2d 886 (2006). I recognize that the response to the issue you present appears harsh. If not for the very specific guidance of the Virginia Supreme Court, a different outcome could be argued. However, the statute, as interpreted by the Court, does not permit a different result.

his last known address and included the certified mail number. You advise that the notice was mailed certified mail to the property owner, and the owner actually received the notice.

Additionally, you note that § 43-15 protects liens from certain inaccuracies in a memorandum, but you question whether the statute would apply to the certification of mailing required by § 43-4.

### **Applicable Law and Discussion**

Section 43-4 provides that:

A general contractor ..., in order to perfect the lien given by § 43-3, ... shall file a memorandum of lien at any time after the work is commenced or material furnished .... The memorandum shall be filed in the clerk's office in the county or city in which the building, structure or railroad, or any part thereof is located. The memorandum shall show the names of the owner of the property sought to be charged, and of the claimant of the lien, the amount and consideration of his claim, ... and giving a brief description of the property on which he claims a lien.... A lien claimant who is a general contractor ... also shall file along with the memorandum of lien, a certification of mailing of a copy of the memorandum of lien on the owner of the property at the owner's last known address.

Statutory language is ambiguous when it may be understood in more than one way.<sup>2</sup> An ambiguity also exists when statutory language lacks clarity and precision, or is difficult to comprehend.<sup>3</sup> "The province of [statutory] construction lies wholly within the domain of ambiguity, and that which is plain needs no interpretation."<sup>4</sup> But when statutory language is clear and unambiguous, the plain meaning and intent of the enactment will be given to it.<sup>5</sup> It is my opinion that § 43-4 is free of any ambiguities.

The Supreme Court of Virginia has stated that "[a] mechanic's lien is purely a creature of statute" and is "in derogation of the common law."<sup>6</sup> As a result, when there are questions concerning the existence and perfection of such a lien, the mechanic's lien statutes must be strictly construed.<sup>7</sup> The reason for such a rule is evident from the priority conferred by statute on a mechanic's lien. Within the parameters set forth in § 43-21, a mechanic's lien "leaps to the head of the class," receiving priority over most other liens. It is a powerful device to secure the payment of monies due and owing. The mere recordation of a memorandum of lien is enough to encumber a piece of property until the question of the lien is resolved.

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<sup>2</sup>Supinger v. Stakes, 255 Va. 198, 205, 495 S.E.2d 813, 817 (1998); Va.-Am. Water Co. v. Prince William County Serv. Auth., 246 Va. 509, 514, 436 S.E.2d 618, 621 (1993); Va. Dep't of Labor & Indus. v. Westmoreland Coal Co., 233 Va. 97, 101, 353 S.E.2d 758, 762 (1987).

<sup>3</sup>Supinger, 225 Va. at 205, 495 S.E.2d at 817; Lee-Warren v. Sch. Bd., 241 Va. 442, 445, 403 S.E.2d 691, 692 (1991).

<sup>4</sup>Winston v. City of Richmond, 196 Va. 403, 408, 83 S.E.2d 728, 731 (1954).

<sup>5</sup>Brown v. Lukhard, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985).

<sup>6</sup>Rosser v. Cole, 237 Va. 572, 576, 379 S.E.2d 323, 325 (1989).

<sup>7</sup>Id.

In determining the existence and perfection of mechanic's liens, the statutes must be strictly construed.<sup>8</sup> The situation you present involves a notice which: (1) stated that the owner was notified of the filing of a lien; (2) is recorded with a general contractor's mechanic's lien; (3) showed on its face that it is addressed to the owner at its last known address; and (4) listed the certified mail number. In 2006 in a substantially similar factual context, the Virginia Supreme Court decided that the certification of mailing requirement contained in § 43-4 must be strictly construed.<sup>9</sup> The Court further concluded that failure to comply with such certification requirement invalidated mechanic's liens where the certifications of mailing were not filed along with the memoranda of liens.<sup>10</sup>

Section 43-15 provides that:

No inaccuracy in the memorandum filed, or in the description of the property to be covered by the lien, shall invalidate the lien, if the property can be reasonably identified by the description given and the memorandum conforms substantially to the requirements of §§ 43-5, 43-8 and 43-10, respectively, and is not willfully false.

In considering whether the inclusion of an item in a memorandum of mechanic's lien affidavit that represented reimbursement for a fine was an "inaccuracy" within the meaning of § 43-15, the Virginia Supreme Court accepted the definition of the term "inaccuracy" to mean "the condition of being inaccurate."<sup>11</sup> Further, the Court noted the meaning of the word "inaccurate" to be "not accurate: as ... containing a mistake or error: incorrect, erroneous."<sup>12</sup>

You describe a situation where a lien did not contain the particular mailing certification language. Clearly, such situation does not meet the definition of "inaccuracy" adopted by the Virginia Supreme Court. Instead, what you describe constitutes an "omission"<sup>13</sup> of a filing specifically required<sup>14</sup> rather than an "inaccuracy." Therefore, it is my opinion that § 43-15 is not applicable.

Therefore, I must conclude that the subject mechanic's lien does not comply with the requirements of § 43-4 although the property owner actually received notice of the lien. Section 43-4 clearly and unambiguously requires that a general contractor "shall file along with the memorandum of lien, a certification of mailing of a copy of the memorandum of lien on the owner of the property at the owner's last known address." Thus, a mechanic's lien may be invalidated for failure to contain such certification of lien notwithstanding the fact that the property owner received actual notice.<sup>15</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> *Britt Construction*, 271 Va. at 64, 623 S.E.2d at 889.

<sup>10</sup> *Id.* The court was very specific in its direction stating "that the certification of mailing is not merely a notice provision." *Id.* at 63, 623 S.E.2d at 888.

<sup>11</sup> *Reliable Constructors, Inc. v. CFJ Props.*, 263 Va. 279, 281, 559 S.E.2d 681, 682 (2002) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1139 (1986)).

<sup>12</sup> *Id.* at 282, 559 S.E.2d at 682 (alteration in original).

<sup>13</sup> "The act of omitting whether by leaving out or by abstention from inserting or by failure to include or perform." WEBSTER'S NEW INTERNATIONAL DICTIONARY 1574 (1993). I note that the 1993 edition of the *Webster's* dictionary contains the same definitions for "inaccuracy" and "inaccurate" as the version quoted by the court in *Reliable Constructors*. *See id.* at 1139.

<sup>14</sup> *Britt Construction*, 271 Va. at 63-64, 623 S.E.2d at 888-89.

<sup>15</sup> *See supra* note 1.

The Honorable Ken Cuccinelli, II  
July 8, 2009  
Page 4

### Conclusion

Accordingly, it is my opinion, based upon a recent decision of the Supreme Court of Virginia upon which I am bound to rely,<sup>16</sup> that a notice stating that the owner is notified of the filing of a lien which is recorded with a general contractor's mechanic's lien which merely indicates on its face that it is addressed to the owner at its last known address and lists the certified mail number is not sufficient to satisfy the strict statutory requirement of § 43-4 that "[a] lien claimant who is a general contractor ... also shall file along with the memorandum of lien, a certification of mailing of a copy of the memorandum of lien."

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, appearing to read "W. C. Mims", with a stylized flourish at the end.

William C. Mims

1:213; 1:941/09-005

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<sup>16</sup> *Id.*