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THE DO'S AND DO NOTS OF MECHANICS' LIENS

By: John F. Sawyer



A mechanics' lien can be an effective tool to obtain payment on a construction project. However, they are highly technical and held to an exceptionally high standard of review. As a result, courts often dismiss liens due to minor defects or failure to follow the Virginia Code requirements exactly. Mechanic's liens are infamous in the legal community as pitfalls that even the most wary of practitioners sometimes cannot avoid.

Mechanic's liens arise most often when there is dispute over payment or where an owner or contractor becomes financially unable to pay sub-contractors and material providers. The current business environment has resulted in an unusual amount of lien activity. The practical purpose for filing a lien is to cause a halt in all payments and thereby force all interested parties to the table to resolve their differences. However, this can only be achieved if the lien is filed promptly while work is ongoing and draw schedules are not complete. In other instances, the owner or contractor may opt to file a bond in an amount twice as much as the lien with the court which will remove the lien and allow construction to continue. This does remove the leverage of the lien claimant, but it also places a source of funds with the court for collection if the unpaid contractor opts to pursue litigation to enforce the lien.

The two primary "do nots" for mechanic's liens are do not delay in filing a lien if a draw request is left unpaid and unresolved. Time is of the essence in mechanic's liens and if they are not promptly filed not only can the unpaid party waive its lien rights but also he may also lose any leverage he may have gained if the draw schedule is complete. The second "no" is don't file the lien yourself. The requirements are exacting. A proper title search must be performed before filing the lien in order to satisfy the statutory notice requirements. Also, the amounts that may be claimed under the lien must relate to work that occurred within the statutorily set time frame. Mechanic's lien agents must be notified timely where applicable. These and several other statutory requirements must be followed with precision. In short, there are countless ways to prepare the lien improperly but only one right way. The slightest error can be grounds for removal.

The primary "Do's" are good business practices for anyone. Endeavor to maintain a good working relationship and open

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CONSTRUCTION FRAUD: NOT JUST A CIVIL MATTER

Stephen P. Pfeiffer



Due to the economic downturn, there is a proliferation of building contractors forced to file bankruptcy leaving materialmen, laborers and subcontractors unpaid and homeowners with unfinished work. When a contractor files bankruptcy the general rule is that all pending civil suits are stayed and the creditors begin the battle for what remains of the company.

Unpaid subcontractors and homeowners with incomplete projects will begin to mount pressure on the Commonwealth Attorney's Office to force what is generally considered to be a civil matter into the criminal arena. As a result, we may experience a substantial increase in criminal litigation under the following (relatively unknown) two criminal statutes: Va. Code §§ 18.2-200.1 and 43-13. This article will address only Va. Code § 18.2-200.1 and a subsequent article will address Va. Code § 43-13.

The Code of Virginia, Section 18.2-200.1 is located in the criminal section of the Code covering crimes involving fraud and is a Class 6 Felony. This section of the Code states the following: *If any person obtain from another an advance of money, merchandise or other thing, of value, with fraudulent intent, upon a promise to perform construction, removal, repair or improvement of any building or structure permanently annexed to real property, or any other improvements to such real property, including horticulture, nursery or forest products, and fail or refuse to perform such promise, and also fail to substantially make good such advance, he shall be deemed guilty of the larceny of such money, merchandise or other thing if he fails to return such advance within fifteen days of a request to do so sent by certified mail, return receipt requested, to his last known address or to the address listed in the contract.*



The prosecution will have the burden to prove the following beyond a reasonable doubt: 1). The defendant obtained an advance of money from another person; 2). The defendant had a fraudulent intent at the time of the advance; 3). The defendant promised to perform construction or improvements involving real property; 4). The defendant failed to perform the promise; and 5). The defendant failed to return the advance within fifteen days of the request to do so by certified mail to the defendant's last known address or his address listed in the contract.

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UNINTENDED CONSEQUENCES IN ESTATE PLANNING

C. Arthur Robinson, II



We are now in an environment in which, by virtue of a congressional failure to act, the estate tax, also known as the death tax, has been repealed starting on January 1, 2010. There are significant and substantial problems that are created by Congress's failure to act after having nine years to do so.

The federal estate tax law situation is a perfect illustration of the maxim attributed to Benjamin Franklin that no man's life, limb or property is safe when the legislature is in session. Mr. Franklin was right and we have a series of problems created by Congress's failure to act.

First and foremost, if the law stays as it currently exists, we will be dealing with a one year period in which the transfer of assets to the next generation will not have a step-up in basis, except for a relatively small layer of assets, approximately \$1.3 million, which will be able to be stepped up. In addition, with respect to carry-over basis which will be the rule under the new estate tax, we will have several hidden taxes which will apply to inherited assets. In the case of assets passing by Will or Trust after a client's death, we will need to be concerned with the capital gains inherent in the assets which will persist in the hands of the inheritors. In the case of transfers during lifetime, although the estate tax has been repealed, the gift tax will continue to be in effect and can create substantial difficulties for our clients.

To make matters worse, on January 1, 2011, if nothing is done, because the repeal of the estate tax is not revenue neutral, the estate tax will spring back into existence as it would have existed had the 2001 Act never been passed. This will effectively cause, in the year 2011, the estate tax to spring back into existence with a \$1 million exemption against the taxable estate and a series of unintended consequences will ensue.

First, the Virginia estate tax will come back into existence as a consequence of the federal repeal. To make matters worse, we must deal with an environment where instruments which have been drawn over the last twenty years, which intend to and do reference concepts such as the federal taxable estate, the applicable credit amount and so on, will produce unintended results due to the repeal.

It also appears likely that Congress will turn to this issue with a "legislative fix" which is intended to be retroactive to January 1, 2010, at some point this year. Putting aside the technical legal arguments with respect to this matter, since bills were introduced in both the house and the Senate previous to December 2009, it appears likely that such a retroactive extension of the estate tax in some form would likely succeed from a constitutional perspective and therefore it is highly likely that sometime later in the year 2010, we will know what rules will actually apply to this year.

In this environment of uncertainty, what steps might we take to deal with the current planning environment? Fortunately, there are several steps which we can take. The first is to keep a careful eye on what Congress does in the coming months so that if your estate exceeds \$1 million, you are aware that there are potential consequences which could apply to you. The second and most important action is to retrieve and review your existing estate planning documents to ensure that you understand how those documents, most especially the trust(s), would allocate your assets in the event that your estate were created. It is possible with a

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relatively quick Amendment to your trust to force an allocation which will both make sense from a planning perspective and not allow the repeal of the estate tax to otherwise disturb good planning.

Lastly, it will be important for all of our clients to realize that estate planning is in fact a dynamic process and that, unfortunately, it not only requires periodic attention but, at times such as these, may require adjustments to be made in the very short term. It is my advice to all of our clients that they should very carefully consider whether an update to their plan is necessary and should contact us at their earliest opportunity so that we may review their plans and make appropriate adjustments. A failure to take appropriate remedial action will almost certainly have consequences, many of which are unintended and many of which may be detrimental. Please contact us at your convenience with respect to this issue.

This article has been authored by C. Arthur Robinson, II, Esquire, who practices in the areas of tax planning and reformation, tax sensitive transactions, estate planning and estate administration. Please call Mr. Robinson at 757-470-5551 if he can be of any assistance to you with the matters mentioned in this article or any other matter within his areas of practice.

The attorneys of Wolcott Rivers Gates provide a full range of legal services to those who demand exceptional representation.

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THE DO'S AND DO NOTS OF MECHANICS LIENS CONTINUED

lines of communication with other parties on the job. Good communication remains the best way to resolve differences. Keep in mind, the best effect of a mechanic's lien is to force everyone to the table to resolve their differences. In some instances, communication breaks down, but the second "do" is within your sole control. Keep organized and accurate records. It is amazing the number of times we have seen contractors who have done great work for which they deserve to be paid, but they lack the records to show it. Construction is a fluid business where changes routinely occur. Get signed Change Orders and keep track of expenses incurred. Do not just throw job related documents into a box or binder. Organize them in a coherent fashion. The paperwork aspect of construction is every bit as important as the nuts and bolts.



Mechanic's liens are an exacting business that makes the most seasoned of practitioners worried. Accordingly, contractors are playing a dangerous game in filing liens themselves. Whether you need to file lien or are confronted with one, we will be pleased to advise you.

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CONSTRUCTION FRAUD: NOT JUST A CIVIL MATTER CONTINUED

The case law in Virginia on this crime indicates that approximately 90% of these cases hinge upon the prosecution's ability to prove beyond a reasonable doubt that the defendant had a "fraudulent intent" at the time of the advance. The Courts have held whether the fraudulent intent actually existed depends on the specific circumstances of each case and will be highly fact intensive. The courts of the Commonwealth have established certain pieces of circumstantial evidence that can be used to prove or disprove fraudulent intent. The following language is used in virtually every case involving Va. Code § 18.2-200.1: "fraudulent intent at the time he obtained the advances depends upon the circumstances of the case . . . intent may, and most often must, be proven by circumstantial evidence and the reasonable inferences to be drawn from the facts that are within the province of the trier of fact."

Some of the common examples of circumstantial evidence weighed by a judge or jury are: 1). Contractor's failure to perform the work for which the advance was specifically requested; 2). Contractor's failure to apply for necessary permits; 3). Contractor's general lack of communication with the homeowners; 4). Contractor's failure to contact the homeowner when he realized he was financially unable to perform the construction; 5). Contractor having other similar transactions with other homeowners. However, there is case

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CONSTRUCTION FRAUD: NOT JUST A CIVIL MATTER CONTINUED

law to suggest that if the Contractor's conduct was likely to have been caused by poor management, financial distress or both, it can combat the fraudulent intent necessary to sustain a conviction.

If you are a Homeowner or a Contractor facing issues similar to those discussed in this article and need legal assistance, please contact our office to schedule an appointment.

This article has been authored by Stephen P. Pfeiffer, Esquire, who practices civil litigation and criminal litigation. Please contact Mr. Pfeiffer at pfeiffer@wolriv.com if he can be of any assistance to you with the matters mentioned in this article or any other matters within his areas of practice.