

Be Ready to Lien in 2009 (but Be Careful!)

2009 is likely to be a year in which [many construction liens are filed](#). As all of us in construction know, and as reported in the [AGC Smart Brief](#), the beginning of 2009 and through 2010 will likely show an even greater downturn in the commercial and residential markets. These economic times will make mechanic's liens, bonding and other proactive approaches to collection all the more important.

While the instinct to “work it out” can be strong, and in many cases a correct, waiting to file a lien can end up in disaster. Given the present construction landscape with owners and developers filing bankruptcy, a lack of credit flowing in the building market and many construction companies simply going out of business, a lien may be the only true payment recourse for a contractor, subcontractor or material man.

However, you need to be careful in filing your liens, *especially* in Virginia. The slightest misstep in the form or timing of a lien can be fatal to your lien.

For example, in a recent case out of Fairfax County, [Artitech, Inc. v. Kaled Naser, et. al.](#), CL07-5431 (Va. 2007), the Court invalidated a lien because the affidavit required to be filed with the lien to verify the amount claimed did not identify the *capacity* of the signatory of the affidavit. The Court reasoned that the Virginia statute requires that the lien be verified by the claimant or its agent. Therefore, the failure of the affidavit to *specifically identify the affiant* as an agent for the lien claimant invalidated the entire lien.

As another example, this one from the Virginia Supreme Court in [Britt Construction v. Magazzino Clean, LLC](#), 623 S.E.2d 886 (Va. 2006) the Court invalidated a lien *for which the Owner had actual notice* because Britt did not append a certification of mailing to the mechanic's lien. In short, this is yet another victory of form over substance in the Virginia mechanic's lien jurisprudence.

In short, *do not wait to file a lien in hopes of a more “amicable” solution*. However, remember that the filing of mechanic's liens in Virginia is fraught with pitfalls for the unwary and legal counsel from an experienced construction lawyer familiar with this field is required to assure that your rights are protected. Filing a lien memorandum without advice of counsel is never a good idea because one misstep can cause you to lose your lien rights.

If you want more insight into this and other construction related topics, please check out Christopher Hill's *Construction Law Musings* blog (<http://constructionlawva.com>) for more information.