

An Analysis of Virginia. Code § 43-11, as Amended: An Old Law that is Still Good Law



by Randall H. Wintory

“The Code of Virginia does not state what priority a claim under § 43-11 has against competing mechanic’s liens to any remaining contract balance.”

From as early as the Acts of Assembly 1869-70,¹ subcontractors, laborers and materialmen² in Virginia had a statutory alternative to a mechanic’s lien to obtain payment for labor and materials supplied to a general contractor or subcontractor.³ Pursuant to § 43-11 *Code of Virginia* (1950), an owner or general contractor may be held personally liable to a subcontractor, provided that notices satisfying the requirements of the statute are given to the owner or the general contractor. The Virginia General Assembly recently amended § 43-11, clarifying the notice requirements that subcontractors must satisfy to impose personal liability on an owner or general contractor and also clarifying the time when such liability attaches.⁴ This article briefly discusses the recent amendments, the procedural steps necessary to impose liability under the amended statute and some issues connected with claims arising under § 43-11.

Two Notices Must be Given.

A subcontractor must carefully adhere to the notice requirements in § 43-11. Any defect in satisfying the notice procedure is fatal to the claim because the right to impose liability on an owner or general contractor is “purely the creation of the statute” and will be strictly construed.⁵ However, former versions of § 43-11⁶ were not explicit regarding whether the subcontractor seeking to impose liability was required to give one notice or two.⁷ A subcontractor might, for example, find himself unpaid at the end of a project and attempt to send a combined notice and affidavit to

the owner, arguing that this was sufficient to impose personal liability. While older cases interpreted the earlier versions of this provision as requiring two notices, there is a dearth of recent reported cases on the procedural requirements of the current statute.⁸ Eliminating any such uncertainty, § 43-11, in the pertinent part, now reads:

Any subcontractor or person furnishing labor or material to the general contractor or subcontractor, may give *a preliminary* 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.

Additionally, if such subcontractor, or person furnishing labor or material shall at any time after the work is done or material furnished by him and before the expiration of thirty days from the time such building or structure is completed or the work thereon otherwise terminated furnish the owner thereof or his agent and also the general contractor, or the general contractor alone in case he is the only one notified, with *a second notice stating* a correct account, verified by affidavit, of his *actual* claim against the general contractor or subcontractor, for work done or materials furnished and of the amount due, . . . ⁹

The statute is specific as to when the second notice must be given, but less so

regarding the preliminary notice. While the better practice is to send the preliminary notice before commencing work, at the latest, it must be given before the work is completed or materials furnished.¹⁰

Form of the Notices

Unlike the statutory notices for mechanic's liens, there are no statutory forms provided for giving the required notices under § 43-11.¹¹ Absent such forms, a subcontractor must attempt to comply with the requirements in the statute for the contents of the notice.¹² While this allows some leeway in the form and content of the notices, the preliminary notice must be in writing and state the nature and character of the subcontractor's contract and the probable amount of its claim.¹³ Additionally, the preliminary notice must "be reasonably and fairly designed to apprise the owner that he is to be held accountable for the debts of the general contractor" and affirmatively inform the owner of its liability to the subcontractor by "invoking the protection of § 43-11."¹⁴ The second notice must contain a correct account, verified by affidavit, of the actual amount of the claim.¹⁵ Both notices must either be recorded in the appropriate clerk's office with proof of service, or sent to the owner and/or general contractor by registered or certified mail with a return receipt requested.¹⁶

In *English's, Inc. v. McCrickard*, the supplier's attempt to "courteously, yet arcanelly, comply with § 43-11" by means of a letter to the owner was held to be fatally defective as notice under § 43-11.¹⁷ The letter expressed the supplier's pleasure that it would be selling building materials for the construction of the owner's house on open account, that the probable amount of the account would be \$30,000, that the supplier would render a full accounting within 30 days of the completion of the work for the owner's records, and that the owner was ultimately responsible for the cost of the materials.¹⁸ The court found that the letter was equivocal at best, and otherwise failed to substantially comply with the preliminary notice requirements of § 43-11.¹⁹

Timing and Extent of Liability

According to the terms of the amended § 43-11, both of the required notices must either be recorded in the clerk's office or received by the owner by registered or certified mail, before the owner or general contractor becomes personally liable. Section 43-11 now reads:

The provisions of this section are subject to the qualification that before any such personal liability of the owner or general contractor herein provided for shall be binding the *two notices* herein required, with such *returns* thereon as is sufficient under § 8.01-325, shall be recorded and indexed as provided in § 43-4.1 in the appropriate clerk's office; or the *two notices* herein required shall be mailed by registered or certified mail to and received by the owner or general contractor upon whom personal liability is sought to be imposed, and a return receipt therefor showing delivery to the addressee shall be prima facie evidence of receipt.²⁰

Thus, the owner or general contractor does not become personally liable until the subcontractor furnishes the second notice, which must be after the subcontractor completes the work or furnishes the work materials and the money is due. This amendment specifically addressed subcontractors' arguments that the owner was liable for any payments made to the general contractor after receipt of a preliminary notice.

If the subcontractor satisfies the two notice requirements, then the owner or the general contractor is personally liable for the actual amount due,

[P]rovided the same does not exceed the sum in which the owner is indebted to the general contractor at the time the *second* notice is given or may thereafter become indebted by virtue of his contract with the general contractor, or in case the general contractor alone is notified the sum in which he is indebted to the subcon-

tractor at the time the *second* notice is given or may thereafter become indebted by virtue of his contract with the general contractor. But the amount, which a person supplying labor or material to a subcontractor can claim, shall not exceed the amount for which such subcontractor could file his claim.²¹

Thus, § 43-11 follows the well-established policy under the mechanic's lien statutes that an owner can never be liable for more than the amount due under his contract with the general contractor.²² The limitation of liability also applies to the amount of the general contractor's indebtedness to his subcontractor for claims asserted by sub-subcontractors and materialmen supplying labor and materials to the subcontractor.

The limitation of liability makes it imperative that the subcontractor furnish his second notice promptly on completion of its work to help ensure that sufficient contract funds remain to satisfy the debt. The prudent thing for the subcontractor to do is to submit his final invoice, verified by affidavit, simultaneously to both the owner and general contractor promptly upon completion of the subcontractor's work.

Although the owner's and general contractor's personal liability is limited and coincides with the second notice, an owner or general contractor who receives a § 43-11 preliminary notice may take steps to ensure that the subcontractor giving such notice is paid, simply to avoid the second notice and disputes that may arise from a disgruntled subcontractor whose preliminary notice was ignored. This can be done by a variety of means. For example, the owner could demand that the general contractor furnish proof of payments to the subcontractor, require lien and claim waivers for payments made, or issue joint checks.

Priority

The *Code of Virginia* does not state what priority a claim under § 43-11 has against competing mechanic's liens to any remain-

ing contract balance.²³ If, at the completion of the project the owner is holding funds consisting of retainage and additional sums due the general contractor,

crediting the bank with the amount due [these claimants] as preferred claims, to be paid in full out of the balance due from bank” because the “bank was not liable for

Consequently, it is questionable whether *Schreiber* maintains any validity as authority for priority of a § 43-11 claim over a mechanic’s lien claim.

“An owner is not statutorily entitled to a credit for payments made to a § 43-11 claimant from funds owed to the general contractor.”

and there is a § 43-11 claim—with one or more mechanic’s liens that together exceed the amount of the fund—then is the § 43-11 claimant paid in full and the remainder of the fund divided among the lien claimants, or are the § 43-11 claim and the lien claims all paid a *pro rata* share?

There is some authority that a § 43-11 claim has priority over mechanic’s liens and should be paid before the mechanic’s lien claims.²⁴ The rule that a personal liability claim has priority over mechanic’s liens appears to have its origins in *Schreiber v. Citizen’s Bank of Norfolk*,²⁵ which arose from a bank’s contract for the construction of a bank building. At the completion of the work, the bank was holding \$4,444.40, and several subcontractors had filed liens totaling over \$12,000. The bank sued to ascertain and determine the amounts due and the proper distribution of the funds according to the rights of the respective subcontractors.²⁶

The Supreme Court of Virginia affirmed the circuit court’s decree that two types of claims were of “superior dignity,” which had to be paid first—with the remainder distributed *pro rata* among the other claimants. One such claim, that is not pertinent to personal liability imposed by statute, was for an amount owed to the asphalt paving subcontractor that the bank guaranteed because the subcontractor refused to perform otherwise.²⁷ The other type of claim was for the amount due two claimants, who “perfected” claims under § 2479 of the *Code of Virginia*, 1887 (the predecessor of § 43-11), thereby making the bank personally liable. The *Schreiber* court held that there was “no error in

more than the contract price it had agreed to pay for the building and it had always kept back more than enough to pay those subcontractors who had given it notice as required by law, and it was entitled to have the balance thus reserved in its hands applied first to the satisfaction of such claims.”²⁸

Schreiber appears to be the only reported case to consider this issue of priority. However, *Schreiber* may not support priority of a § 43-11 claim over a mechanic’s lien under current law. At the time *Schreiber* was decided, the holding was consistent with another statute that supported the priority of the personal liability claim over mechanic’s liens. Pursuant to § 2480 of the *Code of Virginia*, 1887, if an owner paid the subcontractor the amount for which the owner was made personally liable, then the owner was entitled to a credit against any amount that may be due the general contractor.²⁹ However, §§ 2479 and 2480 were repealed in the *Code of Virginia*, 1919. Then, when the personal liability provision was restored in the *Code of Virginia*, 1924, a provision comparable to § 2480 was omitted, and no such provision exists in the current *Code*: An owner

Given the uncertainty of the priority of § 43-11 claims over mechanic’s lien, what should an owner do when there are insufficient contract balances to pay the various claims? Clearly, Virginia has a strong policy that an owner cannot be required to pay for the building twice. This policy is embodied in both § 43-11 and the mechanic’s lien statutes that have identical language limiting liability for each of these type of claims to the amount that the owner is indebted to the general contractor at the time that the required notice is given, or thereafter becomes indebted under the contract.³⁰ That limitation is potentially inapplicable if the owner mistakenly paid claims having a lower priority than other claims. Faced with such a dilemma, the owner can interplead the funds to a court and seek to have the court determine the priority of the competing claims and the allocation of the remaining contract balances.³¹

Conclusion

An owner is under no obligation to protect the interests of a subcontractor unless the subcontractor takes the required steps to protect himself. As the Supreme Court of Virginia noted long ago, the “law has generously thrown around the subcontractor every safeguard, and provided adequate means for protection. To secure benefits, however, the subcontractor must act.”³² A subcontractor should use every means available to make sure he is paid for the labor and materials. Although the recent

“An owner is under no obligation to protect the interests of a subcontractor unless the subcontractor takes the required steps to protect himself.”

is not statutorily entitled to a credit for payments made to a § 43-11 claimant from funds owed to the general contractor.

amendment to § 43-11 provides that liability attaches at the time the second notice is furnished, and though priority of a § 43-

11 claim is an open question, a claim under § 43-11 still provides a subcontractor, laborer or materialman with some advantages over mechanic's liens for securing payment for labor and materials furnished to a general contractor or subcontractor. The first steps the subcontractor must take to impose personal liability on the owner are easy and straightforward, imposing little burden or expense on the subcontractor, compared to perfecting a mechanic's lien. Second, the fact that the subcontractor can give the preliminary notice before commencing work increases the probability that the owner will take steps to see that the subcontractor is paid. In contrast, by the time the subcontractor realizes that it must perfect a mechanic's lien, and the owner may no longer be indebted to the general contractor, it will be too late. These advantages make § 43-11 an important alternative tool, which should be used by subcontractors as part of their standard business practices. 🏠

6 Immediately prior to the 2002 amendment, § 43-11 provided as follows:

Any subcontractor or person furnishing labor or material to the general contractor or 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, and if such subcontractor, or person furnishing labor or material shall at any time after the work is done or material furnished by him and before the expiration of thirty days from the time such building or structure is completed or the work thereon otherwise terminated furnish the owner thereof or his agent and also the general contractor, or the general contractor alone in case he is the only one notified, with a correct account, verified by affidavit, of his claim against the general contractor or subcontractor, for work done or materials furnished and of the amount due, the owner, or the general contractor, if he alone was notified, shall be personally liable to the claimant for the amount due to said subcontractor or persons furnishing labor or material by general contractor or subcontractor, provided the same does 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 said general contractor, or in case the general contractor alone is notified the sum in which he is indebted to the subcontractor at the time

receipt therefor showing delivery to the addressee shall be prima facie evidence of receipt.

Va. Code § 43-11 (1999 Repl. Vol.).

7 See e.g., *Lanmor Corp. v. B M & K Builders, Inc.*, 26 Va. Cir. 484 (Caroline, Sept. 16, 1990) (Ledbetter, J.) (holding that two notices were required by statute).

8 Although *Steigleder, supra*, ostensibly established that two notices are required, one before completion of the work followed by service of the verified account, there still existed some uncertainty. See e.g., *Lanmor, supra* n. 2 (on question presented on demurrer whether § 43-11 required a two-step notice procedure, the court held that it did); *Penrod & Stauffer Building Systems, Inc. v. Metro Printing and Mailing Services, Inc.*, 229 Va. 150, 153, 326 S.E. 2d 662, 664 n. * (1985) (subcontractor sought to impose personal liability against owner under § 43-11 and subcontractor gave one notice only, but the court rejected the owner's challenge, which was based solely on the subcontractor's use of a copy of the required affidavit, holding that a photocopied duplicate of the original fulfilled the notice requirements of § 43-11, and, because of the limited nature of the issue, did not reach the "broader question of the precise notice required . . . to impose personal liability").

9 Va. Code § 43-11 (2002 Repl. Vol.) (emphasis added to show language inserted by amendment).

10 *Id.*

11 See *English's, Inc. v. McCrickard*, 7 Va. Cir. 218, 219-20, 221 (Campbell Cir. Ct. March 19, 1984) (Johnston, J.).

12 *Id.*

13 Va. Code § 43-11(1)(2002 Repl. Vol.).

14 *English's*, 7 Va. Cir. at 220-21.

15 Va. Code § 43-11(4) (2002 Repl. Vol.).

16 *Id.*

17 *English's*, 7 Va. Cir. at 220.

18 *Id.*

19 *Id.*


20 Va. Code § 43-11(2) (2002 Repl. Vol.) (emphasis added to show language inserted by amendment).

21 *Id.*

22 See e.g., Va. Code § 43-7(A) (2002 Repl. Vol.).

23 § 43-11 does not address the issue and Va. Code §§ 43-21 and 41-23 are limited by their terms to liens and encumbrances on land. *But cf., DeWitt v. Coffey*, 150 Va. 365, 143 S.E. 710 (1928) (holding that personal liability claim under predecessor of § 43-11 was superior in priority to a lien of a deed of trust per predecessor of § 43-21, and general contractor's assignment was subject to the personal liability claim per predecessor of § 43-19).

24 See e.g., *Burks Pleading and Practice*, § 460, p. 896 (4th ed. 1952) (citing *Schreiber*); Joseph E. Ulrich, *Virginia and West Virginia Mechanics' and Materialmen's Liens*, § 2.7 (1985) (citing



Randall H. Wintory is an associate at the Richmond office of Sands, Anderson, Marks & Miller, P.C., where he practices construction law and litigation for private, commercial and government contract work. He is a graduate of Blackburn College and the College of William and Mary School of Law. Before practicing law, he worked for 13 years in residential building construction. Wintory expresses his gratitude to Elaine R. Jordan for her guidance, insight and input on the issues discussed in this article.

Endnotes

- 1 See Ch. 294, § 3, p. 444. The personal liability provision was codified as Chapter 115, § 3 in the Code of Virginia, 1873, then as § 2479 in the Code of 1887. Although repealed in the *Code of Virginia*, 1919, the personal liability provision was restored as § 6429a in the Code of Virginia, 1924, which was later recodified as § 43-11 in the Code of Virginia, 1942. For an interesting discussion of the reasons for the repeal of the personal liability provision, see *Nicholas v. Miller*, 182 Va. 831, 30 S.E. 2d 696 (1944).
- 2 For convenience, these parties will generally be referred to collectively as the subcontractor.
- 3 See *N.J. Steigleder & Son v. Allen*, 113 Va. 686, 75 S.E. 191, 192 (1912) (noting that the bar to a remote subcontractor's claim against owner based on lack of privity was abrogated by Acts 1869-70, p. 444).
- 4 See 2002 Va. Acts, Ch. 772. The recent amendments were proposed by The Virginia Bar Association's Construction and Public Contracts Law Section.
- 5 *Steigleder*, 113 Va. at 691, 75 S.E. at 193.

the notice is given or may thereafter become indebted by virtue of his contract with said general contractor. But the amount, which a person supplying labor or material to a subcontractor can claim, shall not exceed the amount for which such subcontractor could file his claim.

Any bona fide agreement for deductions by the owner because of the failure or refusal of the general contractor to comply with his contract shall be binding upon such subcontractor, laborer or materialman.

The provisions of this section are subject to the qualification that before any such personal liability of the owner or general contractor herein provided for shall be binding the notice herein required, with such return thereon as is sufficient under § 8.01-325, shall be recorded and indexed as provided in § 43-4.1 in the appropriate clerk's office; or the notice herein required shall be mailed by registered or certified mail to and received by the owner or general contractor upon whom personal liability is sought to be imposed, and a return

Code § 43-11 continued on page 26

Code § 43-11 *continued from page 25*

- 25 *Schreiber*; Virginia CLE Publications, *Enforcement of Liens and Judgments in Virginia*, § 3.1002, p. 132 (4th ed. 1999) (citing *Schreiber*, Burks and Ulrich); Virginia CLE Publications, *Everything You Need to Know About Mechanic's Liens*, p. II-27 (1999) (citing *Schreiber*, Burks and Ulrich).
- 26 99 Va. 257, 38 S.E. 134 (1901).
- 27 *Schreiber*, 99 Va. at 259, 38 S.E. at 134.
- 28 The priority given to the guaranteed debt was based on the bank's contract with the general contractor, which provided that if the general contractor failed to perform any part of the work, the bank was entitled to supply the deficiency and deduct the cost from the contract price. An owner also has this right pursuant to *Va. Code* § 43-16.
- 29 *Schreiber*, 99 Va. at 262, 38 S.E. at 136.
- 29 Section 2480 provided, in pertinent part, as follows:
- When owner may pay sub-contractor; if general contractor dispute account of sub-contractor.** If the account furnished under [§ 2479, making the owner personally liable to subcontractor] be approved by the general contractor, or if after ten days' notice to him of the filing of the said account with the owner, such contractor shall fail to file with the owner any objection in writing to the said account, in either case, the owner may pay the amount of the account to the sub-contractor and shall then be entitled to credit for the amount so paid upon whatever may be due by him to the general contractor.
- Interestingly, § 2480 also provided for a dispute resolution procedure if a general contractor disputed the correctness of a subcontractor's verified account.
- 30 *See Va. Code* §§ 43-7(A) and 43-11(2) (2002 Repl. Vol.).
- 31 *See e.g., Isle of Wight Materials Co., Inc. v. Cowling Bros., Inc.*, 246 Va. 103, 431 S.E. 2d 42 (1993). Virginia's interpleader statute is at *Va. Code* § 8.01-364. Note: the interpleader will not necessarily mean that the owner is discharged from further liability regarding the disputed funds. *See Sovran Bank, N.A. v. Bedford Park Associates L.P.*, 23 Va. Cir. 110 (Fairfax, Feb. 7, 1991) (Annunziata, J.). However, the interpleader should eliminate the possibility of incurring liability from distribution of the funds.
- 32 *Schreiber*, 99 Va. at 262, 38 S.E. at 135.