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Annual Survey of Virginia Law: Construction Law

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CONSTRUCTION LAW

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I. INTRODUCTION

In 1998 and 1999, the Supreme Court of Virginia decided numerous cases that impact the practice of construction litigation in the Commonwealth. This flurry of activity by the high court reflects its apparent attempt to clarify an approach to the interpretation of contracts that fall outside the scope of the Uniform Commercial Code. By addressing an increasing number of cases in this area of the law, the court has been able to adapt many of its longstanding precedents to the problems found in today's construction contracting environment. This *Survey* article evaluates recent construction cases concerning the use of applicable federal law in contracts governed by Virginia law, the appropriate measure of delay damages, the grounds for finding a contract or modification between parties, the enforcement of liquidated damages provisions, the proper enforcement of the statute of limitations or statute of repose, and the application of statutory remedies.

II. APPLICATION OF FEDERAL LAW TO VIRGINIA CONTRACTS

A. *Delay Damages and the* Eichleay[1] *Formula*

The Supreme Court of Virginia's recent decision in *Fairfax County Redevelopment & Housing Authority v. Worcester Bros.*[2] is likely to have a substantial impact on construction litigation in the Commonwealth. In *Worcester Brothers*, the supreme court joined many previous federal courts in awarding a contractor delay damages for its extended unabsorbed home office overhead using the *Eichleay*

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1. *See* Eichleay Corp., 60-2 B.C.A. (CCH) ¶ 2688 (1960), *aff'd on recons.*, 61-1 B.C.A. (CCH) ¶ 2894 (1961).

2. 257 Va. 382, 514 S.E.2d 147 (1999).

formula.[3] With this decision, the supreme court solidified as recoverable a previously untested measure of damages.

The undisputed facts demonstrated that the Authority delayed the contractor's completion of a project because, at the time work commenced, the Authority had not obtained the necessary clearances from adjoining property owners.[4] Worcester Brothers mobilized, but was unable to perform work because of the owner's delay. The Authority then denied Worcester Brothers' change order application seeking to recover extended field and overhead costs because they maintained personnel on the job site during the "stand-by" period.[5]

At trial, Worcester Brothers established that the indefinite "stand-by" status prevented them from engaging other work.[6] Worcester Brothers then presented evidence of damages for extended field overhead costs and for unabsorbed home office overhead costs calculated using the *Eichleay* formula.[7] The trial court found that the contractor suffered damages as a result of the Authority's "egregious" and "frankly inexcusable" delay and that extended field overhead and unabsorbed home office overhead were not only proper elements of the contractor's damages, but were proven to a reasonable degree of certainty.[8]

On appeal, the Authority only challenged the trial court's ruling that Worcester Brothers had proven its home office overhead with reasonable certainty, by contending that (a) Worcester Brothers was first required to demonstrate actual delay damages before presenting the *Eichleay* formula, and (b) the formula had not previously met approval in Virginia.[9] Rejecting the Authority's claims, the supreme court expounded upon the propriety of using the *Eichleay* formula for the calculation of unabsorbed home office overhead.[10]

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3. *See Worcester Bros.*, 257 Va. at 390, 514 S.E.2d at 152.
4. *See id.* at 382, 514 S.E.2d at 147.
5. *See id.* at 385, 514 S.E.2d at 149.
6. *See id.*
7. *See id.* The *Eichleay* formula creates a ratio between the contractor's total receipts and fixed (or home office) expenses and then compares the quotient to the delayed project's receipts to assign a share of the contractor's fixed expenses assignable to that project. *See id.* at 390 n.5, 514 S.E.2d at 152 n.5. It is the prevailing method used in federal government contracts to calculate a contractor's home office expense due to a government-caused delay. *See id.* at 385 n.2, 514 S.E.2d at 149 n.2; *see also* Capital Elec. v. United States, 729 F.2d 743, 744 (Fed. Cir. 1984) (using the *Eichleay* formula to calculate damages).
8. *Worcester Brothers*, 257 Va. at 386, 514 S.E.2d at 150.
9. *See id.* at 387-89, 514 S.E.2d at 150-51.
10. *See id.* at 388, 514 S.E.2d at 151.

The court first found that unabsorbed overhead expenses are recoverable if the contractor incurs direct costs because of the "stand-by" period, such as additional labor or materials.[11] "It is not necessary for the contractor to show that its overhead was increased as a result of the delay, but only that it could not otherwise reasonably recoup its pro rata home office expenses incurred while its workforce was idled by the delay."[12]

The court then approved the use of the *Eichleay* formula in this circumstance as "an intelligent and probable estimate" of the contractor's damages.[13] The court determined that the formula is not a legal standard; rather, it is "a mathematical method of prorating a contractor's total overhead, expenses for a particular contract."[14] The *Eichleay* formula is "an acceptable method, though not the only possible method, of calculating the portion of home office expenses attributable to delay."[15]

This firmly establishes in Virginia law a well-known method of calculating delay costs. Despite the court's attempt to caveat its application, litigants can be expected to use this now approved calculation of damages whenever possible. Proof of direct costs incurred during "stand-by" periods allows a contractor to claim unabsorbed overhead which can often overshadow the direct costs. The court's recognition of the full range of costs incurred because of a workforce idled by an unexpected delay demonstrates a more practical approach in resolving business disputes.

B. *Using Federal Acquisition Regulation ("FAR") Standards for Differing Site Conditions*

Further demonstrating a willingness to follow federal law on a shared topic, in *Asphalt Roads & Materials Co. v. Virginia Department of Transportation*,[16] the Supreme Court of Virginia applied federal cases interpreting the FAR[17] to interpret a similar "differing

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11. *See id.*
12. *Id.* at 388, 514 S.E.2d at 151.
13. *Id.* at 390, 514 S.E.2d at 152 (quoting Pebble Bldg. Co. v. G.J. Hopkins, Inc., 223 Va. 188, 191, 288 S.E.2d 437, 438 (1982)).
14. *Id.* at 389, 514 S.E.2d at 151-52.
15. *Id.* at 390, 514 S.E.2d at 152. It is important to note that the court limited this holding to cases in which there is evidence that a contractor has suffered actual damages as the result of an unreasonable delay caused by the owner. *See id.*
16. 257 Va. 452, 512 S.E.2d 804 (1999).
17. 48 C.F.R. § 52.236-2 (1984).

site conditions" clause in a state contract.[18] The court used the opportunity to clarify the utility for both owners and contractors in relying upon the contract specifications to define the scope of work and to define methods for adjusting a contract when conditions differ.[19]

In this case, the Virginia Department of Transportation ("VDOT") refused to pay a contractor's full claim for the removal of unsuitable soils and the import of acceptable backfill material.[20] "The contract required the contractor to remove and replace [such unsuitable] soil," but the drawings indicated a far smaller amount of soil than the contractor ultimately found.[21] VDOT had inserted a "differing site conditions" clause similar to that used in the FAR, but contended that the clause only applied to differences in character, not deviations from estimated quantities in the specifications.[22] After determining that the contract provided the appropriate rate of compensation for additional backfill material, the court addressed whether the increased quantity of unsuitable soil was a differing site condition.[23]

The supreme court looked to the federal courts' interpretation of similar clauses to find that differing site conditions apply to excess quantities.[24] The court found that such clauses ensure the lowest competent bid for basic services as the owner only pays for differing conditions, including excess quantities as they occur.[25] Otherwise, contractors would have to increase their bids to account for unforeseen conditions or increase costs by undertaking their own borings and inspections of the project while bidding for a contract.[26] Instead, the court found that contractors are entitled to rely upon the accuracy of the specifications consistent with federal case law.[27] This case provides authority for Virginia courts to look to federal law when interpreting common clauses and recognizes that an increase

18. *See Asphalt Roads*, 257 Va. at 457-60, 512 S.E.2d at 806-08.
19. *See id.* at 460, 512 S.E.2d at 808.
20. *See id.* at 454, 512 S.E.2d at 805.
21. *Id.*
22. *See id.* at 457, 512 S.E.2d at 807.
23. *See id.* at 456, 512 S.E.2d at 806.
24. *See id.* at 457-58, 512 S.E.2d at 807 (citing Foster Constr. C.A. v. United States, 435 F.2d 873, 887 (1970); Schutt Constr. Co. v. United States, 353 F.2d 1018, 1021 (1965)).
25. *See id.*
26. *See id.*
27. *See id.* at 459-60, 512 S.E.2d at 807-08 (citing *Foster Constr.*, 435 F.2d at 887; *Schutt Constr.*, 353 F.2d at 1021).

in actual quantities from estimated quantities can qualify as a differing site condition.

III. CONTRACT OR MODIFICATION EXISTENCE

A. *Unsigned Contracts*

The Supreme Court of Virginia recently clarified that a party is not necessarily bound by an unsigned contract after performance.[28] In *Brooks & Co. General Contractors v. Randy Robinson Contracting, Inc.*,[29] a general contractor orally accepted a subcontractor's bid on a project but never made sure a signed contract existed before the subcontractor began work on the project.[30] The general contractor sent the subcontractor an American Institute of Architects ("AIA") form contract, but the subcontractor ignored it and commenced work on the project without objection.[31] The contractor argued that the AIA contract mandating arbitration applied because, by performance, the subcontractor accepted that contract's conditions.[32]

The supreme court distinguished this case from its previous ruling in *Galloway Corp. v. S.B. Ballard Construction Co,*[33] which applied the terms of an unsigned contract.[34] Unlike *Galloway*, in *Brooks* the lack of signature was *not* an oversight,[35] and an earlier parol agreement existed that could define the parties' obligations.[36] Robinson, the subcontractor, stated at trial that he had disagreed with the terms of the AIA contract, and Brooks, the general contractor, never insisted that those were the only terms that applied to work on the project.[37] The facts of the *Brooks* case combined to enable the court to find that performance was not manifest acceptance of the written contract as compared to the *Galloway* facts.[38] As a result, the terms of the oral contract and not the AIA contract controlled, and arbitration was not required.[39]

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28. *See* Brooks & Co. Gen. Contractors v. Randy Robinson Contracting, Inc., 257 Va. 240, 245, 513 S.E.2d 858, 860 (1999).
29. *Id.*
30. *See id.* at 242-43, 513 S.E.2d at 858-59.
31. *See id.* at 242-43, 513 S.E.2d at 859.
32. *See id.* at 244, 513 S.E.2d at 859.
33. 250 Va. 493, 464 S.E.2d 349 (1995).
34. *See id.* at 506, 464 S.E.2d at 356-57.
35. *See Brooks*, 257 Va. at 242-43, 513 S.E.2d at 859.
36. *See id.* at 244, 513 S.E.2d at 860.
37. *See id.* at 242-43, 513 S.E.2d at 859.
38. *See id.* at 244, 513 S.E.2d at 860.
39. *See id.*

The intent of the parties demonstrated that the bid and oral acceptance defined the limits of the agreement, and thus, the obligations of the parties. This case, combined with *Galloway*, creates some uncertainty for the all too common situation where a party forgets or refuses to sign a contract. Close factual scrutiny is now required to determine the intent of the contracting parties and the prior agreements that may otherwise control the relationship.

B. *Acceptance of Modifications*

Using some of the same principles involved in *Brooks*, the supreme court reached a somewhat contrary conclusion in *Cardinal Development Co. v. Stanley Construction Co.*[40] The court found that oral acceptance of additional work obligated a developer to pay the contractor for the extra work.[41] In this case, the developer of a subdivision plat increased the number of lots from 42 to 62, which impacted the contractor's cost to install utilities on the site.[42] The developer verbally ordered the contractor to begin the additional work.[43] The contractor sent the developer itemized invoices reflecting the cost for the extra work, yet the developer refused to make payment.[44]

Looking again to the intent of the parties, the supreme court found that "a course of dealing 'may evince mutual intent to modify the terms of a contract.'"[45] The developer's instructions, acceptance of the work, and partial payment all evinced his intent to pay for the modifications in the amounts billed by the contractor.[46] Again, the intent of the parties and their subsequent actions are the key facts in determining the terms of an oral, written, or modified contract.[47]

IV. ENFORCING LIQUIDATED DAMAGES PROVISIONS

A topic of crucial importance to the construction community is the application and enforceability of liquidated damages clauses. In order to ensure timely performance, parties often sign contracts

40. 255 Va. 300, 497 S.E.2d 847 (1998).
41. *See id.* at 306, 497 S.E.2d at 851.
42. *See id.* at 303, 497 S.E.2d at 849.
43. *See id.* at 304, 497 S.E.2d at 850.
44. *See id.*
45. *Id.* at 305, 497 S.E.2d at 851 (quoting Stanley's Cafeteria, Inc. v. Abramson, 226 Va. 68, 73, 306 S.E.2d 870, 873 (1983)).
46. *See id.*
47. *See id.*

containing these clauses without a clear understanding of their impact. Such provisions in contracts often contain language that attempts to limit the parties' ability to contest the liquidated damages provision, even if it acts as an unenforceable penalty. The Supreme Court of Virginia recently approved of the application of such a clause in a contract between energy providers in *Gordonsville Energy, L.P. v. Virginia Electric & Power Co.*[48] In Gordonsville's contract to provide electricity on demand to Virginia Electric and Power Company ("VEPCO"), payments would be reduced by $600,000 per day if Gordonsville exceeded its annual allotment of "outage" days.[49] In addition, the contract stated that Gordonsville "waives any defense as to the validity of any liquidated damages stated in this Agreement as they may appear on the grounds that such liquidated damages are void as penalties or are not reasonably related to actual damages."[50] When a generator failed for eleven days through no fault of Gordonsville, VEPCO invoked the liquidated damages clause, assessing a total of $6.6 million in liquidated damages.[51]

Gordonsville argued that the outage qualified as a *force majeure* and that, in any event, the waiver to the liquidated damages clause violated public policy.[52] Rejecting both arguments, the court looked to the plain and unambiguous language of the contract as a matter of law.[53] After addressing the *force majeure* portion of the contract, the court upheld the waiver of objection to the liquidated damages clause stating:

> We long have recognized that a party may enter into an agreement in which he waives a significant right. . . . [T]he evidence at trial established that the entire Contract resulted from extended "arms-length" negotiations between two sophisticated corporate entities, both represented by counsel. Therefore, we conclude that Gordonsville's contractual waiver is enforceable and bars its claims alleged in Count V.[54]

While the sophistication of the parties may have weighed heavily in the decision of the court in *Gordonsville* to enforce the terms of the contract, that same principle may lead to closer scrutiny of

48. 257 Va. 344, 512 S.E.2d 811 (1999).
49. *See id.* at 349, 512 S.E.2d at 814.
50. *Id.*
51. *See id.* at 349-53, 512 S.E.2d at 814-16.
52. *See id.* at 352, 512 S.E.2d at 816.
53. *See id.* at 352-53, 512 S.E.2d at 816.
54. *Id.* at 355-56, 512 S.E.2d at 818 (citations omitted).

liquidated damages provisions when imposed on other, less-sophisticated parties. For instance, in *O'Brian v. Langley School*,[55] the Supreme Court of Virginia reversed a trial court's grant of summary judgment enforcing a liquidated damages clause.[56] When the O'Brians withdrew their daughter from the upcoming second grade on June 13, 1996, the Langley School sought to enforce the enrollment agreement's clause requiring full payment of a year's tuition, costs, and legal fees, "in the event of withdrawal after June 1, 1996."[57] The trial court denied the O'Brian's motion to compel discovery of the school's actual damages and instead entered judgment in the school's favor.[58]

Although the language of the liquidated damages provision appeared clear and unambiguous, the court allowed O'Brian to contest its enforceability. They had the burden, however, to demonstrate that the clause was unenforceable because "the damage resulting from a breach of contract is susceptible of definite measurement, or where the stipulated amount would be grossly in excess of the actual damages."[59] The discovery requests were therefore appropriate to determine the relationship between the stipulated damages and the actual damages.

While it is possible to speculate that the court might be willing to closely scrutinize harsh liquidated damages provisions imposed on commercially unsophisticated parties, the practical import of *O'Brian* may now be subsumed by *Gordonsville*. Because a waiver of objection to liquidated damages received a supreme court stamp of approval, parties seeking to enforce liquidated damages provisions will soon include identical waiver language in their contracts. The argument over unenforceable penalties may now be moot when parties blindly waive this right in the contract.

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55. 256 Va. 547, 507 S.E.2d 363 (1998).
56. *See id.* at 549, 507 S.E.2d at 366.
57. *Id.* at 550, 507 S.E.2d at 364.
58. *See id.* at 549, 507 S.E.2d at 365.
59. *Id.* at 551, 507 S.E.2d at 365 (quoting Brooks v. Bankson, 248 Va. 197, 208, 445 S.E.2d 473, 479 (1994)).

V. LIMITATIONS PERIODS

A. *Project Completion and the Statute of Limitations*

In *Suffolk City School Board v. Conrad Bros.*,[60] the Supreme Court of Virginia reaffirmed its decision in *County School Board v. A.A. Beiro Construction Co.*,[61] that an action does not accrue on any part of an indivisible construction contract until after final completion of the entire project.[62] Conrad, the general contractor, reached substantial completion on two high schools for the city of Suffolk in September of 1990.[63] The contracts, however, provided for completion upon the issuance of a "Final Certificate for Payment," and that was not made by the architect until March of 1991.[64] In February of 1996, the school board sued Conrad for constructing defective roofs.[65]

The contractor maintained that the action was untimely under Virginia Code section 8.01-230 because the breach occurred more than five years prior to the action's commencement.[66] According to the common law, the limitations period did not commence on an indivisible contract until final performance, enabling a party to sue either upon the occurrence of the breach or upon final performance.[67] The new Virginia Code, according to *Conrad Bros.*, eliminated the distinction in accrual between divisible and indivisible contracts, specifying only breach, not final completion, as the critical date.[68] The court rejected this argument, stating that "§ 8.01-230 merely codified existing law"[69] and contract completion was required before the limitations period would commence.[70]

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60. 255 Va. 171, 495 S.E.2d 470 (1998).
61. 223 Va. 161, 286 S.E.2d 232 (1982).
62. *See Conrad Bros.*, 255 Va. at 176, 495 S.E.2d at 473.
63. *See id.* at 173, 495 S.E.2d at 471.
64. *See id.*
65. *See id.*
66. *See id.* at 174, 495 S.E.2d at 472. Section 8.01-230 states in relevant part: "In every action for which a limitation period is prescribed, the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date when the breach of contract occurs in actions ex contractu and not when the resulting damage is discovered . . . ." VA. CODE ANN. § 8.01-230 (Cum. Supp. 1999).
67. *See* Andrews v. Sams, 233 Va. 55, 58, 353 S.E.2d 735, 738 (1987); County Sch. Bd. v. A.A. Beiro Constr. Co., 223 Va. 161, 163, 286 S.E.2d 232, 233 (1982).
68. *See Conrad Bros.*, 255 Va. at 175, 495 S.E.2d at 472.
69. *Id.* at 176, 495 S.E.2d at 472.
70. *See id.* at 176, 495 S.E.2d at 473.

As a result of this decision, portions of construction projects performed years before final completion may remain subject to suit until the period for the entire contract has run. This serves as a benefit to owners who can rely on a single, defined date from which to measure the period in which they must take action for any defects on a project. This "bright line" test also reinforces the contractor's need to read, follow, and enforce each term of a contract for project completion even though it realizes that a dispute is imminent.

B. *Statute of Repose*

Often an issue of concern in construction litigation is whether an action falls within the Virginia statute of repose. The act limits the bringing of a cause of action concerning unsafe real property improvements causing property damage, personal injuries, or wrongful death to five years from construction, regardless of when the limitation period accrued.[71] In *Luebbers v. Fort Wayne Plastics, Inc.*,[72] the Supreme Court of Virginia reexamined its distinction between ordinary building materials and "equipment or machinery," the latter term being exempt from the five year period.[73]

An item is an ordinary building material if it is incorporated into work outside the control of the manufacturer and not subject to close quality control after installation.[74] According to the court, the steel

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71. *See* VA. CODE ANN. § 8.01-250 (Repl. Vol. 1992). Section 8.01-250 states:

> No action to recover for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction, or construction of such improvement to real property more than five years after the performance of furnishing of such services and construction.
>
> The limitation prescribed in this section shall not apply to the manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property, nor to any person in actual possession and in control of the improvement as owner, tenant or otherwise at the time the defective or unsafe, condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought; rather each such action shall be brought within the time next after such injury occurs as provided in sections 8.01-243 and 8.01-246.

Id. A personal injury action would not accrue until the injury is sustained, which may be many years after completion of the construction. *See id.* § 8.01-230 (Cum. Supp. 1999).

72. 255 Va. 368, 498 S.E.2d 911 (1998).

73. *Id.* at 372, 498 S.E.2d at 913 (citing Grice v. Hungerford Mechanical Corp., 236 Va. 305, 374 S.E.2d 17 (1988); Cape Henry Towers, Inc. v. National Gypsum Co., 229 Va. 596, 331 S.E.2d 476 (1985)).

74. *See Cape Henry Towers*, 229 Va. at 602, 331 S.E.2d at 480.

panels, braces, and vinyl liners made by Fort Wayne and used in a swimming pool's construction qualified as ordinary building materials because they were so fungible and generic within the pool industry that they served no function until incorporated into a finished pool.[75] By focusing on the pool as a unit and the fungibility of the supplies, this decision narrows the universe of items that fit within the definition of "equipment or machinery."

With regard to the same statute of repose, in *Tate v. Colony House Builders, Inc.*,[76] the Supreme Court of Virginia clarified that the statute does not apply to actions for constructive fraud, but is instead limited to its enumerated actions.[77] In *Tate*, a home buyer sued the manufacturer, claiming constructive fraud because of false representations made prior to the purchase.[78] The supreme court reversed the trial court's decision that the fraud action was barred by the statute of repose, holding that the statute only applies to an injury to property, bodily injury or wrongful death.[79]

> Fraud is not a tort specified in the statute because, as we have stated, the wrongful act involved in fraud is "aimed at the person." We also stated that because "fraud invariably acts upon the person of the victim, rather than upon property its consequence is personal damage rather than injury to property."[80]

As *Luebbers* and *Tate* demonstrate, the court continues to strictly construe the General Assembly's language whenever possible.

VI. INTERPRETATION OF STATUTORY ACTIONS

A. *Mechanics Liens*

In *Carolina Builders Corp. v. Cenit Equity Co.*,[81] the Supreme Court of Virginia invalidated a mechanic's lien because it contained a claim for sums due more than 150 days from the date the supplier last provided materials to the job.[82] Virginia Code section 43-4 requires that a "lien claimant may file any number of memoranda

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75. *See Luebbers*, 255 Va. at 372-73, 498 S.E.2d at 913.
76. 257 Va. 78, 508 S.E.2d 597 (1999).
77. *See id.* at 84, 508 S.E.2d at 600.
78. *See id.* at 80-81, 508 S.E.2d at 598.
79. *See id.* at 85, 508 S.E.2d at 600-01.
80. *Id.* at 85, 508 S.E.2d at 601 (quoting J.F. Turner & Son v. Staunton Prod. Credit Assoc., 237 Va. 155, 158, 375 S.E.2d 530, 531 (1996); Pigot v. Moran, 231 Va. 76, 81, 34 S.E.2d 179, 182 (1986)).
81. 257 Va. 405, 512 S.E.2d 550 (1999).
82. *See id.* at 407, 512 S.E.2d at 550.

but no memorandum shall include sums due for labor or materials furnished more than 150 days prior to the last day on which labor was performed or materials furnished to the job preceding the filing of such memorandum."[83] Carolina Builders filed a lien memorandum claiming sums due for materials provided within the 150 day period and sums due for materials provided more than 150 days prior to the date it last provided materials to the job.[84]

The supreme court reached a seemingly harsh result of denying the *entire* lien, stating that the 150 day period is a statutory requirement to the perfection of the lien and simply reducing the lien to the amount due within the 150 day period is not possible.[85] Because mechanic's liens are creatures of statutes, the perfection requirements are strictly construed.[86] Carolina Builders should have filed multiple liens as the work progressed unpaid, and not have waited to the end of the project. Instead, it was denied its entire lien because part of the lien violated the statute, and Carolina Builders could not concurrently file a proper lien memorandum.[87] Despite the practical impact this decision may have on contractors and suppliers attempting to get paid on a project without resorting to legal action, the clear message sent by the court to all potential lien claimants is that timeliness and precision are essential to the maintenance of a successful lien action.

B. *The Virginia Public Procurement Act*

Just as the supreme court strictly construed the perfection of a mechanic's lien, in *Sabre Construction Corp. v. County of Fairfax*[88] the court strictly construed the Virginia Public Procurement Act[89] to dismiss a bid protest that did not strictly comply with the statute's provisions.[90] Sabre wished to contest the county's award of a contract to a competitor, made in part because Sabre failed to submit a responsive bid containing all requested alternate bids.[91] Sabre filed a bid protest, and then proceeded to file suit one day before the county issued its written opinion denying the protest.[92] Virginia

83. VA. CODE ANN. § 43-4 (Repl. Vol. 1999).
84. *See Carolina Builders*, 257 Va. at 408, 512 S.E.2d at 551.
85. *See id.* at 411-12, 512 S.E.2d at 553.
86. *See id.* at 410, 512 S.E.2d. at 552.
87. *See id.* at 412, 512 S.E.2d at 553.
88. 256 Va. 68, 501 S.E.2d 144 (1998).
89. VA. CODE ANN. § 11-35 to -80 (Repl. Vol. 1999).
90. *See Sabre*, 256 Va. at 73, 501 S.E.2d at 147-48.
91. *See id.* at 69-70, 501 S.E.2d at 146.
92. *See id.* at 70, 501 S.E.2d at 146.

Code section 11-66 requires a bidder to file its action in the circuit court "within ten days of the written decision."[93] As a result, the county filed a motion to dismiss because the suit was filed before the written decision and thus in derogation of section 11-66.[94]

The supreme court concurred with the county, concluding that the special limitations to the act are a "condition precedent to maintaining a claim and failure to comply with [them] bars the claim."[95] Just as the court said of mechanic's liens in *Carolina Builders*, the *Sabre* court emphasized that "The Public Procurement Act constitutes a waiver of public bodies' sovereign immunity, is in derogation of the common law, and, therefore must be strictly construed."[96] Like *Carolina Builders*, this is a seemingly harsh result enforced by the court for deviation from the statute's requirements. While these two cases might be factually uncommon, the principles emphasized by the court will often resound in defense of any statutory action not in strict compliance.

VII. CONCLUSION

When taken as a whole, the cases decided in the two previous years impacting construction litigation may create some artificial themes. The *Fairfax County* and *Asphalt Roads* decisions indicate that the court appears more ready than ever to countenance process and reasoning developed in the federal courts. The court's rulings on contract interpretation in *Brooks*, *Cardinal Development*, *Gordonsville* and *O'Brian* continue to emphasize the intent of parties when contracting as well as their relative sophistication before entering potentially complex agreements. However, the broad freedom to contract and sacrifice rights contained in preprinted waivers may serve only to further create onerous provisions of which the commercially unsophisticated have little knowledge or bargaining power against. Finally, despite the court's ruling in *Conrad Brothers* that the statute on accrual of actions conforms with the common law on indivisible contracts in spite of its language, the court continues to strictly construe rights of litigants that are granted by statute. *Luebbers*, *Carolina Builders*, and *Sabre Construction* demonstrate that principle, and a failure to strictly comply with the statutory

93. VA CODE ANN. § 11-66 (Repl. Vol. 1999).
94. *See Sabre*, 256 Va. at 70, 501 S.E.2d at 146.
95. *Id.* at 72, 501 S.E.2d at 147.
96. *Id.* at 73, 501 S.E.2d at 147 (citing Halberstam v. Commonwealth, 251 Va. 248, 250-51, 467 S.E.2d 783, 784 (1996)).

requirements will often lead to the harsh result of no maintainable action. In sum, it is a positive development to see the Supreme Court of Virginia take such an active interest in this area of the law and attempt to provide clarity for judges, lawyers, and potential litigants when interpreting and evaluating potential construction litigation cases.