

11-1-2005

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### Recommended Citation

K. B. Marston & J. B. Lucy, *Construction Law*, 40 U. Rich. L. Rev. 143 (2019).

Available at: <https://scholarship.richmond.edu/lawreview/vol40/iss1/14>

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## CONSTRUCTION LAW

*K. Brett Marston* \*

*J. Barrett Lucy* \*\*

Since the last survey of this topic published in the fall of 2000, construction law in Virginia has continued to evolve in an array of areas involving issues such as claims on surety bonds, claims against public entities, construction-related products like Exterior Insulation Finishing Systems (“EIFS”), and mechanic’s liens. These changes have implicated and better defined legal principles including the “no damage for delay” clause on public contracts, requirements for privity in breach of warranty claims, and implied indemnification.

The significant issues in construction law have arisen both in a number of significant judicial decisions, mostly from the Supreme Court of Virginia, and in amendments to statutes by the Virginia General Assembly. This article will cover most of the significant judicial decisions and statutory changes since the middle of 2000.

### I. ARBITRATION

In the area of “dispute resolution,” there continues to be much litigation concerning arbitrations in construction and other disputes. The issues, which often involve the application of the Uniform Arbitration Act in Virginia, Virginia Code sections 8.01-581.01 to -581.016, revolve around a couple of major themes—whether a certain dispute is arbitrable and whether a certain arbitration award is enforceable. Although not always strictly construction-related cases, all decisions in this area affect construc-

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tion contracting and dispute resolution given the prevalence of arbitration provisions in construction contracts.

### A. *Is the Matter Arbitrable?*

Virginia courts continue to maintain the trend toward compelling parties to arbitrate in the face of questions about whether the “arbitration” provision of a contract is applicable to a particular dispute. For example, in *TM Delmarva Power, L.L.C. v. NCP of Virginia, L.L.C.*,<sup>1</sup> the Supreme Court of Virginia held that, where the contract provided that either party “may” submit disputes to arbitration, the trial court erred in denying one of the parties’ request to compel arbitration.<sup>2</sup> Likewise, in *Weitz v. Hudson*,<sup>3</sup> the Supreme Court of Virginia concluded that an arbitration provision was broad enough to cover claims related to the conversion of funds and reversed the trial court’s ruling denying a motion to compel arbitration.<sup>4</sup> In that case, the arbitration provision provided that “[a]ny dispute or controversy arising under, out of, in connection with, or in relation to this Agreement, and any amendments or proposed amendments hereto, shall be determined and settled by arbitration in Baltimore, Maryland pursuant to the Rules of the American Arbitration Association then obtaining.”<sup>5</sup>

### B. *Is the Arbitration Award Enforceable?*

Another issue that has been subject of much litigation related to arbitrations is the enforceability of awards issued by arbitrators. Virginia’s version of the Uniform Arbitration Act provides various, although limited, bases for vacating an arbitration award in Virginia.<sup>6</sup>

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1. 263 Va. 116, 557 S.E.2d 199 (2002).

2. *See id.* at 120–23, 557 S.E.2d at 201–02.

3. 262 Va. 224, 546 S.E.2d 732 (2001).

4. *See id.* at 229, 546 S.E.2d at 735.

5. *Id.* at 226, 546 S.E.2d at 733.

6. *See* VA. CODE ANN. § 8.01-581.010 (Repl. Vol. 2000 & Cum. Supp. 2005).

One such recent case involved a subcontractor that sought treble damages under Virginia's "business conspiracy" statute<sup>7</sup> in an arbitration filed against the contractor that had terminated the subcontractor from a project and then hired the subcontractor's employees to work directly for the contractor.<sup>8</sup> The arbitrators awarded treble damages, and the contractor challenged that award in circuit court pursuant to Virginia Code section 8.01-581.010, claiming that the arbitrators had exceeded their powers in arbitrating the business conspiracy issue and in applying the applicable statutes.<sup>9</sup> The circuit court found that the arbitration provision, which stated that "[a]ny dispute arising under or related to this subcontract with respect to the rights, duties or obligations of the parties"<sup>10</sup> was broad enough for the arbitrators to decide the termination issues.<sup>11</sup> The Supreme Court of Virginia also concluded that there was no basis to vacate the award on the ground that the arbitrators had disregarded the law in interpreting the business conspiracy statute.<sup>12</sup>

## II. BONDING/SURETY ISSUES

In the area of bond and surety claims, there have been many reported decisions. Two of those stand out as significant developments over the last five years.

### A. *Actions of Principal and Effect on Surety*

The interplay between the actions, or lack thereof, of the principal on a surety bond and the liability of the surety itself came to

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7. *Id.* §§ 18.2-499, -500 (Repl. Vol. 2004 & Cum. Supp. 2005).

8. *See* SIGNAL Corp. v. Keane Fed. Sys., Inc., 265 Va. 38, 43, 574 S.E.2d 253, 255-56 (2003).

9. *See id.* at 41, 574 S.E.2d at 254.

10. *Id.* at 45, 574 S.E.2d at 257.

11. *See id.* at 41, 574 S.E.2d at 254.

12. *See id.* at 46, 574 S.E.2d at 257; *see also* Va. Eastern Co. v. N.C. Monroe Constr. Co., 56 Va. Cir. 220, 226-29 (Cir. Ct. 2001) (Salem City) (denying a motion to vacate an arbitration award on the basis that the arbitrators ruled in contravention of Virginia law, and in which the court thoroughly examined the arguments for and against this ground to vacate); *cf.* E.J. Miller Constr. Co. v. Holt, 56 Va. Cir. 153, 154 (Cir. Ct. 1998) (Roanoke City) (concluding that an arbitrator exceeded his authority in awarding "delay" damages under the construction contract and amending the contractor's award).

the forefront in the Supreme Court of Virginia's decision in *American Safety Casualty Insurance Co. v. C.G. Mitchell Construction, Inc.*<sup>13</sup> There, the surety was held to be liable for a default judgment against the principal (a subcontractor) by a claimant (the general contractor) on a payment bond claim.<sup>14</sup> The default judgment resulted from a corporate designee for the principal failing to appear at a corporate deposition after receiving proper notice.<sup>15</sup> The surety, although it had power-of-attorney rights under an indemnity agreement with the subcontractor, received the notice of the deposition, and had an opportunity to designate a corporate representative, did not act to designate anyone for that corporate deposition.<sup>16</sup> Thus, the surety was liable for the default judgment held by the general contractor against the subcontractor.<sup>17</sup>

### B. *Choice of Bonds to Pursue*

Another decision that caused waves in the surety field was issued by the Chesapeake City Circuit Court in 2000 in *Crofton Construction Services, Inc. v. Reliance Insurance Co.*<sup>18</sup> In that case, both the general contractor and the subcontractor had procured a payment bond for the project in which they were involved.<sup>19</sup> A sub-subcontractor that had not been paid by the subcontractor brought a claim against the general contractor's payment bond only.<sup>20</sup> The general contractor's surety challenged the claim on the grounds that the claimant was required instead to proceed against the subcontractor's payment bond.<sup>21</sup> Reading the language of the general contractor's payment bond, the circuit court concluded that "on its face" it included the sub-subcontractor within the definition of "claimant" and that there

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13. 268 Va. 340, 601 S.E.2d 633 (2004).

14. *See id.* at 343, 601 S.E.2d at 634.

15. *See id.* at 346, 601 S.E.2d at 636.

16. *See id.* at 348, 601 S.E.2d at 637.

17. *Id.* at 353, 601 S.E.2d at 640-41; *see also* *Airlines Reporting Corp. v. Auto-Owners Ins. Co.*, 53 Va. Cir. 192, 196 (Cir. Ct. 2000) (Arlington County) (holding that the surety was collaterally estopped from litigating the issue of liability where a default judgment had been entered against the principal).

18. No. 99-1204 (Cir. Ct. 2000) (Chesapeake City).

19. *Id.* at 1.

20. *Id.*

21. *Id.*

was no limitation within the Virginia Code prohibiting the sub-subcontractor from choosing which of the two bonds against which it would proceed.<sup>22</sup>

### III. BUILDING CODE

#### A. *Adoption of New Uniform Statewide Building Code*

Effective October 1, 2003, Virginia's Board of Housing and Community Development adopted and incorporated the codes of the International Code Council, Inc. as the underlying basis for Virginia's Uniform Statewide Building Code ("USBC"), replacing the Building Officials and Code Administrators International Inc. ("BOCA").<sup>23</sup> This change was spawned by a change in Virginia Code section 36-99(B), in 2002, whereby the General Assembly directed the Board for Housing and Community Development to give regard to standards established by, among others, the International Code Council and the National Fire Protection Association.<sup>24</sup>

#### B. *Judicial Decision*

The Court of Appeals of Virginia addressed the enforcement of the USBC in a recent decision. In *Avalon Assisted Living Facili-*

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22. *Id.* at 2. Note also that in 2003, the General Assembly amended Virginia Code section 2.2-4341(B) ("Actions on payment bonds") to remove language that appears to have been superfluous based upon the circuit court's analysis in *Crofton*. See Act of Mar. 16, 2003, ch. 255, 2003 Va. Acts 277 (codified as amended at VA. CODE ANN. § 2.2-4341(B) (Repl. Vol. 2005)). Prior to deletion, the second sentence formerly read "[a]ny claimant who has a direct contractual relationship with a subcontractor from whom the contractor has required a subcontractor payment bond under subsection F of § 2.2-4337 but who has no contractual relationship, express or implied, with such contractor, may bring an action on the subcontractor's payment bond." See VA. CODE ANN. § 2.2-4341(B) (Cum. Supp. 2003). The deleted language had ostensibly, until the *Crofton* decision, suggested to many practitioners that, if the subcontractor had procured a bond, the sub-subcontractor would need to proceed only against that subcontractor's payment bond, but neither the statute nor that specific language contained any limitation for the claimant to seek relief just on that bond.

23. See 13 VA. ADMIN CODE § 5-62 (2005) (promulgating the Uniform Statewide Building Code, based upon authority set forth in Virginia Code section 36-99).

24. See Act of Apr. 5, 2002, ch. 555, 2002 Va. Acts 742 (codified as amended at VA. CODE ANN. § 36-99(B) (Repl. Vol. 2005)).

*ties, Inc. v. Zager*,<sup>25</sup> the court faced the issue of whether the State Building Code Technical Review Board (“TRB”), which is the next level of administrative review after decisions of local appeals boards, had the authority to modify the USBC’s “use group classifications” for an Alzheimer’s housing facility.<sup>26</sup> The court held that the TRB lacked the authority under Virginia’s statutory and regulatory structure because

[t]o the extent the Housing Board purported to authorize the local official—and the local appeals board and TRB via the appeals process—to grant modification to *any* of the provisions of the USBC, that regulation exceeds the Housing Board’s statutory authority and constitutes a clear abuse of delegated discretion.<sup>27</sup>

#### IV. PUBLIC PROCUREMENT

The beginning of this decade has been a busy time for cases and legislation related to construction for public entities in Virginia and for statutes establishing the framework for the procurement and contracting of those projects.

##### A. *The Upper Occoquan Sewage Authority Cases*

Two of the most notable decisions related to contracts and claims on public projects arose from a single controversy involving a public authority (“the Authority”) and a general contractor (the “General Contractor”) regarding the construction of a wastewater treatment facility in Fairfax County.<sup>28</sup> The General Contractor asserted multiple claims against the Authority, which was a public entity subject to the Virginia Public Procurement Act (“VPPA”), Virginia Code sections 2.2-4300 to -4377.<sup>29</sup>

The case has a detailed procedural history, but, in general terms, the General Contractor submitted certain claims for addi-

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25. 39 Va. App. 484, 574 S.E.2d 298 (Ct. App. 2002).

26. *Id.* at 489, 574 S.E.2d at 300.

27. *Id.* at 502, 574 S.E.2d at 306 (emphasis in original).

28. See *Blake Constr. Co. v. Upper Occoquan Sewage Auth.*, 266 Va. 564, 568–69, 587 S.E.2d 711, 713–14 (2003); *Upper Occoquan Sewage Auth. v. Blake Constr. Co.*, 266 Va. 582, 584–85, 587 S.E.2d 721, 722 (2003).

29. See *Blake Constr.*, 266 Va. at 569, 587 S.E.2d at 713–14; *Upper Occoquan*, 266 Va. at 584–85, 587 S.E.2d at 722–23.

tional compensation and time to the Authority for consideration related to the scope and timing of completion of the work, and to a large extent, those claims were denied.<sup>30</sup> From there, the General Contractor filed several suits in circuit court challenging those adverse rulings and seeking a declaration from the court that parts of its contract with the Authority violated Virginia Code section 2.2-4335(A) and were void as against public policy.<sup>31</sup> The circuit court, through pre-trial proceedings and a trial on certain pleas in bar of the Authority, issued rulings to which both parties objected, resulting in appeals from both.<sup>32</sup> The disputes came to a head with two opinions from the Supreme Court of Virginia issued in October 2003.<sup>33</sup>

These two decisions addressed a number of common issues that arise in claims related to public construction projects, including the scope and enforceability of “no damage for delay” provisions in Virginia public contracts and requirements for providing notice to the owner of claims for changes in the work.

### 1. Scope of the “No Damage for Delay” Prohibition in Public Contracts Under Virginia Code Section 2.2-4335(A)

The General Contractor asserted that its contract with the Authority ran afoul of Virginia Code section 2.2-4335(A).<sup>34</sup> This section, in pertinent part, prohibits:

Any provision . . . [of a public construction] contract that purports to waive, release, or extinguish the rights of a contractor to recover costs or damages for unreasonable delay . . . if and to the extent the delay is caused by acts or omissions of the public body, its agents or employees and due to causes within their control . . . .<sup>35</sup>

A provision within the contract at issue provided that the General Contractor could obtain “direct costs proximately and fore-

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30. See *Blake Constr.*, 266 Va. at 569, 587 S.E.2d at 714; *Upper Occoquan*, 266 Va. at 585, 587 S.E.2d at 722.

31. See *Blake Constr.*, 266 Va. at 569, 587 S.E.2d at 714; *Upper Occoquan*, 266 Va. at 585, 587 S.E.2d at 722–23.

32. See *Blake Constr.*, 266 Va. at 570, 587 S.E.2d at 714; *Upper Occoquan*, 266 Va. at 586–87, 587 S.E.2d at 723.

33. See *Blake Constr.*, 266 Va. 564, 587 S.E.2d 711; *Upper Occoquan*, 266 Va. 582, 587 S.E.2d 721.

34. See *Blake Constr.*, 266 Va. at 568, 572, 587 S.E.2d at 713, 715–16.

35. VA. CODE ANN. § 2.2-4335(A) (Repl. Vol. 2005).



seeably resulting from unreasonable delay caused by the Owner or the Engineer due to causes within their control.”<sup>36</sup> The contract, however, went on to define “unreasonable delay” in a manner that the General Contractor asserted violated Virginia Code section 2.2-4335(A), including limiting recovery of costs to circumstances where the Authority exercised “bad faith, malice, gross negligence or abandonment” of the contract.<sup>37</sup> The Authority asserted that as long as the parties did not contract to fully extinguish all monetary relief for the contractor who was victim to some type of unreasonable delay, then no violation of the statutory prohibition occurred.<sup>38</sup>

The Supreme Court of Virginia disagreed with the Authority.<sup>39</sup> Taking the General Contractor’s allegations as true in reviewing the trial court’s ruling in favor of the Authority’s demurrer on this issue, the court held that the General Assembly’s use of the word “any” in its prohibition of “no damages for delay” provisions was “instructive and mandatory,” and that “[i]f an expansion or construction of the blanket prohibition found in Code § 2.2-4335(A) is to be created, that authority must come from the General Assembly and not the parties or the judiciary.”<sup>40</sup> The court concluded that:

In the context of a contract under the VPPA, unreasonable delay damages are to be determined by the court under the facts and circumstances of each case. Contract limitations on the contractor’s right to damages for unreasonable delay are thus forbidden except to the extent enumerated by the General Assembly under Code § 2.2-4335(B) or other specific statutory enactment.<sup>41</sup>

## 2. The Authority’s Application for “Costs” Under Virginia Code Section 2.2-4335(C)

Part of the Authority’s appeal was in response to the circuit court’s denial of its application for the costs incurred in defending against certain claims by the General Contractor, under Virginia

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36. *Blake Constr.*, 266 Va. at 573, 587 S.E.2d at 716.

37. *Id.* at 574, 587 S.E.2d at 716–17.

38. *Id.* at 575, 587 S.E.2d at 717.

39. *Id.*

40. *Id.* at 576, 587 S.E.2d at 717–18.

41. *Id.* at 577, 587 S.E.2d at 718.

Code section 2.2-4335(C).<sup>42</sup> In particular, the Authority asserted that a claim that the General Contractor had brought for “material breach” (a claim that the Authority believed the circuit court had dismissed as a result of pre-trial challenge by the Authority) was actually one for “delay damages” and, therefore, the Authority should be entitled to its costs expended in defending against it.<sup>43</sup> Virginia Code section 2.2-4335(C) provides that:

A contractor making a claim against a public body for costs or damages due to the alleged delaying of the contractor in the performance of its work under any public construction contract shall be liable to the public body and shall pay it for a percentage of all costs incurred by the public body in investigating, analyzing, negotiating, litigating and arbitrating the claim, which percentage shall be equal to the percentage of the contractor’s total delay claim that is determined through litigation or arbitration to be false or to have no basis in law or in fact.<sup>44</sup>

The Supreme Court of Virginia denied the Authority’s argument based upon there not being any order in the record providing that the “material breach” claim actually had been dismissed, even though there were some “on the record” statements by the circuit court judge to that effect.<sup>45</sup> Thus, those claims, in the eyes of the court, were within a group of claims that had been non-suited by the General Contractor and on which there had been no ruling on the merits.<sup>46</sup>

### 3. Notice Provisions Related to Decrease in Contract Amount for Work Deleted by Owner

On another issue, the circuit court granted the Authority’s plea in bar which resulted in the dismissal of certain claims of the General Contractor arising from the Authority’s unilateral removal of work from the contract and its associated reduction in contract amount.<sup>47</sup> The General Contractor argued that, because there was no specific provision within the contract addressing such claims, no notice was required by it to preserve its rights to

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42. See *Upper Occoquan*, 266 Va. at 587, 587 S.E.2d at 723.

43. *Id.* at 588, 587 S.E.2d at 724.

44. VA. CODE ANN. § 2.2-4335(C) (Repl. Vol. 2005).

45. See *Upper Occoquan*, 266 Va. at 588–89, 587 S.E.2d at 724–25.

46. *Id.* at 589, 587 S.E.2d at 725.

47. See *Blake Constr.*, 266 Va. at 578, 587 S.E.2d at 719.

challenge those reduction amounts.<sup>48</sup> The Supreme Court of Virginia disagreed and ruled that the Authority's actions "had the effect of converting the [General Contractor's] claim into one for additional funds," which was subject to a specific notice requirement within the contract.<sup>49</sup>

### B. *Notice of Claims: The Bland County Service Authority Case*

The Supreme Court of Virginia also addressed the issue of "notice" in the context of a contract under the VPPA in *Welding, Inc. v. Bland County Service Authority*.<sup>50</sup> In this instance, the completion of the project was delayed, and the owner, the Bland County Service Authority ("the Authority"), withheld funds from the contractor as liquidated damages.<sup>51</sup> The contractor originally filed the case in federal court in West Virginia.<sup>52</sup> After the federal court dismissed the case, the contractor re-filed in a Virginia circuit court.<sup>53</sup> The circuit court dismissed the contractor's case on demurrer due to issues with timeliness of filing suit and because the amended motion for judgment did not reflect that the contractor had ever given the Authority written notice of its intention to file a claim.<sup>54</sup>

The contractor's amended motion for judgment stated that the Authority had prior written notice of the contractor's intention to file a claim and, according to the Supreme Court of Virginia, the pleading cited "portions of the written minutes of a progress meeting."<sup>55</sup> The pleading did not assert that they constituted "written notice."<sup>56</sup>

The Supreme Court of Virginia ruled that, for purposes of the demurrer, the amended motion for judgment sufficiently stated that notice had been provided, and that whether the notice provisions of the VPAA had been met was a "determination to be made

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48. *Id.*

49. *Id.*

50. 261 Va. 218, 222–23, 541 S.E.2d 909, 911 (2001).

51. *Id.* at 222, 541 S.E.2d at 911.

52. *Id.*

53. *Id.*

54. *See id.*

55. *Id.* at 227, 541 S.E.2d at 914.

56. *Id.*

at trial.”<sup>57</sup> In summing up its reversal of the circuit court’s dismissal of the contractor’s amended motion for judgment on three notice-related points, the court stated that “the dispute here involves interpretation of the various contract provisions and application of the construed contract to the facts of this case. That is a matter for trial. As we have said, resolution of such issues is not appropriate for determination on demurrer.”<sup>58</sup>

### C. Oral Agreements with Public Entities

In *King George County Service Authority v. Presidential Service Co. Tier II*,<sup>59</sup> the Supreme Court of Virginia confronted the issue of whether a contract entered into by the King George County Service Authority was enforceable.<sup>60</sup> The court concluded that there was not sufficient authority in the Authority’s records allowing it or its general manager to enter into the contract to purchase a privately owned utility system.<sup>61</sup> The court “reiterated ‘that those who deal with public officials must, at their peril, take cognizance of their power and its limits.’”<sup>62</sup> The court, however, concluded that there was sufficient authority in the records for the Authority to enter into a letter agreement to purchase the system, and thus the subsequent contract was lawful and enforceable.<sup>63</sup>

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57. *Id.*

58. *Id.* at 229, 541 S.E.2d at 915. The Supreme Court of Virginia in *Welding, Inc.* also addressed a procedural issue as to whether the tolling provision of Virginia Code section 8.01-229(E)(1) would invalidate the time limitations of the VPPA (previous Virginia Code sections 11-69(D) and -70(E)), where a suit was brought and then voluntarily dismissed and brought again at a time outside of those VPPA provisions. *Id.* at 224–25, 541 S.E.2d at 912–13. The court concluded that the two statutes were intended to “address separate matters,” and that the VPPA provisions were “not specific statutes which take precedence over the general tolling provision of Code § 8.01-229(E)(1).” *Id.* at 225, 541 S.E.2d at 912. The court also rejected the argument that Virginia Code section 11-69(D) was a statute of repose that could not be tolled. *Id.* at 225–26, 541 S.E.2d at 913.

59. 267 Va. 448, 593 S.E.2d 241 (2004).

60. *See id.* at 454, 593 S.E.2d at 241–42.

61. *See id.* at 455–56, 593 S.E.2d at 245.

62. *Id.* at 454, 593 S.E.2d at 244 (quoting *County of York v. King’s Villa, Inc.*, 226 Va. 447, 450, 309 S.E.2d 332, 334 (1983)).

63. *See id.* at 456, 593 S.E.2d at 245.

## D. Significant Statutory Changes

### 1. Recodification of VPPA

Effective October 1, 2001, the General Assembly re-codified the VPPA by moving it from Title 11 of the Virginia Code to Title 2.2.<sup>64</sup>

### 2. Government's Bad Faith Denial of Claims

In 2001, the General Assembly added a provision to Virginia Code section 2.2-4335, which provides a corollary to the provision discussed in the *Upper Occoquan* case above concerning payments for the costs the government expends defending against meritless claims.<sup>65</sup> This new provision, which is codified at Virginia Code section 2.2-4335(D), provides that:

A public body denying a contractor's claim for costs or damages due to the alleged delaying of the contractor in the performance of work under any public construction contract shall be liable to and shall pay such contractor a percentage of all costs incurred by the contractor to investigate, analyze, negotiate, litigate and arbitrate the claim. The percentage paid by the public body shall be equal to the percentage of the contractor's total delay claim for which the public body's denial is determined through litigation or arbitration to have been made in bad faith.<sup>66</sup>

### 3. Public-Private Education Facilities and Infrastructure Act of 2002

In 2002, the General Assembly added an alternative method by which localities can procure the construction of educational and other public facilities when it adopted the Public-Private Education Facilities and Infrastructure Act of 2002 ("PPEA").<sup>67</sup> Similar

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64. Act of Apr. 5, 2001, ch. 844, 2001 Va. Acts 1428 (codified as amended at VA. CODE ANN. §§ 2.2-4300 to -4366 (Repl. Vol. 2005)).

65. Act of Apr. 5, 2001, ch. 324, 2001 Va. Acts 285 (codified as amended at VA. CODE ANN. § 2.2-4335(D) (Repl. Vol. 2005)); see *supra* notes 42-46 and accompanying text.

66. VA. CODE ANN. § 2.2-4335(D) (Repl. Vol. 2005).

67. See Act of Apr. 6, 2002, ch. 571, 2002 Va. Acts 770 (codified at VA. CODE ANN. §§ 56-575.1 to -575.16 (Repl. Vol. 2003 & Cum. Supp. 2005)).

to the Public-Private Transportation Act enacted in the 1990s, the PPEA “[a]uthorizes private entities to acquire, design, construct, improve, renovate, expand, equip, maintain or operate qualifying projects after obtaining approval of a public entity that has the power to take such actions with respect to such projects.”<sup>68</sup>

## V. CONTRACTS

The Supreme Court of Virginia has addressed one commonplace problem with construction contracts—the effect when a contract is not signed by one of the parties.<sup>69</sup> In *G&M Homes II, Inc. v. Pearson*, the court held that a contract not signed by the “seller” was incomplete and unenforceable.<sup>70</sup> The contract provided two signature lines for the “seller,” which was comprised of two different individuals.<sup>71</sup> The second individual “seller” never signed the contract.<sup>72</sup> The court thus upheld the trial court’s summary judgment in favor of the “seller” denying the purchaser’s request for specific performance.<sup>73</sup>

## VI. FRAUD IN CONSTRUCTION

### A. *Statement About Future Performance / False Advertisement*

An ever-increasing type of allegation in construction cases relates to fraud or false advertising regarding the quality or nature of products, such as the Exterior Insulation Finishing Systems (“EIFS”) or “synthetic stucco” that are used in construction. The Supreme Court of Virginia addressed such a situation in *McMillion v. Dryvit Systems, Inc.*<sup>74</sup> As to the fraud claim, the court held that statements about the future performance, as opposed to present or pre-existing qualities, of a good are not actionable as

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68. S.B. 681, Va. Gen. Assembly, Summary as passed (Reg. Sess. 2002).

69. See *G&M Homes II, Inc. v. Pearson*, 263 Va. 107, 109, 556 S.E.2d 743, 744 (2002).

70. *Id.*

71. See *id.* at 110, 556 S.E.2d at 745.

72. *Id.*

73. *Id.* at 115, 556 S.E.2d at 748.

74. 262 Va. 463, 552 S.E.2d 364 (2001).

fraud.<sup>75</sup> The court concluded that a misrepresentation must be of an existing fact and not the mere expression of an opinion, which, however strong and positive the language may be, is not fraud.<sup>76</sup> Whether the statements concerned an “existing fact” is to be determined by interpreting all of the surrounding circumstances and is not subject to a bright line test.<sup>77</sup>

### B. *Criminal Aspects*

As seen in a recent Supreme Court of Virginia decision, fraud in construction can have criminal ramifications.<sup>78</sup> *Holsapple v. Commonwealth* involved the application of Virginia Code section 18.2-200.1, which makes it a larceny to accept money for construction services yet fail to perform or return the advanced funds “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.”<sup>79</sup>

The debate in *Holsapple* focused on whether the Commonwealth had proven that there was sufficient notice to the defendant contractor.<sup>80</sup> The defendant argued that “actual receipt” of the notice must be proven.<sup>81</sup> The Supreme Court of Virginia held that it was sufficient evidence of “notice” that it was “sent by certified mail, return receipt requested.”<sup>82</sup> Thus, the conviction was upheld.<sup>83</sup>

### C. *Fraud Against Taxpayers Act*

A recent legislative enactment that does not directly implicate the construction industry, but which has significant ramifications for those working on projects where the Commonwealth of Virginia is the distributor of funds, is the Fraud Against Taxpayers

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75. *See id.* at 472, 552 S.E.2d at 369.

76. *See id.*

77. *Id.* at 471, 552 S.E.2d at 369.

78. *See Holsapple v. Commonwealth*, 266 Va. 593, 587 S.E.2d 561 (2003).

79. *See id.* at 595, 587 S.E.2d at 562.

80. *See id.* at 598–99, 587 S.E.2d at 564–65.

81. *Id.* at 599, 587 S.E.2d at 564.

82. *Id.*

83. *Id.* at 604, 587 S.E.2d 567.

Act ("FATA"), which went into effect on January 1, 2003, and is codified at Virginia Code sections 8.01-216.1 to -216.19.<sup>84</sup> Under FATA, there are various acts that can lead to civil penalty, including presenting a false or fraudulent claim for payment or taking steps to get such a false or fraudulent claim paid by the Commonwealth.<sup>85</sup>

## VII. GOODS/IMPLIED WARRANTY CLAIMS

### A. Privity Issues and Consequential Versus Direct Damages

The Supreme Court of Virginia's decision in *Beard Plumbing & Heating, Inc. v. Thompson Plastics, Inc.*<sup>86</sup> left unanswered questions about the interplay of the anti-privity statute within Virginia's version of the Uniform Commercial Code ("UCC"), Virginia Code section 8.2-318, and the recovery of consequential damages for breach of implied warranties provided for by the UCC under Virginia Code section 8.2-715.<sup>87</sup> In *Pulte Home Corp. v. Parex, Inc.*,<sup>88</sup> the Supreme Court of Virginia clarified that where the damages for breach of implied warranty of merchantability are "consequential," privity is required.<sup>89</sup>

In *Pulte Home Corp.*, the home builder settled claims with the home purchaser related to the use of an EIFS product on a new home.<sup>90</sup> The builder sought recovery against the manufacturer of the EIFS product with whom it did not have privity, there being an intervening distributor in the chain of sale.<sup>91</sup> The circuit court sustained the defendant's demurrer on the basis that the damages being sought were consequential and were not recoverable in the absence of privity, as either consequential or direct damages required privity for recovery under Virginia Code section 8.2-715.<sup>92</sup>

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84. See VA. CODE ANN. §§ 8.01-216.1 to -216.19 (Cum. Supp. 2005).

85. See *id.* § 8.01-216.3 (Cum. Supp. 2005).

86. 254 Va. 240, 491 S.E.2d 731 (1997).

87. See *Pulte Home Corp. v. Parex, Inc.*, 265 Va. 518, 524-26, 579 S.E.2d 188, 191-92 (2003).

88. 265 Va. 518, 579 S.E.2d 188.

89. *Id.* at 527-28, 579 S.E.2d at 192-93.

90. *Id.* at 522 & n.4, 579 S.E.2d at 190 & n.4.

91. See *id.* at 521, 579 S.E.2d at 189.

92. See *id.* at 524, 579 S.E.2d at 191.



The Supreme Court of Virginia affirmed the dismissal, concluding that the trial court had found the damages to be "consequential"—a ruling made as a matter of law.<sup>93</sup> Given the intervening event—the builder's liability to the homeowner—the court concluded that the damages being sought were "consequential," and privity was required for recovery.<sup>94</sup>

### VIII. INDEMNIFICATION

*Pulte Home Corp.* also addressed an issue that has been raised increasingly in construction cases, that being the status of implied and equitable indemnification under Virginia law.<sup>95</sup> The Supreme Court of Virginia clarified that, in order for a party, such as the home builder in that case, to recover against another party on the theory of "implied indemnity," there must first be a "contractual relationship" between the parties.<sup>96</sup> Such a relationship did not exist in that case between the builder and product manufacturer, and thus the court affirmed the dismissal of the implied indemnity claim.<sup>97</sup>

Likewise, the court affirmed the dismissal of the home builder's claim for "equitable indemnification" because there had been no "previous determination" that the manufacturer was negligent.<sup>98</sup> In order for such a claim to survive, there must have been active negligence on the part of the defendant and passive negligence on the part of the plaintiff, both resulting in the harm to a particular third-party to whom the passive tortfeasor was liable.<sup>99</sup>

### IX. LICENSING

Another prevalent issue in construction cases during the first part of this decade has been that of the status of the contractor's license with the Contractor's Board of the Virginia Department of

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93. *Id.* at 526, 579 S.E.2d at 192.

94. *Id.* at 527-28, 579 S.E.2d at 192-93.

95. *Id.* at 528-29, 579 S.E.2d at 193.

96. *Id.* at 528, 579 S.E.2d at 193.

97. *Id.*

98. *Id.*

99. *Id.* at 528-29, 579 S.E.2d at 193.

Professional and Occupational Regulation (“DPOR”). As these issues have arisen more, the General Assembly has been called upon to modify certain portions of Title 54.1 relating to contractor licensing.<sup>100</sup> As a result, there have been several changes to the Virginia Code related to contractor licensing in the last several years:

1. In 2005, the General Assembly modified Virginia Code section 54.1-1100 to raise the limits for a Class B license for a single contract from \$70,000 to \$120,000, and the twelve-month cap from \$500,000 to \$750,000.<sup>101</sup>

2. In 2005, the General Assembly raised the maximum amount of a single claim against the Contractor’s Recovery Fund from \$10,000 to \$20,000.<sup>102</sup>

3. In 2004, the General Assembly amended Virginia Code section 54.1-1115 to impose daily sanctions for anyone doing work without the proper license classification for such work.<sup>103</sup>

4. In 2003, the General Assembly clarified the language of Virginia Code section 54.1-1115(C) to state that:

No person shall be entitled to assert the lack of licensure or certification as required by this chapter as a defense to any action at law or suit in equity if the party who seeks to recover from such person gives substantial performance within the terms of the contract in good faith and without actual knowledge *that a license or certificate was required by this chapter to perform the work for which he seeks to recover payment.*<sup>104</sup>

The emphasized portion of that statute replaced language that stated that the actual knowledge had to be “of the licensure or certification requirements of this chapter.”<sup>105</sup>

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100. See generally REPORT OF THE DEPT’ OF PROF’L AND OCCUPATIONAL REGULATION ON THE ESTABLISHMENT OF A PILOT PROGRAM FOR LOCAL ASSISTANCE WITH THE INVESTIGATION OF COMPLAINTS AND THE IMPLEMENTATION OF FINAL DISCIPLINARY ORDERS OF THE BOARD OF CONTRACTORS, S. Doc. No. 16 (2004).

101. Act of Mar. 21, 2005, ch. 348, 2005 Va. Acts 454 (codified as amended at VA. CODE ANN. § 54.1-1100 (Repl. Vol. 2005)).

102. Act of Mar. 20, 2005, ch. 252, 2005 Va. Acts 339 (codified as amended at VA. CODE ANN. § 54.1-1123(A) (Repl. Vol. 2005)).

103. Act of Mar. 15, 2004, ch. 131, 2004 Va. Acts 201 (codified as amended at VA. CODE ANN. § 54.1-1115(B) (Repl. Vol. 2005)).

104. Act of Mar. 16, 2003, ch. 429, 2003 Va. Acts 539 (codified as amended at VA. CODE ANN. § 54.1-1115(C) (Repl. Vol. 2005) (emphasis added)).

105. VA. CODE ANN. § 54.1-1115(C) (Repl. Vol. 2002).

## X. MECHANIC'S LIENS

A. *Judicial Decisions*

Practitioners who file mechanic's liens became more concerned about the "150-day" rule under Virginia Code section 43-4 after the Supreme Court of Virginia's ruling in *Carolina Builders Corp. v. Cenit Equity Co.*<sup>106</sup> In that decision, the court affirmed the dismissal of a memorandum of mechanic's lien in its entirety because some of the amounts being claimed were incurred prior to the 150-day window provided for by Virginia Code section 43-4.<sup>107</sup>

In a more recent decision in *Reliable Constructors, Inc. v. CFJ Properties*,<sup>108</sup> however, the Supreme Court of Virginia held that the circuit court, under Virginia Code section 43-15, must allow the mechanic's lien claimant the opportunity to present evidence that the inclusion of amounts prior to the 150-day limit was an error.<sup>109</sup> Without citing the *Carolina Builders* decision, the court declined to dismiss the bill of complaint to enforce the memorandum of mechanic's lien where the claimant, a subcontractor, had included a \$250 fine it incurred for an OSHA citation within the amounts being claimed in its memorandum of mechanic's lien.<sup>110</sup> The circuit court had dismissed the entire lien under *Carolina Builders*, refusing the claimant's argument that it was a mere "clerical error" that could be corrected under Virginia Code section 43-15.<sup>111</sup>

The Supreme Court of Virginia concluded that the claimant should be provided with an opportunity to present evidence that it was a mere inaccuracy and not a willful attempt to include amounts that were in violation of Title 43.<sup>112</sup> Thus, the court reversed and remanded the case to the circuit court for determination of the applicability of Virginia Code section 43-15.<sup>113</sup>

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106. 257 Va. 405, 512 S.E.2d 550 (1999).

107. *Id.* at 412, 512 S.E.2d at 553.

108. 263 Va. 279, 559 S.E.2d 681 (2002).

109. *Id.* at 281-82, 559 S.E.2d at 682-83.

110. *See id.* at 280-82, 559 S.E.2d at 682-83.

111. *Id.* at 281, 559 S.E.2d at 682.

112. *See id.* at 282, 559 S.E.2d at 682-83.

113. *Id.*, 559 S.E.2d at 683.

## B. *Mechanic's Lien Legislation*

The General Assembly has made several modifications to the mechanic's lien statutes within Title 43 in recent years:

1. In 2003, the General Assembly amended Virginia Code section 43-4 to require a mechanic's lien claimant who is the "general contractor" to file, along with its memorandum of mechanic's lien, a certification that it has mailed a copy of the memorandum of mechanic's lien to the owner's last known address.<sup>114</sup>

2. In 2002, the General Assembly amended Virginia Code section 43-11 to require that a second notice of the actual amount of the subcontractor's or supplier's claim for payment due be given to the owner in order for the owner to be made personally liable to the subcontractor or supplier.<sup>115</sup>

3. In 2002, the General Assembly amended Virginia Code section 43-3 to clarify that a lien claimant can include reasonable rental and use value of equipment when it calculates the amount of its labor and materials.<sup>116</sup>

## XI. NEW HOME WARRANTY

Following the Supreme Court of Virginia's ruling in *Vaughn, Inc. v. Beck*,<sup>117</sup> the General Assembly, in 2002, amended Virginia's warranty statute for the sale of new homes, Virginia Code section 55-70.1.<sup>118</sup> In *Vaughn*, the Supreme Court of Virginia had read Virginia Code section 55-70.1 not to have a requirement that the homeowner provide written notice of the breach of warranty within one year after the homeowner took title or possession.<sup>119</sup> The 2002 legislative amendment to the statute provides that such

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114. Act of Mar. 19, 2003, ch. 698, 2003 Va. Acts 931 (codified as amended at VA. CODE ANN. § 43-4 (Cum. Supp. 2005)).

115. Act of Apr. 7, 2002, ch. 772, 2002 Va. Acts 1285 (codified as amended at VA. CODE ANN. § 43-11 (Repl. Vol. 2002)).

116. Act of Apr. 1, 2002, ch. 273, 2002 Va. Acts 351 (codified as amended at VA. CODE ANN. § 43-3 (Cum. Supp. 2005)).

117. 262 Va. 673, 554 S.E.2d 88 (2001).

118. See Act of Apr. 8, 2002, ch. 795, 2002 Va. Acts 1324 (codified as amended at VA. CODE ANN. § 55-70.1 (Repl. Vol. 2003 & Cum. Supp. 2005)).

119. 262 Va. at 678-80, 554 S.E.2d at 90-91.

written notice within the one-year window is a prerequisite to recovery on the statutory warranty.<sup>120</sup>

## XII. STATUTE OF LIMITATIONS

### A. *False Advertising*

In *Parker-Smith v. Sto Corp.*,<sup>121</sup> the Supreme Court of Virginia, in a claim related to the sale of an allegedly defective EIFS product, held that the catch-all statute of limitations of Virginia Code section 8.01-248 applied to a claim for false advertising.<sup>122</sup> Thus, the court upheld the trial court's dismissal of the claim because it was filed too late.<sup>123</sup>

### B. *Enforcement of OSHA Citations in Virginia*

The enforcement of citations within the Virginia Department of Labor and Industry's ("DOLI") enforcement of the occupational safety and health laws is an issue that impacts the construction industry greatly. The time limit, if any, for the Commonwealth to file a bill of complaint to enforce a citation that it has previously issued was an issue in *Barr v. S.W. Rodgers Co.*<sup>124</sup>

In *Barr*, the contractor challenged the fifteen-month delay from the date it filed its notice of contest to the date that the commissioner of DOLI filed its bill of complaint to enforce the citation.<sup>125</sup> The Court of Appeals of Virginia refused to dismiss the bill of complaint for being filed too late.<sup>126</sup> The court did recognize, however, that there was not an unlimited amount of time for the commissioner to file under Virginia Code section 40.1-49.4.<sup>127</sup>

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120. See VA. CODE ANN. § 55-70.1(D) (Repl. Vol. 2003 & Cum. Supp. 2005).

121. 262 Va. 432, 551 S.E.2d 615 (2001).

122. *Id.* at 434, 551 S.E.2d at 616.

123. See *id.*

124. 34 Va. App. 50, 57, 537 S.E.2d 620, 623 (Ct. App. 2000).

125. *Id.* at 56-57, 537 S.E.2d at 623.

126. *Id.* at 58, 537 S.E.2d at 624.

127. *Id.* Subsequently, there have been several circuit court decisions further exploring this issue. Two reported decisions have refused to dismiss bills of complaint. See *Davenport v. English Constr. Co.*, 66 Va. Cir. 77, 80-82 (Cir. Ct. 2004) (Roanoke City) (allowing a

### XIII. CONCLUSION

As is apparent from this survey, construction law covers an array of different legal topics from indemnity to contractor licensing and from mechanic's liens to claims on public construction contracts. During the first five years of this decade, the courts and the legislature have continued to face challenging new issues and the application of old principles in new settings. While many disputes in the construction arena are being resolved through alternative measures such as mediation and arbitration, it is apparent through decisions such as *Pulte Home Corp.*, *American Safety Casualty Insurance*, and the *Upper Occoquan Sewage Authority* cases that the courts of the Commonwealth will continue to face challenging and interesting construction disputes and will be asked to define the respective rights of the variety of players in the construction business. Likewise, with legislation related to the PPEA, contractor licensing, and mechanic's lien claims, it is apparent that the General Assembly will also be asked to define and refine the parameters of the many statutes that impact the construction business.

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thirty-four month delay in filing enforcement action); *Davenport v. Thor, Inc.*, 62 Va. Cir. 237, 238 (Cir. Ct. 2003) (Montgomery County) (allowing a thirty-three month delay in filing enforcement action). In one reported decision, however, a circuit court did dismiss the bill of complaint. *See Davenport v. Thor, Inc.*, 62 Va. Cir. 228, 230 (Cir. Ct. 2003) (Martinsville City) (ruling that a forty-month delay in filing enforcement action was unreasonable).

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