

1989

Annual Survey of Virginia Law: Construction Law

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Recommended Citation

Daniel L. Fitch, *Annual Survey of Virginia Law: Construction Law*, 23 U. Rich. L. Rev. 541 (1989).

Available at: <http://scholarship.richmond.edu/lawreview/vol23/iss4/7>

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CONSTRUCTION LAW

*Daniel L. Fitch**

I. INTRODUCTION

This article examines changes in the statutes affecting the area of construction law made by the General Assembly of Virginia in 1988 and 1989. This article will also examine judicial decisions from 1987, 1988 and the first half of 1989 that have affected construction law in the Commonwealth.

Construction law is still an area where the parties primarily govern themselves through contract provisions.¹ The General Assembly and the judiciary of Virginia continue to largely leave parties in privity to their own devices vis-a-vis the written contract between them. The main function of the General Assembly and courts is to enforce the relevant contracts or, in certain cases, to prevent the expansion of liability of the parties to those beyond the privity of the contract. One of the few areas of activism for the legislature and courts in the field of construction law has been to regulate those qualified to be contractors, subcontractors, architects, etc., and to protect the public in certain areas.

II. LEGISLATION

The General Assembly normally makes relatively few changes affecting the relationship between parties in a construction contract. Since construction law is so dominated by the contractual relationships of the parties involved in the respective projects, the main thrust of the legislation affecting this area has generally been to set certain standards and procedures to protect the state and

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1. See, e.g., *C & P Telephone v. Sisson & Ryan, Inc.*, 234 Va. 492, 362 S.E.2d 723 (1987). The Supreme Court of Virginia said, "[w]e are committed to the view that parties may contract as they so choose so long as what they agree to is not forbidden by law or against public policy." *Id* at 503, 362 S.E.2d at 729.

the public as opposed to the regulation of the contracting parties themselves.

A. *The 1988 General Assembly*

1. The Virginia Public Procurement Act²

The General Assembly amended the procedure for the procurement of design-build or construction management contracts by public bodies. The statute now requires offerors to supply their qualifications to the Commonwealth.³ Also, the Commonwealth may now only choose up to five offerors to submit proposals for the contract.⁴ Under the proper circumstances, construction management contracts can result in substantial savings to the owner while in other circumstances, it is to the owner's advantage to look to the contractor as both the building and design professional. The 1988 changes streamline the procurement process for design-build or construction management contracts by requiring qualifications to be established prior to bidding.

2. Subdivision Ordinances

The 1988 General Assembly enacted a major change in the code sections regulating subdivision ordinances by adding a provision designed to assist subdivision developers who pay for the road improvements they perform.⁵ This section provides that a subdivision ordinance may include a provision reimbursing a developer who performs reasonable and necessary improvements outside his property limits.⁶ The work must be "substantially generated and reasonably required by the construction or improvement of his subdivision or development"⁷ and approved by the locality's governing body in order to qualify for annual reimbursements from the locality.⁸ This should diminish the localities' cost for road improvements since they can now reimburse the developers for improvements instead of having to contract with road builders to do the work. This change should also increase the developers' incentive to

2. VA. CODE ANN. §§ 11-35 to -80 (Repl. Vol. 1989).

3. *Id.* § 11-41.2(B).

4. *Id.*

5. *Id.* § 15.1-466(E).

6. *Id.*

7. *Id.* § 15.1-466(E).

8. *Id.* § 15.1-466(E)(a).

make quality improvements since they will be reimbursed for the work.

The subdivision code provisions were also amended to allow a subdivision ordinance to require developers to pay their pro-rata share of any cost incurred for off-site water improvements.⁹ This ordinance merely added water improvements to the pre-existing requirement for pro-rata payments by developers for sewage and drainage improvements.¹⁰ This will help keep the localities' cost down by making the developers pay for improvements made necessary by the developers' construction.

3. Housing

The General Assembly amended the code in order to include nursing care facilities and nursing homes under the Virginia Housing Authorities Law.¹¹ Section 36-47 of the Code of Virginia¹² was amended to include any nursing care facility or any nursing home as defined in section 32.1-123¹³ as a residential building as used in the chapter. Section 36-55.26¹⁴ goes even further, stating that for the purpose of the Virginia Housing Development Act,¹⁵ housing developments, housing project, and residential housing include medical and related facilities for the residence and care of the aged. These changes give the housing authorities around the state the authority to supervise the construction, repair, and alteration of nursing facilities in the Commonwealth.¹⁶

9. *Id.* § 15.1-466(A)(j).

10. *Id.*

11. *Id.* §§ 36-1 to 36-55.6 (Repl. Vol. 1984 & Cum. Supp. 1989).

12. *Id.* § 36-47.

13. *Id.* § 32.1-123 (Repl. Vol. 1985). This section provides that:

'Nursing home' means any facility or any identifiable component of any facility in which the primary function is the provision, on a continuing basis, of nursing services and health-related services for the treatment and inpatient care of two or more nonrelated individuals, including facilities known by varying nomenclature or designation such as convalescent homes, skilled care facilities, intermediate care facilities, extended care facilities and infirmaries.

Id.

14. *Id.* § 36-55.26 (Cum. Supp. 1989).

15. *Id.* §§ 36-55.24 to -55.52 (Repl. Vol. 1984 & Cum. Supp. 1989).

16. *Id.* §§ 36-19, -55.30.

4. Contractors

The 1988 General Assembly made several amendments to the code specifically directed at the construction industry. Two of these should have relatively little impact on the construction industry as a whole. Now, it is not necessary to be licensed as an architect or professional engineer in order to prepare the plans for churches with an occupancy load of 100 or fewer.¹⁷ The legislature also provided for the publication of a roster containing the names and places of business of all licensed and registered contractors which would be available at cost to any interested party.¹⁸

In an amendment which may have slightly more important impact on the industry, the definition of judgment under the Contractor Transaction Recovery Act¹⁹ was expanded. A judgment now includes "an order of a United States Bankruptcy Court declaring a claim against a regulant who is in bankruptcy to be a 'debt non-dischargeable in bankruptcy.'"²⁰ Now, even if a claim against a bankrupt contractor has not been reduced to a judgment by a Virginia court of competent jurisdiction, a claimant can still use the Virginia Contractor Transaction Recovery Act's recovery provision if the claim has been declared non-dischargeable in a United States Bankruptcy Court.²¹ This will allow a claimant to eliminate the wasteful step of having to secure a judgment from a Virginia court when the merits of the claim have already been decided in a United States Bankruptcy Court.

In 1988, the General Assembly tightened its regulation of asbestos concerns in the construction industry. As of January 1, 1989, a local building department cannot issue a building permit to renovate or demolish a building constructed before 1978 until the building has been inspected by a licensed inspector who determines that either no asbestos is present or that the appropriate abatement action has been taken.²² Similarly, beginning July 1, 1989, an asbestos inspection and abatement plan, if necessary, is required for the issue or renewal of licenses for hospitals²³ or child-

17. *Id.* § 54.1-402(A)(3) (Repl. Vol. 1988).

18. *Id.* § 54.1-1105.

19. *Id.* §§ 54.1-1118 to -1127.

20. *Id.* § 54.1-1118.

21. *Id.* § 54.1-1120.

22. *Id.* § 36-99.7 (Cum. Supp. 1989).

23. *Id.* § 32.1-126.1 (Cum. Supp. 1988).

care centers²⁴ built before 1978.

The General Assembly also amended the chapter of the code which affects asbestos contractors and workers.²⁵ The chapter's definitions were expanded in order to allow the Department of Commerce to regulate the issuance of licenses to supervisors, inspectors, and project designers working with the control and abatement of asbestos.²⁶ The legislature also amended the code to allow the Department of Commerce the discretion to waive the requirement for an asbestos supervisor's license in an emergency involving an unplanned renovation or demolition.²⁷

B. *The 1989 General Assembly*

1. *The Virginia Public Procurement Act*²⁸

In 1989, the General Assembly made several amendments to the Virginia Public Procurement Act which affect the construction industry. In order to keep up with the rising cost of construction, the legislature increased the minimum amount needed for sealed bids on competitive negotiations to \$15,000.00.²⁹ The amount had been \$10,000.00 since sections 11-41 and 11-41.1 were enacted in 1982.³⁰ This amount was undoubtedly increased in order to maintain flexibility and decreased formality in awarding small construction contracts.

The General Assembly also made an addition to section 11-56 which allows contractors working for political subdivisions to receive interest on retainage.³¹ Under the current section 11.56, the contractor in any public construction contract is paid ninety-five percent of his fee when due.³² The remaining five percent is retained to assure faithful performance of the remainder of the contract.³³ The amendment to section 11-56 allows the retainage to be placed in an interest bearing escrow account chosen by the con-

24. *Id.* § 63.1-198.01 (Cum. Supp. 1989).

25. *Id.* § 54.1-500 to -517 (Repl. Vol. 1988).

26. *Id.* § 54.1-500.

27. *Id.* § 54.1-512.

28. VA. CODE ANN. §§ 11-35 to -80 (Repl. Vol. 1989).

29. *Id.* §§ 11-41, -41.1.

30. *Id.* §§ 11-41, -41.1 (Cum. Supp. 1982).

31. *Id.* § 11-56.1 (Repl. Vol. 1989).

32. *Id.* § 11-56 (Repl. Vol. 1985).

33. *Id.*

tractor until the construction is finished.³⁴ The amendment also allows the locality involved to collect a penalty for a late completion of the contract.³⁵ This is a sensible addition to the statute in that the contractor gets the interest value of the money retained by the locality to assure good performance. Allowing the locality to assess a penalty for lateness, however, could result in increased litigation between localities and contractors as to when the locality can actually charge the penalty.

Finally, the legislature amended the Virginia Public Procurement Act to expand the accessibility of alternative forms of security available in section 11-61(B).³⁶ A bidder is now allowed to "furnish a personal bond, or bank or savings and loan association's letter of credit on certain designated funds in the face amount required for the payment bond or performance bond upon the approval by the Attorney General of the attorney for the political subdivision."³⁷ This should ease the difficulty in securing payment or performance bonds, thereby enlarging the pool of potential contractors from which localities may draw while still retaining some security of faithful performance.

In 1989, the Virginia General Assembly made several changes to the code to encourage construction in industry and housing. In an action to help encourage industrial development, the legislature authorized local governments and political subdivisions to participate in a program in which funds would be available to help construct shell buildings for industry and related uses.³⁸

Because of the rapid growth in certain urban areas of the state, the legislature took steps in 1989 to deal with current and potential housing problems. Three additions were made to section 15.1-491³⁹ to allow certain high growth areas in the state to amend their zoning ordinances. These additions to section 15.1-491 give certain localities the power to allow increased development in heavily populated areas if the construction is for affordable housing.⁴⁰

The 1989 General Assembly continued its already strict regulation of asbestos by specifying that it is illegal for anyone not li-

34. *Id.* § 11-56.1 (Repl. Vol. 1989).

35. *Id.*

36. *Id.* § 11-61(B).

37. *Id.*

38. *Id.* § 15.1-18.4.

39. *Id.* § 15.1-491.

40. *Id.* §§ 15-491.2:1, -491.8.

censed to do so by the Department of Commerce to enter into a contract to work on an asbestos project.⁴¹ This bill also provided that the Department of Commerce shall develop training requirements for workers involved in asbestos work.⁴²

Finally, the legislature passed a law specifically directed at contractors. Contractors who violate State Board of Health water regulations will now risk having their licenses suspended or revoked and possibly face up to a \$1,000.00 fine.⁴³

III. JUDICIAL DECISIONS

A. Responsibilities of the Owner

Most jurisdictions, including Virginia, recognize the rule that an owner who supplies plans and specifications for a particular construction project impliedly warrants their correctness and bears responsibility for extra cost incurred by other parties of the contract due to the insufficiency of those plans.⁴⁴ Virginia has been most chary in allowing disclaimers by the owner in order to circumvent this rule, commonly known as the *Spearin* doctrine.⁴⁵ Thus in *Chantilly Construction Corp. v. Department of Highways and Transportation*,⁴⁶ the Court of Appeals of Virginia held that a generally worded disclaimer concerning any change in the specifications was ineffective when the contractor changed the specification due to defects in the plans supplied by the owner.⁴⁷ In the absence of negligence on the contractor's part, he will not be liable for losses or damages resulting from mistakes in the plans or specifications supplied by the owner.⁴⁸

In dictum, the court of appeals implied in *Chantilly* that a disclaimer for an owner's warranty of adequacy of specifications could be approved with specific language and evidence of additional con-

41. *Id.* § 54.1-503 (Repl. Vol. 1988 & Supp. 1989).

42. *Id.* § 54.1-501(A)(3) (Supp. 1989).

43. *Id.* § 54.1-1106.1.

44. *United States v. Spearin*, 248 U.S. 132 (1918); *see also* *Southgate v. Sanford & Brooks Co.*, 147 Va. 554, 137 S.E. 485 (1927) (adopting the *Spearin* doctrine).

45. *See, e.g.*, *Greater Richmond Civic Recreation, Inc. v. A. H. Eging's Sons, Inc.*, 200 Va. 593, 595-96, 106 S.E.2d 595, 596-97 (1959). The court held that a clause guaranteeing materials, workmanship and equipment were held ambiguous enough to present a jury question as to the contractors' liability. *Id.*

46. 6 Va. App. 282, 369 S.E.2d 438 (1988).

47. *Id.* at 293-94, 369 S.E.2d at 444-45.

48. *Id.* at 292, 369 S.E.2d at 444.

sideration for the assumption of the burden by the contractor.⁴⁹ The court in *Chantilly*, however, rightfully refused to find such an agreement based on a generally worded contract provision, instead impliedly maintaining the viability of the *Spearin* doctrine in Virginia.⁵⁰ This reasonably keeps the burden on the owner, who in these situations is better able to ensure the adequacy of the plans he or she provides than is the contractor.

Another area in which an owner may face liability, despite trying to contract out of it, is personal injuries to employees. In Virginia, the "special employer" rule is still used to determine which of two employers is responsible for workman's compensation benefits paid to an injured employee.⁵¹ The Court of Appeals of Virginia recently applied the special employer rule in *V.P.I. v. Frye*.⁵² V.P.I. was held to be a special employer of a worker supplied through a contract with a labor broker.⁵³ Even though the workman was actually employed by the labor broker, V.P.I. had day to day contact with him and directed his activities. This was enough control to hold V.P.I. liable as a special employer.⁵⁴

The effect of *V.P.I.* could be to subject active owners who exercise control over employees of the contractors or subcontractors on the worksite to liability for injuries suffered by any of those employees. As demonstrated by *V.P.I.*, even if an employee is hired, paid, and *generally* controlled by a contractor or subcontractor,

49. *Id.* at 295, 369 S.E.2d at 445.

50. *Id.*

51. See *Ideal Steam Laundry v. Williams*, 153 Va. 176, 149 S.E. 479 (1929). The court explained that the special employer rule is borrowed from the common law since Virginia's Workman's Compensation Act does not address special employers or loaned employees. *Id.* at 179, 149 S.E. at 480-81. The special employer rule establishes that the loaned employee must be compensated by the special employer when injured performing the special employer's work. *Id.* at 181-82, 149 S.E. at 481.

52. 6 Va. App. 589, 371 S.E.2d 34 (1988).

53. *Id.* at 596, 371 S.E.2d at 38. The court of appeals expressly declined to recognize the "labor broker-exception" which states that an employer who is in the sole business of providing temporary labor and who agrees with its customers to be liable for worker's compensation is liable should an employee be injured working for a customer of the employer. *Id.* at 593, 371 S.E.2d at 36-37. The court stated that while it is a logical rule, the Virginia Workers Compensation Act, sections 65.1-1 to -7 does not provide for it. *Id.* at 594-95, 371 S.E.2d at 36-37.

54. *Id.* at 593, 371 S.E.2d at 36. The court examined four elements from master-servant law to determine which party was the special employer. These were: (1) selection and hiring of the servant; (2) payment of his or her wages; (3) power of dismissal, and (4) power of control of the servant's actions. *Id.* The court stated that control is the dominating factor since whoever directs the actions of the employee should be responsible for his or her compensation for injuries. *Id.*

any day to day control by the owner could render the owner a special employer and, therefore, at least initially, the owner would be liable for workman's compensation for the injured workers.⁵⁵ This also raises questions concerning situations in which the architect, under his contract with the owner, actively supervises the construction of projects. It seems possible that the architect's contractual relationship with the owner could make the owner liable for an employee's injuries if the architect has any direct control over the employees in the context of his supervision.

B. The Contractual Relationship Between the Owner and Architect

The relationship between an owner and an architect arises from and is governed by the contract between the two parties.⁵⁶ Because of the detail required of the contract, and the potential liability involved for the parties, the standard form contracts of the American Institute of Architects (AIA) have become invaluable to the contracting process. Despite the availability of standard, comprehensive forms which can be tailored to fit the specific needs of a particular project, conflicts often arise between the owner and architect.⁵⁷ The courts' main function in this area has been to interpret the contract when problems arise and to maintain the privity of contract. In *Nelson v. Commonwealth*,⁵⁸ a case addressing a host of issues between owners and architects, the court initially stated that in every employment contract between an owner and an architect, it is implicit that unless there is a clause in the contract to the contrary, the architect has a duty to exercise the care of those ordinarily skilled in the profession.⁵⁹ An architect must exercise this same standard of care in the administration of the construction as well.⁶⁰ In an action for architectural malpractice, while the issues of the architect's failures and shortcomings are indeed jury questions, architecture is sufficiently technical as to require expert

55. *Id.* at 595-96, 371 S.E.2d at 38-39. The court stated that there was nothing to prevent the special employer from contracting to have the other employer procure insurance for the workers. However, under Virginia Workman's Compensation Act, the special employer had the responsibility to initially pay compensation to an injured employee, if the payment would otherwise be delayed due to adjudication. *Id.*

56. *Blake Construction Co. v. Alley*, 233 Va. 31, 34, 353 S.E.2d 724, 726 (1987).

57. *See, e.g., Nelson v. Commonwealth*, 235 Va. 228, 368 S.E.2d 239 (1988).

58. 235 Va. 228, 368 S.E.2d 239 (1988).

59. *Id.* at 235, 368 S.E.2d at 243 (citing *Surfrealty Corp. v. Standing*, 195 Va. 431, 442-43, 78 S.E.2d 901, 907 (1953)).

60. *Id.* at 236, 368 S.E.2d at 243.

testimony.⁶¹ The *Nelson* court reversed the owner's award on its architects' malpractice claim and entered final judgment, holding that without expert testimony, an accurate standard of care could not be relayed to the jury.⁶²

Once problems do arise, an owner's cause of action for improper design accrues at the time the plans are approved by the owner.⁶³ An owner must bring his or her action within five years⁶⁴ after the approval of the plans even if the architect continues in the employment of the owner because most owner-architect contracts are severable as distinguished from continuous or recurring.⁶⁵

C. *The Relationship Between the Owner and General Contractor*

The relationship between an owner and a general contractor is also very much contractual in nature and is largely governed by the terms of standard form contracts such as those developed by the AIA. Despite the highly contractual nature of the relationship between the owner and general contractor, there are certain extra-contractual rights and responsibilities which must be considered. As previously mentioned, an owner impliedly warrants that the plans and specifications the owner provides to the general contractor will be accurate.⁶⁶ Additionally, if an owner exercises too much direct control over employees of the contractor, the owner could be held liable for workmen's compensation paid to injured employees.⁶⁷

Generally, however, the contractual nature of the relationship between owners and contractors provides a certain amount of flexibility for the parties to contract around some of the statutory provisions and general customs of the construction industry.⁶⁸ Thus, in *Board of Supervisors v. Sampson*,⁶⁹ the Supreme Court of Virginia held that two parties could contractually establish a short-

61. *Id.* at 238, 368 S.E.2d at 244-45. The court adopted the general rule of most jurisdictions that architecture does require expert testimony to establish the standard of care. *Id.*

62. *Id.* at 241, 368 S.E.2d at 246.

63. *Id.* at 242, 368 S.E.2d at 247.

64. VA. CODE ANN. § 8.01-246(2) (Repl. Vol. 1984). This statute provides for a five year statute of limitations for a written contract.

65. 235 Va. at 242-44, 368 S.E.2d at 242-44.

66. *See supra* notes 44-50.

67. *See supra* notes 51-55.

68. *See, e.g.,* Blue Cross v. McDevitt & Street Co., 234 Va. 191, 360 S.E.2d 825 (1987). The parties contractually shifted the risk of loss from themselves to a third party insurer.

69. 235 Va. 516, 369 S.E.2d 178 (1988)

ened limitation period if the length of time is not unconscionable or unreasonably short.⁷⁰ An owner who decides to contract out of certain responsibilities or to alter statutory provisions or construction industry customs should be alert to the general rule that contract provisions of this sort must be expressly worded and very specific in their intent.⁷¹ Whenever the parties deviate from statutes or generally accepted construction customs there is a strong possibility that a court will either not enforce or will misinterpret the nonconforming clause unless it is in very specific language. The courts in Virginia seem to have struck an effective balance in allowing the parties some flexibility in their contract negotiations while still retaining some strictness in language requirements in order to protect the parties.

In an important decision concerning a number of previously undecided issues, the court in *McDevitt & Street Co. v. Marriott Corp.*⁷² addressed differing site conditions clauses and delays and time extensions clauses. The contractor had agreed to construct a hotel for Marriott, but was almost nineteen weeks late in completing the contract. Allocating the blame for the numerous delays and alleged alterations in connection with the site conditions was at the heart of this suit.⁷³ The contractor asserted that it was entitled to compensation for extra work due to differing site soil conditions principally on the grounds that the owner misled them with respect to the actual conditions of the soil on the project by failing to provide a second soils report which allegedly presaged the problems later encountered by the contractor.⁷⁴ The court, after acknowledging that this was a contract in which time was of the essence, ruled that the contract, which constitutes the law that governs the parties' relationship, should not be disturbed where an agreement is complete on its face, and is plain and unambiguous in its terms.⁷⁵ Given that the contract clearly placed the risk of unanticipated soil conditions squarely on the contractor, the court decided that the contractor was not entitled to additional compensa-

70. *Id.* at 520, 369 S.E.2d at 180.

71. See *Chantilly Constr. Corp. v. Department of Highways & Transp.*, 6 Va. App. 282, 369 S.E.2d 438 (1988) (a generally worded waiver was held not effective); *McMerit Constr. Co. v. Knightsbridge Dev. Co.*, 235 Va. 368, 367 S.E.2d 512 (1988) (a "contractors' affidavit" signed by contractor and stating that the contractor had received all payments due for work performed was held not an express waiver of liens).

72. No. 88-102-A, slip op. (E.D. Va. May 1, 1989 as amended May 28, 1989).

73. *Id.* at 2.

74. *Id.* at 2.

75. *Id.* at 7.

tion simply because the actual soil conditions created unforeseen difficulties.⁷⁶ The court also ruled that weather-caused soil conditions were not a basis for this changed site condition claim as they could have been reasonably anticipated.⁷⁷ It is important to recognize in interpreting this decision that the parties, through their contract, could not have been clearer in expressing their intent that the risk of differing soil conditions remained on the contractor.⁷⁸ Without the very specific language in this agreement, a general disclaimer of site conditions might have resulted in a quite different outcome.⁷⁹

The *McDevitt* court also addressed the issue of "no damage for delay" clauses. The contractor, inter alia, sought to recover damages for an alleged delay by the owner in providing electrical utility service. In what is believed to be the first recognition of the validity of a "no damages for delay" clause in Virginia, the court held that such clauses are generally enforceable.⁸⁰ The court ruled that because there was no evidence that any delay by the owner was unreasonable, intentional or fraudulent the clause as written should be enforced.⁸¹ This language seems to suggest the court's willingness to carve out a bad faith exception to enforcing similar clauses in Virginia.

The *McDevitt* court also addressed the owner's counterclaim in which it sought both direct and out-of-pocket expenses and consequential damages. The court noted that the measure of damages under Virginia law for the late completion of commercial property is either the rental value of the completed structure for the delay period or a reasonable return for that period on the completed structure treated as an investment.⁸² In addition to permitting

76. *Id.*

77. *Id.* at 4.

78. *Id.* at 7.

79. See, e.g., *Chantilly Constr. Corp v. Department of Highways & Transp.*, 6 Va. App. 282, 369 S.E.2d 438 (1988).

80. *McDevitt*, No. 88-102-A, slip op. at 15.

81. The clause provided, in pertinent part that:

Owner, its agents and employees shall not be held responsible for any loss or damage sustained by Contractor, or additional costs incurred by Contractor, through delay caused by Owner or its agents and employees, or any other Contractor or Subcontractor, or by abnormal weather conditions, or by any other clause, and Contractor agrees not to make, and hereby waives, any claim for damages, and agrees that the sole right and remedy therefore shall be an extension of time.

Id. at 33.

82. *Id.* at 26.

these damages caused by the delay, the court also awarded the owner the administrative expenses which were a direct result of the extended construction period consisting of site administration, travel, site security, temporary telephone, field office supplies and bonds and insurance expenses.⁸³

D. *The Relationship Between the General and Subcontractor*

The relationship between a general contractor and a subcontractor is at once one of the most valuable and potentially frustrating associations in the construction field.⁸⁴ One of the first areas in which problems can develop between the contractor and subcontractor is at the bidding stage. In *Piland Corp. v. REA Construction Co.*,⁸⁵ the United States District Court for Eastern Virginia entertained some of the questions concerning a subcontractor's bid and a contractor's reliance thereon. Even when parties are bidding over the telephone, there must be an offer and an acceptance in order to form a binding contract.⁸⁶ However, when the acceptance of a bid or offer is by telephone, the party asserting it bears the burden of proof.⁸⁷ Trade customs of the building industry may also be admitted into evidence to explain or supplement the agreement of the parties.⁸⁸

Contractors frequently require subcontractors to secure performance bonds in order to protect against defaults and other problems. The contractor must be careful to follow the principal contract closely or the surety could be excused from performance of the obligation to pay.⁸⁹ In *Southwood Builders, Inc. v. Peerless Insurance Co.*,⁹⁰ a subcontractor, after supplying a performance bond, fell behind in his work to the extent his termination would have been justified.⁹¹ Instead of terminating the subcontractor, the

83. *Id.* at 29.

84. *See, e.g., infra* notes 90-93.

85. 672 F. Supp. 224 (E.D. Va. 1987).

86. *Id.* at 246 (citing *General Elec. Co. v. Keyser*, 166 W. Va. 456, 275 S.E.2d 289 (1981); *Bernstein v. Bord*, 146 Va. 670, 675-76, 132 S.E. 698, 699 (1926); *Green v. Smith*, 146 Va. 442, 132 S.E. 839 (1926); 4B *Michie's Jur. Contracts* § 20 (1986); 17 *Am. Jur. 2d Contracts* § 43 (1964)).

87. *Piland*, 672 F. Supp. at 247.

88. *Id.* The court held that when the offer is silent as to a required acceptance date, the custom in the construction trade is 30 days.

89. *Southwood Builders, Inc. v. Peerless Ins. Co.*, 235 Va. 164, 366 S.E.2d 104 (1988).

90. *Id.*

91. *Id.* at 166-67, 366 S.E.2d at 105.

general advanced the subcontractor certain funds which were to later be deducted from the subcontractor's progress payments.⁹² The subcontractor eventually defaulted, causing the general contractor to submit claims to the subcontractor's surety.⁹³ Because the general had violated a provision of the principal contract when it gave the subcontractor money for work not yet done and approved by the architect, the court held that the surety was excused from paying the increased cost caused by the subcontractor's default.⁹⁴

Possibly the most far-reaching finding of the court was its reaffirmation of *American Surety Co. v. Plank & Whitsett, Inc.*⁹⁵ In not requiring a surety to show injury in order to discharge its duty to pay, there is a strong risk that contractors who make a good faith attempt to avoid the expense of terminating and replacing a subcontractor will be liable for the expenses which should be covered by the surety. The effect of this is that general contractors will not attempt to mitigate the damages caused by an inadequate subcontractor because if the general contractor violates the principal contract he will be liable for all of the excess cost. Therefore, in the future, the Virginia courts or legislature should consider implementing the rule used by some other jurisdictions⁹⁶ and require a surety to show injury to the extent any discharge from its obligations is granted.

When addressing conflicts between a contractor and subcontractor which develop over money owed, Virginia courts will normally rely heavily on the contract between the parties. In *J.W. Creech, Inc. v. Norfolk Air Conditioning Corp.*,⁹⁷ the contract stated that the subcontractor was responsible and liable for its work, including losses from theft, injury, or damage, until such time as the work was inspected and tested.⁹⁸ Any controversy or questions were to be settled by the architect.⁹⁹ A controversy over payment from the

92. *Id.* at 167, 366 S.E.2d at 106.

93. *Id.* at 167-68, 366 S.E.2d at 106.

94. *Id.* at 169-70, 366 S.E.2d at 108.

95. 159 Va. 1, 165 S.E. 660 (1932). The court held that a surety does not have to show prejudice to its interests when there has been a material deviation from the principal contract.

96. *See, e.g., Fireman's Fund Ins. Co. v. United States*, 15 Cl. Ct. 225 (1988). The court held that in federal government contracts, the surety will only be discharged to the extent the deviation from the contract actually injured the surety.

97. 237 Va. 320, 377 S.E.2d 605 (1989).

98. *Id.* at 324, 377 S.E.2d at 607.

99. *Id.*

repair and replacement of part of the air conditioning unit arose between the contractor and the subcontractor.¹⁰⁰ The court strictly followed the terms of the contract, holding that the subcontractor was liable for the damage since the equipment in question had not yet been accepted and the architect had determined the subcontractor was at fault.¹⁰¹

When a subcontractor brings an action to collect unpaid fees, requisition slips for payment which have been approved by the supervising architect on the payment and the general contractor are evidence, though not determinative, of the completeness and quality of the subcontractor's work.¹⁰² A subcontractor who prevails in an action to collect fees still owed is also entitled to delay interest from the general contractor running from the date when payment would ordinarily have been due the subcontractor even if interest was not contemplated in the contract.¹⁰³

E. Privity of Contract Restrictions

Privity of contract remains a vibrant and important concept in Virginia construction law.¹⁰⁴ Privity of contract between parties is still a necessary prerequisite for recovery of purely economic loss in Virginia.¹⁰⁵ In *Blake Construction, Inc. v. Alley*,¹⁰⁶ the Commonwealth of Virginia, through separate contracts, hired a general contractor to build an office building and an architectural firm to design and supervise the construction.¹⁰⁷ The general contractor brought an action against the architects, alleging they negligently performed certain duties existing under the owner-architect contract.¹⁰⁸ The court, in interpreting section 8.01-223 of the Code of Virginia,¹⁰⁹ held that absent a contractual duty between the con-

100. *Id.*

101. *Id.*

102. *Sweeny Co. v. Engineers-Construction, Inc.*, 823 F.2d 805, 808-11 (4th Cir. 1987). The Court of Appeals for the Fourth Circuit approved of the District Court for Eastern Virginia's admittance of requisition slips into evidence. The case was reversed and remanded on other grounds.

103. *J.W. Creech, Inc.*, 237 Va. at 325, 377 S.E.2d at 609.

104. See *Sensenbrenner v. Rust, Orling, & Neale, Architects, Inc.*, 236 Va. 419, 374 S.E.2d 55 (1988); *Blake Constr. Co. v. Alley*, 233 Va. 31, 353 S.E.2d 724 (1987).

105. *Blake Constr. Co.*, 233 Va. at 33-34, 353 S.E.2d at 726.

106. 233 Va. 31, 353 S.E.2d 724 (1987).

107. *Id.* at 32, 353 S.E.2d at 725.

108. *Id.* at 32-33, 353 S.E.2d at 725.

109. VA. CODE ANN. § 8.01-223 (Repl. Vol. 1984). This section provides, "in cases not provided for in § 8.2-318 where recovery of damages for injury to person, including death, or to

tractor and architect, the contractor could not recover in tort for purely economic loss.¹¹⁰ The Supreme Court of Virginia in *Blake Construction* opined that section 8.01-223 is expressly limited to injuries to person and property.¹¹¹

The privity requirement for recovery of a purely economic loss in tort extends to all the parties involved in the construction. In *Sensenbrenner v. Rust, Orling, & Neal Architects, Inc.*,¹¹² the Supreme Court of Virginia held that the homeowner-plaintiff had no cause of action against the architect and pool contractor that negligently installed a pool resulting in damage to the plaintiff's house.¹¹³ The court based its holding on the fact that the defendant architect and pool contractor had been hired by the general contractor, not the homeowners.¹¹⁴

F. *Mechanic's Liens*

In Virginia, the mechanic's lien is an important tool for protecting the interests of general contractors, subcontractors, and sub-subcontractors.¹¹⁵ Although the Virginia General Assembly has expressly recognized the waiver of a mechanic's lien,¹¹⁶ it is such a valuable and substantial right that the Supreme Court of Virginia has on several occasions refused to enforce a waiver of mechanic's lien unless it is express or clearly implied.¹¹⁷ This prevents contrac-

property resulting from negligence is sought, lack of privity between the parties shall be no defense."

Section 8.2-318 of the Code of Virginia provides:

Lack of privity between plaintiff and defendants shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods. . . .

Id. § 8.2-318 (Add. Vol. 1965).

110. *Blake Constr. Co.*, 233 Va. at 34, 353 S.E.2d at 726.

111. *Id.* The court explained that section 8.01-223 is in derogation of the common law and therefore must be strictly construed.

112. 236 Va. 419, 374 S.E.2d 55 (1988).

113. *Id.* at 425, 374 S.E.2d at 58.

114. *Id.*

115. See Ulrich, *VIRGINIA AND WEST VIRGINIA: MECHANICS' AND MATERIAL MEN'S LIEN* 5-6 (1985).

116. VA. CODE ANN. § 43-3(c) (Repl. Vol. 1986).

117. *McMerit Constr. Co. v. Knightsbridge Dev. Co.*, 235 Va. 368, 374, 367 S.E.2d 512, 515 (1988) (citing *VNB Mortgage Corp. v. Lone Star Indus.*, 215 Va. 366, 371, 209 S.E.2d 909, 914 (1974)); see also *United Masonry, Inc. v. Riggs Nat'l Bank*, 233 Va. 476, 357 S.E.2d 509 (1987). The Supreme Court of Virginia stated that for a waiver of mechanic's liens to be

tors, subcontractors, and sub-subcontractors from being manipulated by owners into unknowingly waiving mechanic's lien rights.

The important status of mechanic's liens was recently reaffirmed in *Donohoe Construction Co. v. Mount Vernon Associations*.¹¹⁸ There the Supreme Court of Virginia held that the filing of a memorandum of mechanic's lien constituted a judicial proceeding.¹¹⁹ As long as the words employed in the memorandum are relevant and pertinent to the case, the memorandum is absolutely privileged.¹²⁰

Despite the important nature of mechanic's liens, courts tend to strictly construe the code provision governing the liens.¹²¹ Thus, in *United Masonry, Inc. v. Riggs National Bank*,¹²² the Supreme Court of Virginia applied section 43-4 of the Code of Virginia¹²³ and held time barred certain mechanic's liens resulting from construction contracts entered into before the effective date of the amended section (July 1, 1980).¹²⁴ The court in *Rosser v. Cole*,¹²⁵ likewise strictly construed the section of the Code of Virginia granting mechanic's lien rights for work done¹²⁶ and declared a road builder's mechanic's lien defective for not strictly following the statute.¹²⁷

valid and binding, it must be supported by consideration. *United Masonry, Inc.* at 483, 357 S.E.2d at 513.

118. 235 Va. 531, 369 S.E.2d 857 (1988).

119. *Id.* at 538-39, 369 S.E.2d 861.

120. *Id.* at 539, 369 S.E.2d at 861. In *Donohoe*, plaintiff filed a suit alleging that the defendants' filing of a mechanic's lien was invalid and that it slandered the plaintiff's title to the property in question and was an abuse of process.

121. VA. CODE ANN. §§ 43-1 to -23.2 (Repl. Vol. 1986).

122. 233 Va. 476, 357 S.E.2d 509 (1987).

123. VA. CODE ANN. § 43-4 (Repl. Vol. 1986). This section provides in pertinent part:

A general contractor, or any other lien claimant under sections 43-7 and 43-9, in order to perfect the lien given by section 43-3, shall file at any time after the work is commenced or material furnished, but not later than ninety days from the last day of the month in which he last performs labor or furnishes material, but in no event later than ninety days from the time such building, structure or railroad is completed, or the work thereon otherwise terminated The time limitations set forth herein shall apply to all labor performed or materials furnished on construction commenced on or after July 1, 1980.

Id.

124. *United Masonry*, 233 Va. at 480-81, 357 S.E.2d at 511-12.

125. *Rosser v. Cole*, No. 870330, slip op. (Va. Apr. 21, 1989).

126. VA. CODE ANN. § 43-3 (Repl. Vol. 1986).

127. *Rosser*, No. 870330, slip op. at 4.

G. Damages

In Virginia, the plaintiff in a construction law action has the burden of proving that the damages suffered were a direct result of the defendant's breach of contract.¹²⁸ If there is no casual relationship between the breach of contract and the damages sought, then there can be no recovery.¹²⁹ This is a logical rule which protects architects, contractors, subcontractors, and even owners from having to pay damages for losses which would have occurred with or without a breach of contract on the potential defendant's part.

Once the relationship between the plaintiff's damages and the defendant's breach of contract has been established, the plaintiff still has the burden of proving what damages he suffered as a result of the breach.¹³⁰ The plaintiff is not, however, under a burden to conclusively prove the extent of his or her losses.¹³¹ In most construction cases, the trier of fact is capable of examining the facts and figures and giving a reasonable estimate of the damage incurred by the plaintiff.¹³² This rule is necessary because in many cases centering around construction projects, while a trier of fact may be able to give a reasonable estimate of damages, it would place too great a burden on a plaintiff to force a plaintiff to prove actual damages with absolute certainty.¹³³

128. See *Haas & Broyules Excavators, Inc. v. Ramey Bros. Excavating Co.*, 233 Va. 231, 235, 355 S.E.2d 312, 315 (1987). In *Haas*, the issue was whether a contractor was liable to its subcontractor for damages the subcontractor suffered when it had its machinery repossessed. The contractor was supposed to have paid certain sums to the subcontractor's creditors but failed to do so. The Supreme Court of Virginia overruled the trial court and found that even if the payment had been made as required, the machinery would have still been repossessed by the creditor. Therefore, the breach on the part of the contractor was not directly responsible for the damages and the plaintiff could not recover. *Id.* at 233-37, 335 S.E.2d at 314-15.

129. *Id.* at 236, 355 S.E.2d at 315 (quoting *Manss-Owens Co. v. Owens & Son*, 129 Va. 183, 202, 105 S.E. 543, 549 (1921)).

130. *Nelson v. Commonwealth*, 235 Va. 228, 251, 368 S.E.2d 239, 252 (1988).

131. The "absolute certainty as to the amount of the damages is not essential when the existence of loss has been established." *Id.* (citing *Pebble Bldg. Co. v. Hopkins, Inc.*, 223 Va. 188, 191, 288 S.E.2d 437, 438 (1982) (quoting *Wyckoff Pipe & Creosoting Co. v. Saunders*, 175 Va. 512, 518, 9 S.E.2d 318, 321 (1940))).

132. See, e.g., *Nelson*, 235 Va. at 251, 368 S.E.2d at 252. The court has on occasion limited recovery of damages, when the cost to complete the contract, or repair what has been done, would greatly outweigh any benefits received. See *Lochaven Co. v. Master Pools*, in which the court refused to award damages in a case where a pool would have to be destroyed to adequately repair it. 233 Va. 537, 544, 357 S.E.2d 534, 538-39 (1987).

133. For example, in *Nelson*, while it would have been extremely difficult to show actual damages of a certain amount, the court upheld the use of tools such as industry manuals to assist in the reasonable estimate of damages. 235 Va. at 250, 368 S.E.2d at 252.

IV. CONCLUSION

In the past two years, the judiciary of Virginia has consistently limited liability to those in privity of contract. Additionally, the court continues to disfavor the enforcement of contract language which deviates from statute or generally accepted customs of the construction industry unless the relevant language is expressly worded and very specific in its intent. In those instances where the contract language has been specific in its intent, the courts have enforced "no damages for delay" clauses and "differing site condition" disclaimer clauses. The courts have also affirmatively ruled that expert testimony is required to establish a breach of the standard of care in cases involving architectural malpractice.

Given the pervasive changes made in the standard form contracts of the AIA in 1987, these issues are likely to be addressed anew in the upcoming year as disputes arising under these contracts make their way to the courts.

