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Recent Developments in Construction and Public Contracts Law in Virginia

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STATE AND FEDERAL CASE LAW

I. CONSTRUCTION LAW CONTRACTS

A. Teaming Agreement Is Unenforceable Agreement To Agree

Cyberlock Consulting, Inc. v. Info. Experts, Inc., 2013 U.S. Dist. LEXIS 49092 (E.D.Va. 2013)

In this suit alleging breach of a teaming agreement to win a federal contract, the court enters summary judgment for defendant, finding the agreement unambiguous and an unenforceable agreement to agree. The parties entered into a teaming agreement to secure a contract from the federal government. The agreement stated that its purpose was to set forth the arrangement between the parties to obtain a prime contract with the government and "to set forth the basis for a subcontract" between the parties such that upon award of the subcontract, Information Experts will perform 51% of the scope of work and Cyberlock the remaining 49%. The teaming agreement also contained provisions indicating that (1) the award of work between the parties would require the negotiation and execution of a future subcontract; (2) the award of such work was dependent on the success of such future negotiations; (3) any future executed subcontract was subject to approval of the government; and (4) the framework set out for the allocation of work in a future subcontract could change.

After Information Experts was awarded the government contract, Cyberlock and Information Experts began negotiating a subcontract. When negotiations failed, Cyberlock filed suit. Subsequently, the parties filed cross-motions for summary judgment. Applying well-established principles of Virginia law on contract interpretation, the court determined that the teaming agreement was unambiguous and constituted an unenforceable agreement to agree. The court found that the agreement read as a whole was not meant to provide a binding obligation, but to set forth a contractual objective and agreed framework for the negotiation of a future subcontract. Among other things, noted the court, the agreement contemplated that future negotiations over a subcontract could fail, described the work of the future subcontract as anticipated based on present understandings of the parties, and noted that any subcontract might be subject to government approval.

B. Virginia Court Strictly Construes Seven-Day Notice Provisions In Contract Thereby Barring Subcontractor's Claim

Faulconer Constr. Co. v. Branch & Assocs., No. CL11000170-00, 2012 Va. Cir. LEXIS 91 (Va. Cir. Ct. June 6, 2012)

In *Faulconer Constr.*, the Circuit Court of Rockbridge County held that a subcontractor's claims were barred because the subcontractor failed to comply with the seven-day notice provisions in the contract. The subcontractor in this case, Faulconer, entered into a contract with general contractor, Branch & Associates, Inc. The parties' contract contained a notice provision requiring Faulconer to provide "notice for any and all claims … in writing immediately upon Subcontractor's first knowledge of the claim condition or first event giving rise to such claim

and under no condition … later than seven (7) days … ." The general contractor, Branch, argued in its plea in bar that Faulconer was aware of its claim for excavating excess rock, upon which its lawsuit was based, by February 24, 2010, and failed to provide notice of its claim to Branch until March 30, 2010, well past the timeframe for doing so under the parties' contract. Faulconer did not dispute these facts, but rather, argued that its "claim" accrued at a later date when its request for extra payment to remove the excess rock was denied.

The court rejected Faulconer's argument finding that when Faulconer encountered the excess rock and knew that the cost for removing the rock would be higher than what it had anticipated, it should have immediately provided notice to Branch that it intended to make a claim for extra costs. This, the court held, was especially applicable since encountering the excess rock was not a "change order" since the contract contained a provision for any rock or soil to be removed by the subcontractor at no additional expense to Branch. The court reasoned that since Faulconer requested more money to perform work that it was already arguably required to perform, the claim accrued on the date of discovery, not the date of denial of any request for extra money. The court held that Faulconer's realization of the amount of rock was the event giving rise to the claim and, therefore, the date after which Faulconer was required to provide notice to Branch was no later than seven days after this discovery. On these grounds the circuit court sustained the general contractor's plea in bar to the subcontractor's claim.

C. Absent Contractual Privity, Recovery Not Available For Purely Economic Losses

Nationwide Mutual Ins. Co. v. Richards Constr., Inc., Case No. CL-2011-0014299 (Va. Cir. Ct. May 23, 2013)

This action arose out of a house fire and was brought before the court on third-party defendant Sensata Technology, Inc.'s demurrer. Nationwide, as subrogee for the homeowners, filed a complaint against several defendants, alleging that the homeowners hired Richards to perform construction on their home, and before the project was complete, a fire broke out, causing real and personal property damage. Richards claimed that Sensata manufactured the light switch within the light fixture that is alleged to have malfunctioned and caused the fire, and Richards sought indemnification from Sensata for any future payment or loss to Nationwide under theories of negligence and breach of express or implied warranties. On demurrer, Sensata argued that Richards' cross-claim failed because Richards was seeking recovery for purely economic losses, which are not recoverable in the absence of privity between Sensata and Richards, and Richards had not alleged privity of contract with Sensata. Therefore, the question before the court was whether Richards sought recovery for damages to the property of the homeowners, or whether Richards sought recovery for purely economic losses.

The court found that Richards sought recovery for purely economic losses because Richards sought indemnification from Sensata in the event that Richards was liable to Nationwide. Ultimately, and after examining Virginia law on economic loss, the court explained that because there was no allegation of privity of contract between Richards and Sensata, it sustained the demurrer. Of note to the court was the fact that Richards' damages would not go towards remedying the injury to the homeowners' property, but rather to indemnification from possible future payment in an effort to make Richards financially whole again. The court also

rejected Richards' theory of indemnification, stating that indemnification must grow out of a contractual relationship, and there were no allegations that any contractual relationship existed between Richards and Sensata.

D. Virginia Supreme Court Finds That The Voluntary Payment Doctrine Serves As A Valid Defense To Action

D.R. Horton Inc. v. Bd. of Supervisors for the County of Warren, 285 Va. 467, 737 S.E.2d 886 (2013)

D.R. Horton, Inc. ("Horton") challenged the trial court's ruling that certain building permit fees it paid to Warren County, which were later found to be unlawful, were paid "voluntarily" under the common law voluntary payment doctrine, and therefore need not be returned to Horton. The Supreme Court of Virginia affirmed.

At the request of Horton's predecessor, the County rezoned a tract of land from agricultural to suburban residential. As part of that rezoning process, Horton's predecessor made a number of proffers to the County to develop a subdivision, including the construction and operation of a centrally located wastewater treatment plant and water system to service the new subdivision. The developer also proposed to make cash payments in the total amount of $8,000 per residential unit payable to the County each time the County issued a building permit for one of the units. The proffers were memorialized in a "revised proffer."

Later, in a "confidential" letter to the County, counsel for the developer proposed that the County allow the developer to obtain water and sewer services from the Town of Front Royal in lieu of constructing the water and sewer systems and that in exchange, the developer would pay to the County an additional $4,000 "hook up" fee for each hook up obtained from the Town. The parties never executed an agreement in line with that letter.

Horton subsequently purchased the subdivision subject to the "revised proffer" and received 52 building permits from the County. Upon the issuance of each building permit, Horton paid the County the $8,000 proffer fee as well as the $4,000 hook up fee. Horton later learned it was not obligated to pay the $4,000 fee, and sought to recover that fee from the County by filing a declaratory judgment action. The trial court agreed with Horton that the County could not lawfully assess the $4,000 fee against Horton. Horton then filed the instant action for restitution seeking reimbursement of the $4,000 fee. The Board raised the voluntary payment doctrine as an affirmative defense, which the trial court agreed with. Horton then appealed.

On appeal, the Supreme Court of Virginia examined the voluntary payment doctrine as established under Virginia common law, and found that the plaintiff has the burden to show that its payment was not voluntary. Horton made several alternative arguments for why its payment was involuntary, however the court rejected each in turn. First, Horton unsuccessfully argued that it paid the fees involuntarily because the County's refusal to issue building permits without the payment of the fees constituted a seizure of property. Second, Horton unsuccessfully argued that it would face other proceedings or actions if it refused to pay the fee and build without a building permit or refused to build. Next, Horton unsuccessfully argued that it had an immediate

and urgent need to pay the fees, which rendered the payment involuntary. Then, Horton unsuccessfully argued that it had adequately protested the assessment of the fees in meetings with County officials. Finally, Horton unsuccessfully argued that the trial court erred in rejecting its assertion that the County's retention of the fees unjustly enriched the County. While the court agreed that those claims constituted the basis for the restitution action, the voluntary payment doctrine was a valid defense to the action.

E. Supreme Court Reverses Circuit Court Decision To Award $1 Nominal Fee For Attorneys' Fees Award

Dewberry & Davis, Inc. v. C3NS, Inc., 284 Va. 485, 732 S.E.2d 239 (2012)

Dewberry brought a breach of contract action against C3NS, Inc. ("C3"), seeking to collect the balance owed to Dewberry for its preparation of a survey and a site plan for the construction of a tire recycling plant on C3's property. The parties' contract included several standard terms and conditions, including that C3 furnish Dewberry with all plans, drawings, and surveys, and provided for the payment of attorneys' fees and expenses to the prevailing party in the event of litigation arising from the contract.

At trial in the circuit court, Dewberry established that C3 had not provided accurate documents necessary for the preparation of the site plan, which resulted in Dewberry improperly placing the location of the recycling plant in the site plan. After C3 withheld payment to Dewberry due to its purportedly defective site plan, Dewberry obtained a mechanic's lien on the property and subsequently filed suit against C3. In that suit, C3 filed a counterclaim, alleging a breach of contract as a result of the inadequacy of the site plan. Both parties sought an award of attorneys' fees and expenses per the terms of the contract.

Following a bench trial, the Fairfax County Circuit Court found in favor of Dewberry on its claim for compensation under the contract, and in Dewberry's favor on C3's counterclaim for the alleged breach of contract. The circuit court stated it would consider an award of attorneys' fees, but in its opinion, the case involved a "legitimate, good-faith dispute, a difference of opinion." Therefore, the circuit court awarded Dewberry over $18,000 in attorneys' fees for the prosecution of its complaint, but a nominal amount of $1 in attorneys' fees for Dewberry's successful defense of C3's counterclaim, despite the actual amount of attorneys' fees incurred by Dewberry. On appeal, the Supreme Court of Virginia declared that the circuit court abused its discretion by ignoring the contract's attorneys' fees provision, and limiting Dewberry's recovery of attorneys' fees for the successful defense of the counterclaim to $1.

F. Statute Of Repose Inapplicable To Claims Arising Solely Out Of The Contract

Frye v. B&B Contracting, Inc., No. CL12-77, 2012 WL 5376701 (Oct. 31, 2012)

In this case, the Plaintiff Purchaser signed a contract to buy a vacant lot and contracted with the Defendant Builder, B&B Contracting, Inc., to construct a house on that lot. Builder completed the house before December 6, 2005. The land transferred to the Purchaser by deed dated December 7, 2005. Within several months of the land transfer, the Purchaser noticed cracks in the foundation and walls of his new home and notified the Builder. The Purchaser and

Builder met and discussed fixing the problem. Their discussions continued for several years until August 2009, when an expert examined the premises, conducted tests and determined that the fill material on which the house had been built was unstable. However, by that time, the statute of limitations for suing the builder on the contract had already run. The Purchaser sued in tort claiming that the Builder negligently performed its contracts. The Circuit Court of Roanoke County held that in order to recover in tort, the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract. The court found that in this case, no duty that was separate and independent from the contract was breached or violated by the Builder. Because there were no tort claims that did not arise from duties assumed under the contract, the court found that the statute of repose did not apply.

II. SURETY, INDEMNITY AND INSURANCE

A. Claim On Performance Bond Cannot Set-Off Balance On Bonded Contract With Balance Due On Another Contract

The Hanover Ins. Co. v. Blueridge Gen., Inc., 2013 U.S.Dist. LEXIS 122821 (E.D.Va. 2013)

General contractor Blueridge subcontracted with Thayer for work on a federal project. As required by the subcontract, Thayer obtained a performance bond from its surety. Blueridge separately hired Thayer on an unrelated project. Both subcontract agreements included clauses allowing Blueridge to withhold monies due or to become due to Thayer on any project existing between Blueridge and Thayer to pay any outstanding obligations of Thayer or to complete Thayer's work under any such subcontract.

On the federal bonded project, following Thayer's default and termination, Blueridge demanded that Hanover take over and complete Thayer's work. Upon Hanover's completion of the subcontract, Blueridge paid Hanover a portion of the remaining subcontract balance, but withheld an amount as offsets against the balance due Thayer on the unrelated subcontract. Hanover then brought suit to recover the withheld amounts and Blueridge counterclaimed, asserting claims for setoff and indemnification.

Hanover subsequently moved for summary judgment on Blueridge's set off claims. Hanover argued that as a performing surety it became subrogated to all rights of the bond obligee Blueridge, including the right to apply the entire subcontract balance to satisfy its expenses in completing Thayer's work. Therefore, argued Hanover, Blueridge could not set off and withhold the amount it claimed on the non-bonded project against the subcontract balance otherwise payable to Hanover on the bonded project. After a thorough analysis of the law of suretyship, the district court agreed and awarded summary judgment to Hanover on its claim for the unrelated backcharge monies. The court denied Hanover's remaining arguments, finding genuine issues of disputed fact.

B. Court Held Shoddy Work By Contractor Was Intentional And Therefore Was Not An "Occurrence" Covered By Comprehensive General Liability Policy

Cheatham v. NGM Ins. Co., No. 3:12cv263, 2013 WL 509049 (E.D.Va. Feb. 11, 2013)

Declaratory judgment action seeking to establish liability of insurer under a standard comprehensive general liability policy for insured's failure to properly and timely perform mold remediation and repair of a residence. Plaintiff homeowners obtained a default judgment for breach of contract and fraud against the contractor, who was judgment proof, so they pursued the contractor's insurance carrier, seeking to shoehorn their claims into non-excluded "occurrences." The court rejected plaintiffs' contentions, finding that the work, "although shoddy, was intentional" and therefore was not an "occurrence," which is defined in the policy and caselaw to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Further, the court rejected the notion that the policy covered the claim for fraud which rested on the contractor's false claim that he was a licensed contractor, as the allegations of fraud upon which the default judgment rested were knowing and intentional false misrepresentations of a material fact which are, by definition, excluded under the policy.

C. Supreme Court Of Virginia Interprets "All Risk" Homeowners Insurance Policy To Exclude Damage Resulting From Chinese Drywall

TravCo Ins. Co. v. Ward, 284 Va. 547, 736 S.E.2d 321 (2012)

This opinion arose from a certified question of law from the Fourth Circuit. Specifically, the Supreme Court of Virginia considered whether, in interpreting an "all risk" homeowners insurance policy, any damage resulting from Chinese drywall unambiguously was excluded from coverage because it constituted a loss caused by 1) "mechanical breakdown, latent defect, inherent vice, or any quality in property that causes it to damage itself"; 2) "faulty, inadequate, or defective materials"; 3) "rust or other corrosion"; or 4) "pollutants."

Ward had sought coverage under his homeowner's insurance policy with TravCo for damages caused by Chinese drywall installed in his new home in Virginia Beach. Ward alleged that the drywall emitted various sulfide gases and/or toxic chemicals through "off-gassing" that created noxious odors and caused health issues, damage and corrosion. After TravCo denied his claim based on the aforementioned exclusions in the policy, TravCo brought a declaratory judgment action in the U.S. District Court for the Eastern District of Virginia seeking a determination that the policy did not cover such losses. After TravCo obtained summary judgment, Ward appealed to the Fourth Circuit, which certified the question to the Virginia Supreme Court.

The court considered the four exclusions in turn, determining that each phrase was unambiguous and the court need not look beyond its plain meaning. Applying the exclusions specifically to Ward's claims, the court determined that all four exclusions operated to bar any recovery for damages caused by Chinese drywall. First, the court rejected Ward's argument that the defect in the drywall was not "latent" because it could have been discovered by testing after manufacture. Instead, the court found that the defect alleged was the release of sulfuric gases,

which was not discovered by Ward for approximately two years. Second, the court determined the drywall was defective because it rendered Ward's home inhabitable, despites Ward's contention that the drywall performed adequately in its primary function of drywall. In fact, Ward had himself alleged that the drywall was "defective" in his various pleadings in the underlying action. Third, the court rejected Ward's contention that the damage was not caused by corrosion because the damage was itself corrosion. The court noted that otherwise the "corrosion" exclusion would be irrelevant as "corrosion" is always caused by an outside source. As to the fourth and final exclusion, Ward argued that the "pollutant" exclusion was overbroad and ambiguous. Although the court noted that some policy exclusions could be so overbroad as to render the exclusion meaningless, here the exclusion was not overbroad or unreasonable, and should be construed according to its plain language. As sulfur gas was clearly a pollutant under both the pleadings in the case and state and federal regulations, the court determined the fourth exclusion applied to Ward's claim. Therefore, the Virginia Supreme Court answered all four certified question subparts in the affirmative, barring any claim by Ward for Chinese drywall damages under his homeowner's insurance policy.

D. Virginia Court Finds That Defective Work Causing Structural Damage To Other Sections Of A Home Is Not Covered By Commercial General Liability Policy

Erie Ins. Exch. v. Salvi, 2013 WL 1213621 (Va. Cir. Ct., Jan. 10, 2013)

In this case, the issue before the court was whether damage to non-defective elements in a home caused by structural defects in construction constituted "an occurrence" eligible for coverage under a Commercial General Liability (CGL) insurance policy. The Chesterfield County Circuit Court decided that such damage was not an "occurrence" and granted summary judgment in favor of the CGL insurance policy provider. The court reasoned that even if the damages caused by the subcontractor's defective workmanship that spread to non-defective components of the home were an "occurrence" under the terms of the policy, such damages were expressly excluded.

The CGL policy at issue in this case contained the following language excluding from coverage property damage to "that particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations if the 'property damage' arises out of those operations;" or "that particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." The court recited that Virginia courts have interpreted the term "occurrence" or "accident" in the context of a CGL policy as defined as "[a]n event that takes place without one's foresight or expectation." The court concluded that when a general contractor's liability to repair buildings arises from its failure to satisfy its obligations under the contract, and the breach of contract causes defective workmanship, then those damages are not "an occurrence" so as to trigger coverage under the policy. The court noted that this would not be the case if the above-cited contract exclusion language was not included in the CGL policy.

Therefore, ordinarily a spread of damage from defective components to non-defective parts of a home would be considered an unintended accident and thus an occurrence covered by a CGL policy. The exception is when the policy language includes an exclusion that narrows the

breath of the meaning of the term "occurrence" and excludes from its definition damage caused by a subcontractor's defective workmanship. The court concluded that since the defective workmanship in this case was a breach of contract and the policy also explicitly excluded a breach of contract claim from coverage, the CGL policy provider was entitled to win its summary judgment motion dismissing the homeowner's breach of express warranty claims.

E. Court Dismisses Bond Claim Due To Claimant's Failure To Name General Contractor As A Party To The Claim

Johnson Controls, Inc. v. Norair Eng'g Corp., No. CL-2012-6504, 2013 Va. Cir. LEXIS 3 (Va. Cir. Ct. Jan. 10, 2013)

This opinion arose on demurrer and plea in bar by Travelers Casualty and Surety Company of America ("Travelers") which had issued a mechanic's lien bond pursuant to Va. Code § 43-71 for a mechanic's lien filed by Johnson Controls, Inc. ("JCI"). Although JCI had instituted litigation against both the general contractor, Norair Engineering Corporation ("Norair"), and Travelers, in its "bond claim" count (Count IV), JCI had failed to identify Norair as party. Travelers argued that this failure to specifically identify Norair as a party to Count IV necessitated a finding that all necessary parties were not joined in the action against the bond, which therefore required dismissal pursuant to *George W. Kane, Inc. v. NuScope, Inc.*, 243 Va. 503 (1992).

After determining that Norair was a necessary party to the suit, the court then considered whether it was necessary to specifically name Norair as a party to the bond claim. The court found that Norair's exclusion from the bond claim denied Norair its due process right to challenge the bond claim and defend the perfection of the lien. For these reasons, Norair was a necessary party specifically for the bond claim.

As Norair's exclusion from Count IV would necessitate dismissal of the bond claim, the court next considered whether JCI could now add Norair as a party. Since the statute of limitations had already run, the court could only allow an amended complaint if the relation back doctrine codified in Va. Code § 8.01-6.1 applied. As Va. Code § 8.01-6.1 specifically excluded "mechanics' lien claims or defenses" from its ambit, and the amendment would add a new claim against Norair, JCI could not rely upon the relation back doctrine. The court found that this ruling comported with other circuit court decisions, notably *ADS Constr., Inc. v. Bacon Constr. Co.*, 2013 Va. Cir. LEXIS 89, *7 (Loudoun 2012) also summarized herein. Therefore, the court dismissed JCI's bond claim with prejudice.

F. Subcontractor Must Join General Contractor as Party to Suit to Recover Payment On Mechanic's Lien Bond Posted by General Contractor

ADS Const. Inc. v. Bacon Const. Co., No. CL-74720, 2012 WL 5840225 (Va. Cir. Ct. Oct. 18, 2012)

In this case, the Loudoun County Circuit Court sustained a surety's demurrer of a claim to recover against a mechanic's lien bond due to the subcontractor's failure to name the general

contractor as a defendant in the suit. The court reached this conclusion on the basis that the general contractor named as principal on the bond, is firmly bound, along with the surety, to the subcontractor. The court held that because the bond does not absolve the general contractor from liability to the subcontractor, the general contractor retained an immediate interest in defending the suit on the bond, and therefore, was a necessary party to the subcontractor's suit on the bond.

In this case, ADS was the subcontractor to Bacon, the general contractor on the project. ADS filed a mechanic's lien based upon Bacon's failure to pay ADS for work performed on a project in Loudoun County. Bacon petitioned the court to accept a mechanic's lien release bond and to release the lien. The court granted the petition and accepted a bond issued by Westfield Insurance Co., as surety, and Bacon, as principal. Subsequently, ADS filed suit on the bond against Westfield only, as well as filing separate claims for breach of contract against Bacon. Westfield challenged the suit on the lien bond, asserting that Bacon was a "necessary party" to the claim and, therefore, ADS was required to name Bacon as a defendant to the claim. Westfield also argued that since Bacon was a necessary party to the claim, it was nevertheless too late to add Bacon as a party because the six-month period for bringing suit on the mechanic's lien bond had expired.

The court sided with the surety, finding that not only was Bacon a necessary party but that the statute applicable to a suit on a lien bond required that a suit be brought within six months of the date the mechanic's lien was recorded. Since more than six months had passed from the date of filing the lien, ADS had missed its opportunity to add Bacon as a party to the lien bond claim. On these grounds the court dismissed ADS's bond claim against Westfield.

III. ARBITRATION

A. Incorporating the Underlying Contract Into the Bond May Require Surety To Arbitrate

Great Am. Ins. Co. v. Hinkle Contracting Corp., 2012 U.S.App. LEXIS 24670 (4th Cir. 2012)

When a bonded subcontractor defaulted, the general contractor notified the surety of default and demanded the surety pay the general contractor under the terms of the bond. The surety filed a declaratory judgment asking the court to determine it was not liable under the bond based on certain defenses.

In response, the general contractor moved to dismiss or stay the suit until completion of arbitration of the claims. The general contractor argued that, because the performance bond provided that the "subcontract is by reference made a part hereof," the surety was obliged to submit its claim to arbitration based upon an arbitration agreement in the subcontract.

On appeal of the district court's denial of the motion to dismiss or stay, the Fourth Circuit reversed. The arbitration provision in the subcontract provided that all claims "arising out of, or relating to the subcontract or breach thereof … shall be resolved by mediation followed by arbitration or litigation" at the general contractor's option. The Fourth Circuit noted that

arbitration provisions which contain the phrase "arising out of or relating to" or similar language are construed broadly in favor of arbitration of every dispute having a "significant relationship" to the subcontract. The court concluded the surety's claims bore a significant relationship to the underlying subcontract requiring arbitration of the surety's claims.

B. Inclusion of AAA Rules in Arbitration Agreement Allows Arbitrator, Not Court, To Determine Whether Dispute Is Arbitrable

United States ex rel. Beauchamp v. Academi Training Ctr., Inc., 2013 U.S. Dist. LEXIS 46433 (E.D.Va. 2013)

The two relators in this False Claims Act case brought claims against the Academi Training Center, Inc. ("Academi"), a security contractor, alleging that Academi retaliated against them after they agreed to testify in a previous False Claim Act case. The relators were independent contractors of Academi who provided security protection to U.S. State Department officials in Iraq and Afghanistan. Both of their contracts with Academi contained an arbitration clause providing, in part:

> …any dispute, suit, action or proceeding relating to, arising out of, or with respect to this Agreement . . . will be resolved exclusively by binding confidential arbitration under the Commercial Rules (Expedited) of the American Arbitration Association (AAA) then in effect.

Based on this clause Academi moved to stay the action to permit arbitration. The relators opposed the motion, arguing that the arbitration clause was unconscionable and, therefore, unenforceable. Academi argued that the question of arbitrability had been delegated to the arbitrator by the arbitration agreement's incorporation of the AAA arbitration rules. Thus, the court framed the issue as follows:

> Whether the incorporation of the AAA Commercial Arbitration Rules (Expedited) in an arbitration agreement is sufficiently clear and unmistakable language evidencing an intent to arbitrate arbitrability.

The court granted Academi's motion and stayed the proceeding for arbitration. It held that the incorporation of the AAA Commercial Rules (Expedited) was a "clear and unmistakable" delegation of arbitrability to the arbitrator. The court noted that the "clear and unmistakable" test is a high and exacting standard and is not met by the expansive breadth of the arbitration clause itself. Rather, it is the incorporation of the AAA Commercial Rules into the arbitration agreement which satisfies the test. Rule 7(a) provides that "the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."

The court also rejected the relators' unconscionability argument, relying on the Supreme Court's holding in *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010), because the

relators only made a general argument that the arbitration provision was unconscionable and did not specifically challenge the delegation of arbitrability to the arbitrator as unconscionable.

C. Permitting Litigation To Progress Does Not Waive Right To Enforce An Arbitration Clause

Winston v. Tingley Const. Co., No. CL10-2419, 2013 WL 1889363 (Va. Cir. Ct. Jan 17, 2013)

In this case, the Circuit Court of Richmond County held that permitting litigation to move forward does not waive one's right to enforce a binding arbitration clause. The court distinguished the case of *Shoosmith Bros., Inc. v. Hopewell Nursing Home, LLC,* 78 Va. Cir. 427 (2009), because that case stood for the proposition that utilizing the litigation machinery waives one's right to enforce an arbitration clause, not allowing the other party to do so. The court decided that since the defendant showed a binding arbitration provision in the contract and the plaintiff did not present sufficient evidence to show waiver, the proceedings should be stayed pending mediation and binding arbitration.

D. Unavailability Of Designated Arbitrator Did Not Render Arbitration Agreement Unenforceable

Schuiling v. Harris, No. 121582, 2013 WL 4854364 (Va. Cir. Ct. Sept. 12, 2013)

In this case, the court held that a provision in an arbitration agreement designating a specified arbitrator did not constitute an integral part of the agreement, and therefore, the unavailability of the designated arbitrator did not render the agreement unenforceable. The court reasoned that the severability provision of the parties' agreement permitted severance of not only a whole provision but any part of any provision determined to be invalid or unenforceable. The court concluded that nothing in the severability clause excluded an arbitrator designation from its scope, and the agreement contained no limitation on the court's statutory authority to appoint an arbitrator.

IV. VIRGINIA PUBLIC PROCUREMENT ACT

A. Virginia Public Procurement Act Does Not Provide A Private Cause Of Action

South End Constr., Inc. v. Tom Brunton Masonry, Inc., 2013 U.S.Dist. LEXIS 25505 (W.D.Va. 2013)

In this case, the court examined whether a subcontractor could allege a cause of action against the prime contractor for violating the Virginia Public Procurement Act (VPPA) by withholding ten percent of all progress payments owed to the subcontractor as retainage rather than five percent as provided in Va. Code § 22-4333(B) of the VPPA. Brunton Masonry was a subcontractor of South End. The subcontract allowed for South End to withhold ten percent of progress payments as retainage. The subcontract was governed by Virginia law. Brunton claimed that South End violated the VPPA by withholding ten percent retainage rather than the

five percent specified by statute and that the district court should imply a private right of action under the VPPA.

The district court granted South End's motion to dismiss the claim. The court noted that federal courts should be reluctant to read private rights of action into state laws where state courts and legislatures have not done so. The court found that there was no express private right of action in the statute, nor had a Virginia court implied a private right in the statute. This ruling did not leave Brunton without a remedy; the court found that the five percent retainage limit was incorporated into the subcontract as a matter of law, following established precedents of the Supreme Court of Virginia. The district court also found that Brunton did not waive the protections of the statute when it agreed to the contract term of ten percent, citing Supreme Court of Virginia precedent that the VPPA is a unique statutory scheme, and in the absence of explicit statutory authority, certain rights cannot be waived. The district court granted leave to Brunton to replead its claim as a breach of contract.

B. Virginia Supreme Court Finds That VPPA Does Not Provide For A Third-Party Challenge To A Governmental Action

Charlottesville Area Fitness Club Operators Ass'n v. Albemarle County Bd. of Supervisors, 285 Va. 87, 737 S.E.2d 1 (Jan. 10, 2013)

The operators of private, for-profit fitness clubs appealed demurrers to their declaratory judgment action in which they challenged the City of Charlottesville's award of a lease and use agreement to the YMCA to construct and operate a fitness center on City property for use by residents as being in violation of the Virginia Public Procurement Act ("VPPA"). The court, implicitly relying upon, but not expressly holding that the VPPA applied, found that the fitness clubs did not present an actual, justiciable controversy because the VPPA does not provide for a third-party challenge to a governmental action and the fitness clubs failed to avail themselves of the right to protest or challenge the award as a "potential bidder" within the context of the VPPA. Further, the court found that the clubs were seeking to protect their own interests, not that of taxpayers similarly situated, and that they did not present a due process violation susceptible of adjudication. Justice Kinser wrote a concurring opinion, focusing upon a lack of standing to bring the declaratory judgment action, while Justice Mims dissented, on grounds that the VPPA did not apply and criticizing the VPPA for failing to provide internal procedures for determining whether it applies or not to a contract, essentially rendering the VPPA unenforceable in the situation where the public body determines unilaterally that the VPPA does not apply.

V. DAMAGES

A. Virginia Circuit Court Finds That Mortgage Payments Are Not Compensable As An Element Of Property Damage In A Loss Of Use Claim

Matulenas v. Venture Supply, No. CL096328, 2013 WL 1951358 (Va. Cir. Ct. March 4, 2013)

On a motion in limine to exclude evidence of mortgage payments made on homes that were unlivable as a result of the presence of Chinese drywall, the City of Norfolk Circuit Court concluded that the mortgage payments were not compensable as an element of property damage. The court evaluated and rejected the plaintiffs' arguments that the mortgage payments for the affected properties represented the best measure of the value of the plaintiffs' loss of use claim. Citing to *MCI WorldCom Network Services v. ASP Consultants*, 266 Va. 389, 396 (2003), the court reasoned that a plaintiff is not entitled to recover loss of use damages when he/she has not actually incurred any costs associated with the lost use. Here, the court held, the plaintiffs' obligations to make their mortgage payments were unrelated to the damage to the residences and, therefore, the payments could not be submitted to the jury as a part of a loss of use claim. The plaintiffs' damages for lost use, the court held, were limited to those costs that they actually incurred by reason of their inability to occupy the affected properties.

VI. MECHANIC'S LIENS

A. Virginia Finds Mechanics' Liens Enforceable But Remands To Examine Whether The Entire Property May Be Sold To Satisfy The Lien

Glasser & Glasser, PLC v. Jack Bays, Inc., 285 Va. 358, 741 S.E.2d 599 (2013)

In *Glasser & Glasser*, the Virginia Supreme Court examined fourteen assignments of error raised by the petitioners to a circuit court's final order directing the sale of twenty-two acres of land to satisfy several mechanic's liens. The court rejected all but one assignment of error but ultimately remanded to take evidence as to the propriety of the sale of the entire 22 acre property to satisfy the mechanic's liens when the improvements were only made on 2.8 acres. Of note in this decision, is the court's analysis on the application of the 90-day rule and the 150-day rule that provides additional guidance to lien claimants.

Jack Bays, Inc. was a general contractor hired by New Life Anointed Ministries International ("New Life") to construct a new church building on 2.8 acres of a 22 acre property in Woodbridge, Virginia. The construction was financed in part by Glasser & Glasser, as well as two other banks (collectively, the "Lenders"), who secured their funding with a deed of trust and a note.

Approximately two years into the project, New Life exhausted its funding for construction and began looking for new financing. As a result of nonpayment by New Life, on September 28, 2007, Jack Bays sent a memorandum to its subcontractors advising that Jack Bays was immediately stopping its active work on the church, and asking the subcontractors to consider waiting until November to file any mechanic's liens to enable New Life to attempt to obtain new financing. That same day, Jack Bays began shutting down its active work. Subcontractors remained onsite until November 16, demobilizing and ensuring the safety of the site.

On December 28, 2007, Jack Bays recorded its memorandum of mechanic's lien. In December 2007 and January 2008, twelve subcontractors also recorded mechanic's liens. The

issue of the enforceability of the liens was all referred to a commissioner in chancery, who found, among other things, that Jack Bays did not violate either the 90-day filing deadline or the150-day "look-back" rules imposed under Virginia Code Sec. 43-4. The Lenders filed exceptions, and the circuit court rejected the Lenders' arguments, ordering that the entire 22 acres be sold with the proceeds of the sale being applied to the satisfaction of the liens. The Lenders appealed.

The 90-Day Rule

Virginia Code Sec. 43-4 requires that in order for a mechanic's lien claimant to perfect its lien, the claimant shall:

> file a memorandum of lien at any time after the work is commenced or material furnished, but not later than 90 days from the last day of the month in which he last performs labor or furnishes material, and in no event later than 90 days from the time such building, structure, or railroad is completed, or the work thereon otherwise terminated.

Clearly the lien was filed within the first of the two deadlines, 90 days from the last day of the month in which Jack Bays' last performed labor, but the Lenders argued on appeal that Jack Bays' lien was filed one day beyond the absolute 90-day deadline from termination of the work, and should therefore be dismissed.

When calculating the 90 days for the filing of Jack Bays' lien, the Lenders alleged that Jack Bays' September 28 memorandum to its subcontractors "otherwise terminated" the work on the church, thus beginning the 90-day period, which would render Jack Bays' lien invalid for having been filed ninety-one days later, on December 28. The Lenders conceded that if the work was not "deemed terminated" on September 28, the limitations clock would not begin until the last day of September, and Jack Bays' December 28 lien would have been timely filed. Finding in favor of the latter construction, and allowing Jack Bays' lien to stand, the court looked to its precedent defining "otherwise terminated" to mean when the contract ceased. The court concluded that the work did not stop on the project on September 28, because several of Jack Bays' subcontractors remained on the project through October and into November, demobilizing and otherwise rendering the site safe. The court therefore affirmed the decisions of the commissioner and the circuit court and ruled that Jack Bays complied with the 90-day rule.

The 150-Day Rule

Virginia Code Sec. 43-4 also provides that:

> the lien claimant may file any number of memoranda but no memorandum filed pursuant to this chapter shall include sums due for labor or materials furnished more than 150 days prior to the last day on which labor was performed or material furnished to the job preceding the filing of such memorandum.

The Lenders also argued that Jack Bays violated the 150-day "look back" rule, by first asserting that a unitary date should apply for all lien claimants, which was summarily dismissed by the court based on the plain language of the Code. The Lenders then unsuccessfully argued that even if the 150-day rule was not unitary, Jack Bays' lien was untimely because Jack Bays used September 28 as the look back date, when Jack Bays, through its subcontractors, was onsite far past that date. Dismissing that argument, the court cited to testimony from Jack Bays' site superintendent and president demonstrating that although Jack Bays informed its subcontractors to cease work on September 28, the following demobilizing and safety work did not add any value to the project which would otherwise extend the date for the 150-day calculation. While recognizing the somewhat inconsistent approach in its analysis of both time periods, the court explained that:

> these distinct dates are used because Code § 43-4 provides that in the circumstances presented by this case, the proper date to use when evaluating compliance with the 90-day rule is the *end* of the relevant month where a contractor last works on a structure, when that structure is not fully completed. The 150-day rule, on the other hand, requires that courts calculate time based on when the contractor last performs labor or finishes material – not necessarily at the end of a month.

Jack Bays' lien was therefore in compliance with the Code and enforceable.

Sale of the Entire Property

As mentioned above, although the liens were proper and enforceable, the court still held there was no evidence to support the circuit court's final order directing the sale of the entire 22 acre property when the lien claimants only improved 2.8 acres of that parcel. Referring to the language of Virginia Code Sec. 43-3 that mechanic's liens only apply to "so much land therewith as shall be necessary for the convenient use and enjoyment thereof" the court instructed that there had been no evidence to demonstrate that the sale of the entire property was necessary for the convenient use and enjoyment thereof, and remanded the case for further proceedings on that question.

VII. BANKRUPTCY

A. False Payment Applications May Constitute Fraud Necessary To Hold A Debt Non-Dischargeable In Bankruptcy

SG Homes Assocs., LP v. Marinucci, 718 F.3d 327 (4th Cir. 2013)

A Maryland subcontractor submitted monthly payment applications for progress payments. With each application, the subcontractor certified it had paid its subcontractors with previously received funds and would use the currently sought payments for the same purpose. When the general contractor learned that lower tier subcontractors were not receiving payments, it terminated the subcontractor and paid the lower tier subcontractors.

After the general contractor obtained a default judgment against the subcontractor for fraud and breach of contract to recover the double payments it made for lower-tier subcontractor work, the subcontractor's principal, Marinucci, filed individually for Chapter 7 bankruptcy protection. The general contractor then filed an adversary proceeding in the bankruptcy court against Marinucci seeking a declaration that Marinucci's debt to it was non-dischargeable under 11 U.S.C. § 523(a)(2)(A).

The general contractor argued that Marinucci had personally committed fraud and violated the Maryland Construction Trust Statute -- which requires money disbursed to a contractor for a particular project to be used only to pay the project's subcontractors -- by wrongfully certifying it had paid and would pay lower-tier contractors. Although the bankruptcy court dismissed the Maryland statutory claim as not applicable to dischargeability of a debt, the court found that Marinucci had committed fraud in falsely certifying payment applications. Therefore, the bankruptcy court determined the debt was non-dischargeable. On appeal, the Fourth Circuit considered whether the false certifications satisfied the elements of fraud necessary to hold a debt non-dischargeable. Focusing particularly on the "justifiable reliance" element, the court affirmed the bankruptcy court's finding that the general contractor relied on the certifications and would not have continued making payments had it known the certifications were false.

VIII. FALSE CLAIMS ACT

A. Recent Court Of Federal Claims Decision Demonstrates The Peril To Federal Contractors Of Submitting Inflated Claims

Veridyne Corp. v. United States, No. 06-150C, 2012 WL 5389733 (Fed Cl. Nov. 5, 2012)

The question of what constitutes "costs" under the CDA's anti-fraud provision was addressed for the first time by the Court of Federal Claims in *Veridyne Corp. v. United States*, No. 06-150C, 2012 WL 5389733 (Fed Cl. Nov. 5, 2012). Earlier, the court determined that $500,000 of Veridyne's $2.5 million claim was fraudulent, therefore entitling the Government to its "costs" in reviewing that portion of Veridyne's claim. The Government then introduced evidence that it had incurred almost $400,000 in "costs" to review the fraudulent portion of the claim, which was comprised of DOJ-attorney and agency-employee review time, Defense Contract Audit Agency (DCAA) review, and third-party contractor services to perform forensic imaging of Veridyne's computers during discovery. The court examined each category of claimed fees in detail.

First, the court considered whether DOJ attorneys and agency employees - who did not contemporaneously record time entries for the case - could apportion the amount of their annual salary to the review of the fraudulent claim using only after-the-fact time entries for the entire case and estimates of how much time they each spent reviewing the fraudulent portion of the claim. Relying upon the Federal Circuit's decision in *Tip Top Construction, Inc. v. Donahoe*, 695 F.3d 1276 (Fed. Cir. 2012), which required contractors seeking attorney's fees incurred in negotiating change orders to provide contemporaneous time entries and sworn declarations describing the work, the court stated there was "no reason why the Government should be held to a different standard when it seeks costs of review pursuant to the CDA." However, the court tempered this holding by limiting the DOJ's obligation to contemporaneously record and

apportion time to the period of time commencing on the date that the DOJ begins considering filing a CDA fraud counterclaim. Attorney time spent prior to that point could be reconstructed from prior emails, calendars, and notes. The court applied the same holding to agency employee time. Here, the failure of the DOJ or agency employees to record their time once they learned of the potential fraud counterclaim barred the Government's claim for these fees.

Conversely, the court awarded all of the requested DCAA auditor fees. Key to the court's differential treatment of these fees was the fact that the auditor kept contemporaneous certified time records and was specifically employed to analyze the fraudulent portion of the claim. Furthermore, as an auditor with accounting expertise, the court could be certain that his time was used for "reviewing" the claim, rather than time spent upon litigation tasks which would not be a recoverable expense.

Finally, the court examined the agency's claimed costs for a third-party contractor to perform forensic computer imaging. Because the court had ordered the forensic imaging, it knew that the service had been employed to review the entirety of the government's claim, not merely the fraudulent portion of the claim. However, because the nature of the service made it difficult, if not impossible, to segregate the services related only to the fraudulent portion of the claim, and the court had been thoroughly involved in overseeing the requirement for the examiner, the court reasoned that a 40% allocation of the examiner fees was reasonable and appropriate.

As *Veridyne* demonstrates, the DOJ has powerful weapons at its disposal to retaliate against fraudulent or overinflated claims submitted to the Government. In total, the Government recovered from Veridyne only approximately 25% of the fees and costs it sought by way of the CDA anti-fraud provision.

IX. MISCELLANEOUS

A. Employee Of Subcontractor Injured While Operating Rental Equipment Leased By Others Has No Claim For Negligence Against Rental Company

Tuel v. Hertz Equip. Rental Corp., 2013 U.S.App. LEXIS 2128 (4th Cir. 2013)

This common law negligence action arises out of an accident at a construction site. Tuel, an employee of an electrical subcontractor and a trained aerial equipment operator, was injured when he moved a boom lift rented by another subcontractor from Hertz Equipment Rental. Tuel sued Hertz alleging, that as a foreseeable third party, Hertz owed him a duty of reasonable care in performing maintenance on its leased construction equipment.

The district court granted summary judgment to Hertz, finding Hertz owed no legal duty in tort to Tuel. The Fourth Circuit Court of Appeals affirmed.

Tuel did not argue that Hertz had a common law duty to repair the boom lift, as such duties were governed by the rental contract. Rather, Tuel argued that once Hertz undertook to repair its leased equipment, it assumed a duty to third parties to perform the repairs with

reasonable care. This is known as the "assumption of duty" principle. Thus, Tuel's claim raised two issues: (1) whether under Virginia law a party may assume a duty to third parties to exercise reasonable care when rendering services pursuant to a contract, and (2) whether Tuel was within the category of third parties covered by the assumption of duty principle.

On the first issue, the Fourth Circuit explored Virginia's source of duty and economic loss rules and assumed, without deciding that once Hertz began to render services under its lease, it assumed a duty to foreseeable third parties to exercise reasonable care in performing its services to avoid physical injury.

As to the second issue, the court concluded that Tuel had failed to put forth sufficient evidence to show that he was a foreseeable third party whom Hertz should have reasonably expected to be harmed by the malfunctioning lift. The court noted there was no evidence that Hertz knew that Tuel or other third parties would use the lift, the rental contract forbade the operation of the lift by third parties, and the lift was "off rent" and awaiting pickup by Hertz.

B. No Private Right Of Action Under FAR

Ciliv v. UXB Intern, Inc., 2012 U.S.Dist. LEXIS 151514 (W.D. Va. 2012)

UXB International, Inc. contracted with the U.S. government to perform work at Bagram Air Force Base in Afghanistan. UXB entered into a subcontract with Plaintiff 77 Construction for construction services. A dispute arose about the work performed by 77 Construction, leading UXB to withhold money from 77 Construction out of fear that the federal government would not ultimately pay for the completed work once it performed the final audit of the prime contract. Plaintiff filed suit to recover monies that UXB received from the federal government on 77 Construction's behalf but had not paid to Plaintiff. Plaintiff's complaint asserted claims for breach of contract, *quantum meruit* and breach of the Federal Acquisition Regulations ("FAR"). Defendant moved to dismiss the latter two counts.

The court dismissed the plaintiff's claim that UXB violated the FAR through non-payment of the amount due 77 Construction. Plaintiff conceded that the FAR does not expressly provide for a private cause of action. The court also determined that no congressional intent to imply a private cause of action under the FAR was present. The court also noted that the modern Supreme Court has been extremely reluctant to expand previously-recognized implied private rights of action or to recognize "new" implied private rights of action. The court concluded that the plaintiff pointed to no statutory language that authorizes, explicitly or implicitly, a private right of action. Further, the fact that the violated standard was a regulation, not a statute, underscored a lack of congressional intent to create a private right of action. An implied private right of action for violation of a regulation is even more difficult to establish, since there is often very little indication that Congress actually intended to create a private remedy. For these reasons, the court held that there is no private right of action to enforce a FAR violation.

The court also granted UXB's motion to dismiss the *quantum meruit* claim, holding that "there can be no recovery in *quantum meruit* where a valid express contract between the parties exists. Parties to an express contract are entitled to have their rights and duties adjudicated

exclusively by its terms." The court noted that it is only after a valid and binding express contract is acknowledged by the parties or the court that this rule attaches. Here the complaint clearly set forth the plaintiff's belief that it could obtain all requested relief on the breach of contract claim. Likewise, defendant did not contest the validity of the contract between the parties. Thus, the parties remained in a contractual relationship at all relevant times. Accordingly, the court found that a valid, express contract existed between the parties and therefore they "are entitled to have their rights and duties adjudicated exclusively by its terms."

C. Eastern District Of Virginia Dismisses Minority Contractor's Complaint For Race Discrimination For Failure To Plead A Cause of Action

Commercial One Electrical Contractors, Inc. v. Trane U.S., Inc., No. 3:12cv888, 2013 U.S. Dist.LEXIS 32554, 2013 WL 871521 (E.D.Va. March 8, 2013).

Commercial One Electrical Contractors, a sub-subcontractor on a parking garage project in downtown Richmond for the Virginia Department of General Services, filed suit in federal court against Urban Grid Solar, Inc., Gilbane Building Company, Trane U.S., and two sureties, claiming that the failure of Commercial One to receive contract payments was the result of a conspiracy based upon racial animus. The court found that the plaintiff, other than asserting its status as a minority contractor, filed a complaint "barren of any specific factual allegations that would support any reasonable inference, or any plausible claim, of racial discrimination" on the part of any of the defendants. Once it dismissed the racial discrimination claims for failing to meet the minimum pleading requirements of *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009), the remaining case lacked complete diversity of citizenship and the court declined to exercise supplemental jurisdiction.

D. Virginia Supreme Court Evaluates Defamation Claim Asserted By Government Contractor

Tharpe v. Saunders, 285 Va. 476, 737 S.E.2d 890 (2013)

This case involved an appeal of the circuit court's decision sustaining the defendant's demurrer of a defamation action on the grounds that the allegedly defamatory statement was an expression of an opinion. In its decision, the Virginia Supreme Court held that a fabricated quotation falsely attributed to a plaintiff is actionable as defamation, regardless of the truth or falsity of the substance of the quotation, when it injures the plaintiff's reputation.

While performing excavation work for the U.S. Government on a project in Fort Pickett, the plaintiff, Shearin Construction, Inc. ("Shearin"), encountered rock and entered into a change order, through its agent Jeffrey W. Tharpe ("Tharpe"), for increased compensation as a result of excavating the rock. Subsequently, Shearin contracted with the Southside Regional Service Authority ("Authority") to perform excavation work at Butcher's Creek Landfill in Mecklenburg County. While on the project Shearin encountered rock during excavation and, again through Mr. Tharpe, requested a change order for additional compensation. Thereafter, J. Harman Saunders ("Saunders"), owner and operator of Saunders Construction, Inc., the defendants and competitors to Shearin, allegedly made the following statement to the Authority upon which

Shearin's defamation action was based: "Tharpe told me that Tharpe was going to screw the Authority like he did Fort Pickett." This statement was allegedly repeated and republished by and to the Authority, people of the community and the news media, causing harm to the business reputation of Tharpe and Shearin.

The question before the Virginia Supreme Court was whether this statement was a statement of opinion that could not form the basis of a defamation action. The court resolved this question by reviewing whether the statement was capable of being proven true or false. The court held that the statement was capable of being proven true or false because it was not an opinion that Tharpe made this statement to Saunders, nor was it dependent on Saunders' viewpoint. The court held that fabricated quotations causing injury to the reputations of the plaintiff give rise to a claim of defamation regardless of the truth or falsity of the matters asserted in the statement allegedly attributed to the plaintiff and regardless of whether such assertions are fact or opinion. The defamation action, the court reasoned, should have been permitted to proceed past the pleadings stage, since whether Tharpe actually stated that his company was about to "screw" (or as that term is commonly understood, unfairly take advantage of) another owner of a government project was capable of being proven true or false.

E. Virginia Supreme Court Evaluates *Res Judicata* Defense to Contract Action

Caperton v. A.T. Massey Coal Co., Inc., 285 Va. 537, 740 S.E.2d 1 (2013)

This is a breach of contract action by a coal supplier against a corporate purchaser of coal arising out of a coal supply agreement, on which there had been much previous litigation spanning several decades in several different state and federal courts, including one prior state case in Virginia. However, and ultimately because of a forum-selection clause in the coal supply agreement, the plaintiff brought their claims for tortious interference, fraudulent misrepresentation, and punitive damages in a second state action in Virginia. In response, the defendant filed a plea of res judicata and the statute of limitations. The circuit court agreed and sustained the plea.

On appeal, the Virginia Supreme Court examined the law of res judicata as it existed in 1998, prior to the adoption of Virginia Supreme Court Rule 1:6, and found that because the same evidence from the first Virginia case was not necessary to provide the plaintiff's claims in the second Virginia case, res judicata would not bar the second Virginia case, and reversed and remanded to the circuit court.

F. Circuit Court Finds Various Fraud Claims Barred by Statute Of Limitations

Sun Hotel, Inc. v. SummitBridge Credit Invs. III, LLC, No. CL-2012-14062, 2013 WL 578498 (Va. Cir. Ct. Jan. 23, 2013)

This case arose following a default on a loan for the purchase of three parcels of real property using seller financing and subsequent refinancing. Following a foreclosure sale and a confession of judgment on related guarantees for the remaining deficiencies due under the loan, the debtors filed a complaint against the lender for a declaratory judgment and relief on the

grounds of fraud, constructive fraud, breach of fiduciary duty, negligent misrepresentation, breach of implied duty of good faith and fair dealing, and rescission. The case came before the court on a plea in bar and demurrer, which were sustained on all counts.

The Fairfax County Circuit Court examined each of the causes of action, and found that the counts for declaratory judgment (based on fraud), fraud, and constructive fraud were time barred by the statute of limitations. The court also dismissed the claim for negligent misrepresentation, because there is no separate claim in Virginia. The court also explained that every contract in Virginia contains an implied covenant of good faith and fair dealing, however the parties agreement was governed by North Carolina law, and under North Carolina law, the claim was also time-barred under a three year statute of limitations. As to the rescission count, the court found that rescission would be inappropriate where there did not appear to be any colorable indication of fraud. Finally, the court held that because the agreements were required to be in writing by the statute of frauds, they could not be modified or waived orally, as the plaintiffs alleged.

G. Court Examines Service of Process For Appealing Board of Contractors Decision

Muse Constr. Group, Inc. v. Commonwealth of Virginia Bd. for Contractors, 61 Va. App. 125 (Nov. 13, 2012)

Muse, a home construction contractor appealed the order of the trial court dismissing Muse's appeal of the Board's decision revoking Muse's contractor's license. On rehearing, the Court of Appeals affirmed the judgment of the trial court, because Muse failed to perfect service of its appeal on the Board's secretary as required by Virginia Supreme Court Rule 2A:4.

The Court of Appeals explained that Rule 2A:4(a) requires service of process in the same manner in which process is served to initiate a civil action, because the plain language of that rule requires the party to take all steps provided in Rules 3:2, 3:3, and 3:4 to cause a copy of its petition for appeal to be served as in a civil action. The Court of Appeals also reaffirmed its prior holding that the simple act of mailing to an agency a copy of a petition for appeal that had been filed with a court does not qualify as process. Rather, process, at lease for purposes of Rule 2A:4(a), must be an official notice issued by a court. The reason is that an agency is not within the judicial branch, so an initial, court-issued process is necessary for a court action to review agency conduct.

X. LEGISLATIVE SUMMARY

HB 1801: Board for Contractors: Change to Rules and Procedures for Recovery Against the Contractor's Fund

This bill changes many of the rules and procedures for claims against the contractor's recovery fund, including removing commercial contractors from the definition of regulant; adding a definition of verified claim that requires a completed form designed by the Board which must be notarized, and supporting documentation; changes the means by which the Contractor's Board must be notified of the action to only require forwarding of the Complaint by certified mail or equivalent; requires a claim to be made to the Director no later than 12 months after the entry of

a final order; changes the actions that must be taken before a claim can be submitted to include making a reasonable attempt to conduct debtor's interrogatories and to take all legally available actions to execute against the assests identified in the debtor's interrogatories; allows the filing of a claim against the contractor's fund if the claimant filed a claim in bankruptcy against the contractor, but the distribution in bankruptcy court failed to satisfy the claim; changes the documentation that must be submitted as part of a claim to a copy of the contract with all change orders and, if there is no contract, an affidavit affirming that debtor's interrogatories were taken, a statement of all actions taken to collect or why collections is not possible, a statement of the balance remaining on the judgment, a statement that the claimant will notify the Board if it receives further payment against the judgment and any documents the claimant wants the Board to consider; the Department will consider verified claims administratively, if the claim is not complete, the claimant will be notified of the deficiency and will have 12 months from the initial claim submission to submit a complete and correct claim; it is now within the discretion of the Department to grant an informal fact finding if the claimant requests it within 15 days of the claimant's receipt of the Department's recommendation, but a hearing is not required; a claim will not be denied because the order of final judgment fails to fine "improper or dishonest conduct", the Board can look to any language in the order that supports that conclusion and, if the order is silent, the Board may determine whether the contractor's conduct was improper and dishonest; and the Board can consider any amount owed to the Board for repayment to the fund when determining whether to grant a license. Effective Date: July 1, 2013.

HB 1802:Board for Contractors: Creation of Residential and Commercial Classifications
Creates new Residential and Commercial Classifications in the Class A, Class B and Class C Contractors classes. Effective Date: July 1, 2013.

HB 1960: Board for Contractors: Licensure Requirements for Public Works Art
A contractor's license is not required for bidding to design or undertake public works art for the Commonwealth, a municipality or a not-for-profit; however, the installation and related work must be performed by a licensed contractor. Effective Date: July 1, 2013.

HB 1913: Mechanic's Liens: Liens by Licensed Contractors
Provides that a person who performs labor without the proper contractor's license is not entitled to a mechanic's lien, requires that all memoranda of mechanic's lien include the license or certificate number, and the issue and expiration dates of the license. The bill also updates the model lien forms to include the licensure information and provides that no lien will be invalid for an inaccuracy in the licensure information. Effective Date: July 1, 2013.

SB 811: Mechanic's lien: Penalty for Filing a False Lien
Makes it a class 5 felony to maliciously file a mechanic's lien that the claimant knows is false. Effective Date: July 1, 2013.

HB 1692/SB 977: Public Private Transportation Act of 1995; Review of Proposals
Requires public entities to post a notice when they receive a proposal under the PPTA, and allow a 120-day submission period for competing proposals. The notice must include information on the proposal and the public comment opportunities. In addition, after negotiations are complete

and a decision to award is made, the public entity must post the major business points of the agreement and outline how the public can submit comments. Effective Date: July 1, 2013.

HB 2079: Virginia Public Procurement Act; Methods of Procurement
Reorganizes the definitions of and processes for competitive sealed bidding and competitive negotiation. Also adds a definition of job order contracting and specifies procedures to be used by public bodies when utilizing job order contracting. The provisions do not become effective until July 1, 2014. The bill also requires the chairs of the House Committee on General Laws and the Senate Committee on General Laws and Technology to convene a work group in 2013 to examine the provisions of the VPPA. The bill also contains technical amendments. Effective Date: July 1, 2014.

HB 1994: Virginia Public Procurement Act; Contract Pricing Arrangements
The VPPA does not prohibit pricing arrangements for a policy or contract of insurance or prepaid coverage having a premium computed on the basis of claims paid or incurred, plus the insurance carrier's administrative costs and retention stated in whole or part as a percentage of such claims. The VPPA also does not prohibit pricing arrangements for a cost plus a percentage of the private investment made by a private entity as a basis for the procurement of commercial or financial consulting services related to a qualifying transportation facility under the Public-Private Transportation Act of 1955 (§§ 56-556 *et seq.*) or a qualifying project under the Public-Private Education Facilities and Infrastructure Act of 2002 (§§ 56-575.1 *et seq.*) where the commercial or financial consulting services are sought to solicit or to solicit and evaluate proposals for the qualifying transportation facility or the qualifying project. As used in this section. "private entity" and "qualifying transportation facility" mean the same as those terms defined in § 56-557 and "qualifying project" means the same as that term is defined in § 56-575.1. Effective Date: July 1, 2013.

HB 2128: Virginia Public Procurement Act; Small Procurements; Localities
Provides that local public bodies are not required to post on the Department of General Services' central electronic procurement website for small purchase procurements.
Effective Date: July 1, 2013.

HB 2316/SB 1246: Virginia Public Procurement Act; Multiple Project Contracts for Architectural or Professional Engineering Services Relating to Construction
Raises, in the case of airport and aviation transportation projects, the maximum cost of architectural or professional engineering services for all projects in one contract term of a multiple project contract from $500,000 to $1.5 million and for any single project from $100,000 to $500,000. For a locality or authority or sanitation district with a population in excess of 80,000, the bill raises the maximum cost of such services from $1 million to $2 million. Effective Date: July 1, 2013.

SB 902: Virginia Public Procurement Act; Alternative Forms of Security
Authorizes the acceptance of a cashier's check in lieu of a bid, payment, or performance bond. Currently the only acceptable alternative forms of security are certified funds or cash escrow. Effective Date: July 1, 2013.

HB 1546: Service of Process on Nonresidents and Foreign Corporations,
Includes new provisions for service of process on nonresidents and foreign corporations, including providing that (1) foreign corporations may be personally served with process outside of the Commonwealth in addition to substituted service on such corporation within the Commonwealth; (2) service of process on the Commissioner of the Department of Motor Vehicles for nonresident motor vehicle owners or operators or the Secretary of the Commonwealth for nonresident aircraft owners or operators is effective on the date service is made on the Commissioner or the Secretary, and (3) the Secretary of the Commonwealth or the statutory agent of a foreign corporation must provide a receipt noting the date service of process was made if the Secretary or statutory agent was served by hand delivery or any other method that does not provide a return of service.

HB 1607: Insurance
Removes provisions that prevent property and casualty insurers from delivering electronically notices of cancellation of certain policies of property or casualty insurance.

HB 2102: UCC Secured Transactions
Provides that a filing under Article 8.9A of the Uniform Commercial Code does not occur with respect to an initial financing statement or amendment thereto that the State Corporation Commission refuses, or may have refused, to file on grounds that such a record is not created pursuant to Article 8.9A, is materially false or fraudulent, is presented for an improper purpose, or indicates that the debtor and secured party are substantially the same person or that the record was transmitted by an individual debtor. If a record should have been rejected for any of these reasons, the record shall be deemed void and ineffective and the filing office may remove it from the index.

* Credit to the Spring 2013 Issue of Construction Law and Public Contracts Newsletter, *available at* http://www.vsb.org/site/sections/construction-news/springnews2013