



# COMMONWEALTH OF VIRGINIA CONSTRUCTION LAW COMPENDIUM

**Prepared by**

Nicole Hardin Brakstad

John "Jack" M. Robb, III

LeClairRyan, A Professional Corporation

Riverfront Plaza, East Tower

951 East Byrd Street, Eighth Floor

Richmond, VA 23219

(804) 783-2003

[www.leclairryan.com](http://www.leclairryan.com)

Revised 2016

Following is an overview of construction law in Virginia. Virginia construction law has much in common with other states, with some important distinctions. Construction cases in Virginia generally sound in contract law, as economic damages cannot be recovered in tort. Virginia also disallows claims for strict liability, except with respect to abnormally dangerous activities or building materials provided by manufacturers and suppliers.

## I. Breach of Contract

### A. Possible Recovery Available to Plaintiffs

In general, an owner must turn to contract law in order to recover damages for poor construction, arguing that construction defects represent a breach in the contract. In Virginia, the statute of limitations for the breach of a written contract is five years, and for the breach of a non-written contract it is three years. Va. Code Ann. §8.01-246. In new construction, provisions which are collateral to the passage of title (*e.g.* the duty to install oak flooring) and not covered by the deed are not merged into the deed and survive its execution. *Abi-Najm v. Concord Condominium, LLC*, 280 Va. 350, 699 S.E.2d 438 (2010).

### B. Abandonment

If a contractor fails to employ a sufficient quality and quantity of workmen, he may be deemed to have abandoned the construction project. *Bd. of Supervisors v. Ecology One, Inc.* 219 Va. 29, 245 S.E.2d 425 (1978). Under such a situation, the owner may proceed to complete the project and recover damages from the contractor. It is often unclear whether the contractor's performance, or lack of performance, constitutes abandonment. A contractor's mere failure to comply with a contract specification regarding materials to be used may not constitute abandonment. However, to avoid the potential difficulty of determining whether a contractor's conduct constitutes abandonment, many construction contracts expressly outline the circumstances under which an owner may declare a contractor to be in default and take over completion of the project.

Further, under many contracts the architect is given the power to determine if abandonment has occurred. Notice to the contractor is usually required of the owner before he can terminate the contractor and commence completion of the project.

### C. Plans and Specifications

The United States Supreme Court's decision in *United States v. Spearin*, 248 U.S. 132 (1918) has been cited with approval by the Supreme Court of Virginia. See *Southgate v. Sanford*

*& Brooks Co.*, 147 Va. 554, 137 S.E. 485 (1927). Thus, in Virginia, the contractor is entitled to rely on the accuracy and adequacy of the contract documents upon which the bid is based. *Worley Bros. Co. v. Marus Marble & Tile Co.*, 209 Va. 136, 161 S.E.2d 796 (1968). Generally, an owner who furnishes a construction contractor with plans and specifications furnished by the owner that prove ineffective or insufficient cannot recover from the contractor for loss or damage resulting solely from the defective or insufficient plans and specifications, unless the contractor is negligent or has made an express guarantee or warranty that the plans or specifications are sufficient or free from defects. See *Richmond, Inc. v. Ewing's Sons*, 200 Va. 593, 595, 106 S.E.2d 595, 597 (1959).

If there is a patent or obvious discrepancy, however, the contractor has a duty to bring it to the attention of the appropriate party for clarification. If the contractor fails to obtain such clarification, he may not be able to recover for the cost of extra work. Exculpatory contractual language whereby the owner seeks to transfer responsibility for detecting errors to the contractor may not be enforced depending on circumstances and the magnitude of the error.

## II. Negligence

In Virginia construction law, negligence is a cognizable theory for recovery in limited circumstances. Virginia courts generally equate negligent performance of construction with a breach of a construction contract. *VMI v. King*, 217 Va. 751, 232 S.E.2d 895 (1977). Nevertheless, an owner may successfully recover from a contractor on a negligence theory when the contractor causes damages that result from defects in plans of which he knew or should have known, but failed to warn the owner. *Id.* Generally, recovery in tort is only available where a contractor violates a separate duty not subsumed by the agreement or where personal injury or other damage occurs. See *Kaltman v. All American Pest Control*, 281 Va. 483, 706 S.E.2d 864 (2001); *Sensenbrenner v. Rust, Orling & Neale*, 236 Va. 419, 246, 374 S.E.2d 55, 62 (1988).

The Supreme Court of Virginia has repeatedly held that an action in tort cannot arise out of the negligent breach of a contractual duty. *Dunn Constr. Co. v. Cloney*, 278 Va. 260, 682 S.E.2d 943 (2009); *Augusta Mut. Ins. Co. v. Mason*, 274 Va. 199, 645 S.E.2d 290 (2007); *Richmond Metro. Auth. v. McDevitt St. Bovis*, 256 Va. 553 559, 507 S.E.2d 344, 347 (1998); *Spence v. Norfolk and Western Railroad Co.*, 92 Va. 102, 116, 22 S.E. 815, 818 (1895). For example, where a contractor fails to construct a home in accordance with generally accepted industry standards and in a structurally sound manner and where the only damages are economic losses, an action for negligence cannot be maintained. *Weiss v. Cassidy Dev. Corp.*, 61 Va. Cir. 237 (Fairfax Co. Cir. Ct. 2003). The court in *Weiss* also noted that code violations may not be the basis of a negligence action when the only damages are economic losses.

In Virginia, the standard for professional negligence is the failure to exercise the standard of care of those ordinarily skilled in the industry in question. In preparing plans and drawings, architects owe owners a duty to exercise skill and ability, judgment and taste, reasonably and without neglect. *Surf Realty Corp. v. Standing*, 195 Va. 431, 78 S.E.2d 901 (1953). In entering a

contract with the owner, the architect implies that he possesses the requisite competence, ability and technical skill to furnish plans and specifications, and he obligates himself to exercise the care of those ordinarily skilled in the business. *Id.* Nevertheless, the architect is not generally liable for faulty construction resulting from plan or design defects, as he neither implies nor guarantees perfect plans or satisfactory results. *Id.* The "professional standard" for architects requires that they perform their duties in accordance with the usual and accepted standards of the profession, given the time and place in question and the state of the art. Plaintiffs seeking damages from architects for professional negligence must prove (a) that the design professional owed the plaintiff a duty of care, (b) that the design professional breached that duty, (c) that the plaintiff was injured, and (d) that the breach of duty proximately caused the damage or injury.

In cases in which the design professional is a third party, a plaintiff must establish that the design professional owed a duty to the plaintiff; otherwise, the design professional could not be negligent toward the plaintiff. Often, the question as to the existence of a duty turns on whether the harm to the plaintiff was foreseeable: in other words, that the plaintiff foreseeably relied on and acted upon design professional's work product. For example, foreseeability may not exist where a job site trespasser incurred injury due to a design defect. An injury that could not have been foreseen or reasonably anticipated may not serve as the basis for a cause of action. *Scheffer v. R.R. Co.*, 105 U.S. 249 (1881); *Dockery v. Norton*, 204 Va. 752, 133 S.E.2d 296 (1963); *Norfolk & W.R. Co. v. Whitehurst*, 125 Va. 260, 99 S.E. 568 (1919).

In addition, an injured party may also be unable to recover if the plaintiff was contributorily negligent. Under this theory, a person who contributes to his own injury cannot recover for an architect's failure. Contributory negligence is an absolute bar against recovery in Virginia.

### **III. Breach of Warranty**

In order to demonstrate a breach of warranty at common law it is necessary to prove four elements: (1) the existence of a warranty, (2) the breach of that warranty, (3) causation, and (4) resulting damage.

#### **A. Breach of Implied Warranty**

The U.C.C. implies certain warranties to contracts. Whenever a merchant sells goods there is an implied warranty of merchantability. This implied warranty guarantees that the goods are merchantable. In this context, merchantable means that the products furnished must:

- 1) Be fit for the ordinary purposes for which such goods are used;
- 2) Pass without objection in the trade under the contract description;
- 3) In the case of fungible goods, be of fair and average quality within the

description;

- 4) Run within the variations permitted by the contract, of even kind, quality and quantity within each unit and among all units involved;
- 5) Be adequately packaged and labeled as the contract may require; and
- 6) Conform to any promises made on the container or label.

In addition, there is an implied warranty of fitness for particular use if, at the time of contracting, the seller had reason to know the particular purpose for which the goods were intended and that the buyer was relying on the seller's skill or judgment to select suitable good.

Virginia law also imposes implied warranties for workmanship and materials in construction contracts in the absence of clear disclaimers. *Mann v. Clowser*, 190 Va. 887, 59 S.E.2d 78 (1950). Owners can have a cause of action for breach of implied warranties in Virginia.

Even in the absence of a specific contractual provision, Virginia has provided for an implied warranty on new homes. Va. Code Ann. §55-70.1. In any contract for the sale of a new dwelling, a vendor warrants that the dwelling is free from structural defects and constructed in a workmanlike manner. Va. Code Ann. §55-70.1(A). In addition, if the vendor is in the business of buying or selling dwellings, a vendor also warrants that the dwelling is fit for habitation. Va. Code Ann. §55-70.1(B).

The implied warranty of workmanship and habitability runs for one year after the transfer of title or the buyer's taking possession, whichever occurs first and a buyer has two years from the date of the breach in which to bring an action for breach of warranty. Va. Code Ann. §55-70.1(E). If a buyer notifies the builder of defects covered by this implied warranty within one year and the builder fails to remedy the defect, the buyer has two years from the date of notifying the builder of the defect to file an action for breach of the warranty. *Davis v. Tazewell Place Assoc.*, 254 Va. 257, 492 S.E.2d 162 (1997).

In building and construction contracts it is implied that a building will be constructed in a reasonably good and workmanlike manner and when constructed will be reasonably fit for the intended purpose. *Mann v. Clowser*, 190 Va. 887, 901, 59 S.E.2d 78, 84 (1950). *Mann* also notes that the standard for judging work is one of reasonableness when compared to the standards of the industry. *Id.*

Standard form construction management contracts impose some design responsibility on the construction manager. It is likely that he too can be liable to the owner for defective design. However, there is relatively little case law addressing the construction manager's liability for defective design. The extent of the construction manager's liability would appear to turn on the

contract limitations and on the extent of his involvement in design. The greater his involvement, the greater his expected liability. For example, a design contractor who overrules the design contractor's specifications for building materials or components may incur liability for his selections if they prove deficient.

Subcontractors are liable to general contractors under the same theories of implied warranty, that is a reasonable workmanlike manner of performing work in conformance with industry standards and fitness for intended use.

#### B. Breach of Express Warranty

The U.C.C. recognizes certain words and conduct as representing express warranties even though the seller may not have so intended. Express warranties by the seller are created by any affirmation of fact or promise made by the seller to the buyer that relates to the goods and becomes a part of the basis of the bargain, or by any description of the goods that is made part of the basis of the bargain, or by any sample or model that is made part of the basis of the bargain.

Written warranty clauses in a contract expand the contractor's liability for defects beyond the date of final acceptance. Express warranties describe the warranty terms and specify the length of time that owners have to discover defects. These express warranties also state the notice period required and the time the contractor has to replace the defective work once he receives notice of it.

Owners should insist that the contract have a clause requiring the work to be performed in a workmanlike manner and to be of high quality. These general terms allow the owner to make claims against the contractor for any number of problems. However, the owner must provide notice of defects prior to the expiration of the warranty period in order to retain his rights.

Many modern construction contracts contain express warranties against defects in material and workmanship within one year of substantial completion or acceptance of the work. These clauses can expose contractors to a new layer of liability. It seems that some warranties can be contracted around, for "purchasers receive consumer protections under Virginia Code § 55-70.1 from the developer. Under § 55-70.1, the developer bears the economic costs of faulty construction and may bargain with the purchaser and disclaim the statutory warranties." *Winchester Homes Inc. v. Hoover Universal Inc.*, 30 Va. Cir. 22 (Fairfax Co. Cir. Ct. 1993).

Subcontractors may be liable to general contractors for breach of their own express warranties in their contracts. Contractually, subcontractors are frequently required to warrant their work for one year from the date of final acceptance of the project. Final acceptance may not occur for months or even years after a subcontractor has completed his work. These provisions require the subcontractor, in effect, to maintain the premises beyond his last day of work on the project. Therefore, the subcontractor should try to provide that the warranty will start running

upon acceptance of the subcontractor's work, and in no event later than one month after the subcontractor completes his work.

#### **IV. Misrepresentation and Fraud**

An action for fraud based on a builder's representations about a home must be based on misrepresentations of existing facts and not on expressions of opinion. Mere trade talk or puffing does not constitute fraud. *Tate v. Colony Homebuilders Inc.*, 257 Va. 78, 82, 508 S.E.2d 597, 599 (1999).

However, an action for fraud can arise in any situation where the elements exist: "(1) A false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled and (6) resulting damage to the party misled." *Meridian Title Ins. Co. v. Lilly Homes, Inc.*, 735 F. Supp. 182 (E.D. Va. 1990); see also *Brin v. A Home Come True, Inc.*, No. CL05-7510, 2009 Va. Cir. LEXIS 71 (Fairfax Co. Cir. Ct. Apr. 2, 2009). A party may also commit fraud by "concealment," which the law treats as the equivalent of an affirmative misrepresentation. See *Allen Realty Corp. v. Holbert*, 227 Va. 441, 318 S.E.2d 592 (1984).

Owners may have a cause of action in misrepresentation due to a defective cost estimate if costs exceed a contractually agreed maximum cost of construction. If the design professionals or construction managers did not guarantee or warrant a maximum cost, as is the case in standard AIA contracts, courts will uphold full fees for contractors.

#### **V. Strict Liability Claims**

Virginia law does not recognize a cause of action of strict liability in tort or in breach of warranty against architects or contractors. Virginia does, however, recognize the doctrine of strict liability in cases involving extremely hazardous activities such as blasting. *Harris v. T.I. Inc.*, 243 Va. 63, 71, 413 S.E.2d 605, 610 (1992); *M.W. Worley Const. Co. v. Hungerford, Inc.*, 215 Va. 377, 380, 210 S.E.2d 161, 164 (1974). Virginia is also one of the few states that does not permit tort recovery on a strict-liability theory in products liability cases. *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 236 Va. 419, 424 n.4, 374 S.E.2d 55, 57 n.4 (1988).

#### **VI. Indemnity Claims**

Contracting parties can use the theory of indemnity to reallocate financial risk among the participants in the construction industry. The right to indemnity—to be held harmless or secure from loss or damage caused by another—can arise either by contractual agreement (express) or as a matter of law (implied). The architect most often seeks indemnification from the contractor for

suits by third parties. In some situations, the right to indemnification may be limited. If the allegations of a complaint identify conduct constituting active negligence, no basis for the indemnity claim exists.

A. Express Indemnity

Express indemnity arises out of the provisions of a contract that cover an anticipated event or condition which results in a loss. “Typically, a contract of indemnity is a bilateral agreement between an indemnitor and an indemnitee in which the indemnitor promises to reimburse his indemnitee for loss suffered or to save him harmless from liability.” *First Va. Bank-Colonial v. Baker*, 225 Va. 72, 77, 301 S.E.2d 8, 13 (1983).

Va. Code Ann. § 11–4.1 provides that certain indemnification provisions in construction contracts are void as against public policy. Specifically,

any provision contained in any contract relating to the construction of projects other than buildings by which the contractor performing such work purports to indemnify or hold harmless another party to the contract against liability for damage arising out of bodily injury to persons or damage to property suffered in the course of performance of the contract, caused by or resulting solely from the negligence of such other party or his agents or employees, is against public policy and is void and unenforceable.

Va. Code Ann. § 11–4.1.

The Supreme Court of Virginia has interpreted this statute to “void[ ] any indemnification provision that reaches damage caused by the negligence of the indemnitee, even if the damage does not result from the negligence of the indemnitor.” *Uniwest Constr. v. Amtech Elevator Serv., Inc.*, 280 Va. 428, 442, 699 S.E.2d 223, 230 (2010), withdrawn in part on rehearing by 281 Va. 509 (2011).

B. Implied Indemnity

Implied indemnity can arise “between parties from equitable considerations . . . [where] the indemnitee is liable to the injured party because of some positive duty created by statute or common law; however, the actual cause of injury to the third party was the act of the indemnitor.” *Bd. of Dirs. of Birdneck Villas Condo. Ass’n. v Birdneck Villas, LLC*, 73 Va. Cir. 175 (Va. Beach Cir. Ct. 2007). Implied indemnity must grow out of a contractual relationship. *RML Corp. v. Lincoln Window Products, Inc.*, 67 Va. Cir. 545, 572 (Norfolk Cir. Ct. 2004).

C. Comparative Indemnity

Virginia courts have yet to address the issue of comparative indemnity.

D. Third Party Beneficiary

Although some have suggested that a third party outside the scope of a contract may be entitled to some indemnification, Virginia does not recognize any separate cause of action for indemnification of a third party beneficiary. This general rule does not, however, preclude any express or implied indemnity rights that may attach to an intended third party beneficiary to a contract.

**VII. Statute of Repose/Statute of Limitations**

In Virginia, actions that are based on a written contract are generally governed by a five-year statute of limitations. Va. Code Ann. § 8.01-246. In addition, Virginia has a three-year statute of limitations for actions resulting from the breach of a non-written contract. *Id.* The statute begins to run when the cause of action accrues. In Virginia, a claim accrues, and the limitations period begins to run, on the date the design professional actually breaches his legal duty. *See, e.g., VMI v. King*, 217 Va. 751, 232 S.E.2d 895 (1977) (an owner's action for negligence of an architect in performing professional services is an action for breach of contract and is thus governed by the statute of limitations applicable to the contract). The Virginia Supreme Court has repeatedly held that difficulty in detecting the existence of a breach plays is not a factor. This differs from the more modern rule, which holds that a claim accrues once the injured party discovers or should have discovered that a breach of the contractual duty has occurred.

In Virginia, a cause of action accrues upon the occurrence of the last event needed to provide the plaintiff with a right to file suit. For example, a property damage claim based on defective plans or specifications upon delivery and approval of the plans. A property damage claim due to negligent supervision accrues once the last opportunity has passed for the design professional to observe and correct any deficiencies. The accrual of a claim for breach of contract against a general contractor is fact-specific, but generally the statute of limitations does not begin to run against a right of action until the time for final performance fixed by the contract has passed. *Suffolk City Sch. Bd. v. Conrad Bros.*, 255 Va. 171, 174, 495 S.E.2d 470, 471-72 (1998). A personal injury action accrues on the date the plaintiff actually sustains an injury.

Virginia's Statute of Repose limits all actions against design professionals, contractors, subcontractors, and suppliers to five years at the outset. Va. Code § 8.01-250. This statute establishes an arbitrary termination date for construction liability, regardless of the cause of action. The five-year period generally begins to run from the date of performance or furnishing of such services and construction, but its application is often dependant on the facts. The Statute of Repose limitations period begins to run from the final completion date of the entire project as against design professionals and general contractors. *Federal Reserve Bank v. Wright*, 392 F. Supp. 1126 (E.D.Va.

1975). The five-year period outlined in § 8.01-250 begins to run as against a supplier of a product that is later installed by others on the date of the last delivery of the product. *Kohl's Dept. Stores, Inc. v. Target Stores, Inc.*, 290 F. Supp. 2d 674, 687 (E.D.Va. 2003). Contractors must bear in mind, however, that repair or replacement that continues the pre-existing use of the property does not qualify as an "improvement" under Va. Code § 8.01-250, and is not subject to the protections of the statute of repose. *See Travelers Indem. Co. v. Simpson Unlimited, Inc.*, No. CL09-4013, 2010 Va. Cir. LEXIS 9 (Fairfax Co. Cir. Ct. Jan. 12, 2009).

## **VIII. Economic Loss Doctrine**

Virginia follows the economic loss doctrine and limits remedies for economic losses to contract claims, denying any relief to those alleging a tort. *Sensenbrenner v. Rust, Orling, & Neale, Architects, Inc.*, 236 Va. 419, 424, 374 S.E.2d 55, 58 (1988). Thus, Virginia stands in contrast to most other states in that, while a lack of contractual privity is no longer a defense to claims for property damage or personal injury, Va. Code §8.01-223, such privity is still an absolute requirement for recovery of purely economic loss. *Blake Constr. Co. v. Alley*, 233 Va. 31, 353 S.E.2d 724 (1987). In practice, this means that absent an unusual contract arrangement, contractors and subcontractors effectively have no right of recovery against architects, and subcontractors cannot recover from owners except under application of mechanic's lien statutes.

### **A. Third Party Beneficiary**

Virginia law recognizes that parties may enter into contracts for the specific purpose of bestowing a benefit on a third party. Under Virginia case law, the third-party beneficiary doctrine may apply only if it can be shown that when entering into the contract, the parties "clearly and definitely intended to confer a benefit" on a third party. *Copenhaver v. Rogers*, 238 Va. 361, 384 S.E.2d 593 (1989). A party that is only an *incidental beneficiary* under a contract is not entitled to enforce any incidental benefit. As a result, under normal circumstances, contractors may not make an end run around the privity requirement and the economic loss rule by alleging third-party beneficiary status with architects or other design professionals. *See Valley Landscape Co. v. Rolland*, 281 Va. 257, 237 S.E.2d 120 (1977).

## **IX. Recovery for Investigative Costs**

Virginia law does not provide for the recovery of investigative costs in construction cases.

## **X. Emotional Distress Claims**

Virginia has yet to address whether a cause of action would lie for emotional distress connected with a construction defect. Emotional distress claims, with a few exceptions, require accompanying physical harm or wanton and willful conduct. *Carstensen v. Chrisland Corp.*, 247 Va. 433, 446, 442 S.E.2d 660, 668 (1994).

## **XI. Stigma Damages**

Outside of the context of construction law, Virginia does not generally recognize stigma damages for diminution of value for landowners, absent a showing of actual property damage. *See, e.g., Adams v. Star Enterprise*, 51 F.3d 417 (4th Cir. 1995) (defendant not liable for failure to remedy an oil plume discharge near the plaintiffs' property). This general rule has not yet been applied in a reported construction case in Virginia.

## **XII. Economic Waste**

Generally, the measure of damages for a breach by a builder of a construction contract is the cost of repair, unless this would result in unreasonable economic waste. *Lochaven Co. v. Master Pools by Schertle, Inc.*, 233 Va. 537, 544, 357 S.E.2d 534, 539 (1987).

## **XIII. Delay Damages**

Damages may also be recoverable for delay in a project. Causes of contractor delay may include, for example:

- Inadequate project staffing;
- Delayed selection of subcontractors for the owner's approval;
- Inadequate supervision and inspection;
- Time spent correcting defective work;
- Inadequate scheduling or coordination;
- Work start delays;
- Failure to provide sufficient equipment; and
- Delay in submission of required shop drawings.

In order to recover delay damages, an owner or general contractor must prove three things. First, the owner or contractor must prove a delay in performance. Second, the owner or contractor must show that the delay was unreasonable and therefore violated the contract. Third, it must be proven that the contractor caused the delay.

In order to establish liability for contractor delay, the owner must show that the completion of work extended beyond the completion date specified in the construction contract. The contractor may rebut the owner's claim by proving that the delay was excused under contract terms. The distinction between excusable and non-excusable delays depends upon the terms of the particular contract clause. Some delays, due to unforeseeable causes or causes beyond the control of the contractor, are excusable under most contracts, such as work change orders, owner and architect actions, labor disputes, natural disasters, fire, floods and unusual weather conditions.

A. Liquidated Damages for Delay

Virginia follows the general rule that liquidated damages clauses are enforceable unless the amount of liquidated damages would constitute a penalty or would create a forfeiture. *301 Dahlgren Ltd. Partnership v. Board of Supervisors*, 240 Va. 200, 202-03, 396 S.E.2d 651, 653 (1990). It is not necessary for the plaintiff to prove actual damages; nor may liquidated damages be disproven by a showing that they exceed actual damages, or by a showing that there were no actual damages at all. When the agreed amount would be grossly in excess of actual damages, however, courts usually construe such an agreement to be an unenforceable penalty. *Taylor v. Sanders*, 233 Va. 73, 75, 353 S.E.2d 745, 746-47 (1987).

The absence of a proof requirement is a big advantage for owners. The disadvantage is that the owner is locked in at recovery of the liquidated damage amount, even when actual damages exceed it. *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956); *Welch v. McDonald*, 85 Va. 500, 8 S.E. 711 (1888).

Therefore, election of a liquidated damages clause runs the risk of loss when actual damages exceed compensation provided under the contract. It is important for owners to consider this risk and adjust amounts in liquidation damage clauses accordingly. Owners may also limit the scope of liquidation damage clauses to exclude losses by third parties who may bring an action against the owner. Another option would be to limit the clause to recovery for costs due to delays in total project completion, thereby excluding follow-up contractors' delays or acceleration that do not delay total project completion.

B. Actual damages for delay

In the absence of a liquidated damages clause, owners may recover actual damages for foreseeable losses proven with reasonable certainty. A foreseeable loss is one that follows from the delay in the ordinary course of events or if the contractor otherwise had reason to know of

the likelihood of the loss. Owners who do not have liquidated damages clauses should protect themselves in the event that they would need to recover actual damages for delay by including a clause making it clear that time is of the essence. Otherwise, a court may deny an owner actual damages for contractor delay by granting the contractor some leeway in completion time. By the same token, however, courts grant owners some leeway in calculating the amount of actual damages, as courts do not require mathematical precision and will even allow damages based on speculation.

Following are some typical recoverable delay claim damages:

(1) Unanticipated job-site expenses, such as additional personnel costs, equipment and storage cost for construction material.

(2) Additional costs for services, such as fees for design professionals, construction managers, scheduling consultants, technical personnel, and attorneys (not including attorney fees spent prosecuting the delay claims, unless they are called for in the contract).

(3) Costs for extended construction financing beyond the completion date in the original contract, provided the additional financing results from contractor delays. These costs may include additional construction loan interest payments and transaction costs necessary to negotiate and obtain extended financing.

(4) Lost profits (usually net profits only) are recoverable in Virginia, though some jurisdictions have ruled that lost profits for new businesses are too speculative and are not recoverable.

(5) Various other damages such as loss of warranty coverage, cost of administering the claim, additional licensing and permit costs, escalated start-up cost, delay claims by follow-up contractors, cost of defending mechanics' liens, cost of renting temporary space or continuing business in pre-existing structure, and additional insurance cost.

*Pebble Bldg. Co. v. G. J. Hopkins, Inc.*, 223 Va. 188, 288 S.E.2d 437 (1982); *Roanoke Hospital Ass'n v. Doyle & Russell, Inc.*, 215 Va. 796, 214 S.E.2d 155 (1975); *Doyle & Russell, Inc. v. Welch Pile Driving Corp.*, 213 Va. 698, 194 S.E.2d 719 (1973); *Lehigh Portland Cement Co. v. Virginia Steamship Co.*, 132 Va. 257, 111 S.E. 104 (1922); *Younger v. Appalachian Power Co.*, 214 Va. 662, 202 S.E.2d 866 (1974).

C. "No Damage for Delay" Clauses

"No damage for delay" clauses are contract provisions that attempt to deny the contractor the right to recovery from the owner for damages due to delays beyond the contractor's control. These clauses limit the contractor's remedy to a time extension only. As a general rule, the Supreme Court of Virginia has acknowledged that no-damage-for-delay clauses are accepted by the majority of courts that have considered them, but the Virginia courts have not considered any possible exceptions to the strict contract language See *Blake Constr. Co. v. Upper Occoquan Sewage Auth.*, 266 Va. 564, 577, 587 S.E.2d 711 718 (2003). Such clauses are likely valid and enforceable so as to preclude an action for damages for delay in private contracting. However, provisions barring or limiting delay damages in public construction contracts governed by the Virginia Public Procurement Act are void and unenforceable as against public policy. Va. Code Ann. § 2.2-4335; *Martin Bros. Contractors, Inc. v. VMI*, 277 Va. 586; 675 S.E.2d 183 (2009); *Blake Constr. Co. v. Upper Occoquan Sewage Auth.*, 266 Va. 564, 577, 587 S.E.2d 711 718 (2003).

**XIV. Recoverable Damages**

A. Direct Damages

Generally, the damages recoverable for defective or unfinished construction are either the reasonable cost of completion in accordance with the contract, if it is possible and does not involve unreasonable economic waste or the difference between the value of the product contracted for and the product received. The proper measure is determined based on the facts of the case. When the corrective measures are absolutely necessary to make the building sufficient for the purposes for which it was constructed, the damages should be measured by the cost of completion or repair, because it is not a situation where an owner can be content with a property of lesser value. *Mann v. Clowser*, 190 Va. 887, 905, 59 S.E.2d 78, 86 (1950).

B. Loss of Use

Virginia case law does not address loss of use damages in construction projects.

C. Punitive Damages

Punitive damages are not allowed for a breach of contract, except in exceptional cases where the breach amounts to an independent willful tort. *Goodstein v. Weinberg*, 219 Va. 105, 245 S.E.2d 140 (1978).

D. Emotional Distress

Virginia has yet to address whether a cause of action would lie for emotional distress connected with a construction defect.

E. Attorney's Fees, Expert Fees, and Costs

In the absence of contractual or statutory provisions, attorney's fees and litigation costs are not recoverable in an action for breach of contract/warranty. *Fidelity Nat'l Title Ins. Co. v. S. Heritage Title Ins. Agency, Inc.*, 257 Va. 246, 254, 512 S.E.2d 553, 557 (1999).

Owners should protect themselves by including a clause allowing them to recover reasonable attorney's fees and litigation costs in the event they have to enforce the contract. Such a clause will be enforced even if it is one-sided; *i.e.*, if it provides for attorney's fees and costs to be paid by the contractor in the event of his breach, but does not allow the contractor to recover such fees as a result of the owner's breach.

The general contractor should include a clause allowing him to recover reasonable attorney's fees and costs in the event he has to enforce the contract. Such a clause, if reasonable, will be enforced. In addition, the prime contractor should attempt to preclude recovery of attorney's fees and costs by the subcontractor.

Exceptions to the general rules, however, do exist. *See Hall v. Cole*, 412 U.S. 1 (1973) (opponent to the action has acted in bad faith or fraudulently in originating or sustaining the litigation); *Hiss v. Friedberg*, 201 Va. 572, 112 S.E.2d 871 (1960) (reasonable attorney's fees are recoverable where another party's breach of contract forces one to maintain or defend a suit with a third person); *see also Owen v. Shelton*, 221 Va. 1051, 277 S.E.2d 189 (1981); *Comstock Potomac Yard, L.C. v. Balfour Beatty Constr., LLC*, No. 1:08-cv-894, 2009 U.S. Dist. LEXIS 73206 (E.D.Va. Aug. 14, 2009).

F. Damages for defective work

Owners may be able to recover in cases of defective work for damages such as repair costs, reduced market value of the structure, cost of temporary protection of the structure, and delay damages incurred during repair of defective work.

G. Damages for abandoned work

When a contractor abandons or defaults on a project, the owner can generally recover damages from the contractor for the amount by which the completion cost exceeds the contract price. In addition, other consequential costs may be recoverable, such as temporary protection of the project following abandonment.

#### H. Damages for defective design

In cases of defective design, the owner can recover (1) all out-of-pocket expenses for the correction of defects, or (2) the diminution in value of the building due to the defects, depending on whether or not it is economically feasible to correct the defects.

#### I. Intentional Interference with Contract

The architect may also have to defend against claims alleging that he intentionally interfered with the progress of the contractor's work. If these claims are proven, the architect has committed an intentional tort, for which the plaintiff can recover both compensatory and punitive damages.

Virginia recognizes the tort of intentional interference with contractual relationships. *Chaves v. Johnson*, 230 Va. 112, 335 S.E.2d 97 (1985); *Allen Realty Corp. v. Holbert*, 227 Va. 441, 318 S.E.2d 592 (1984). To prove intentional interference with a contract, an owner must prove that the architect took action intentionally designed to cause the owner to breach the contract and that the architect's actions in fact caused such a breach.

An architect may also be liable if it gives the owner erroneous information, without reasonable justification, which causes the owner to breach its contract with the contractor. The architect may defend against such a claim by showing that the architect fulfilled its obligation to provide the owner with reasonably accurate and truthful information consistent with the terms of the contract.

#### J. Liquidated damages

Many construction contracts contain liquidated damages clauses. As discussed *supra*, it is well recognized that parties entering into a construction contract may avoid all questions of future delay damages resulting from the breach of the contract by agreeing upon a definite sum that will be paid by the contractor to the owner in the event of a failure to complete the project on time. *Taylor v. Sanders*, 233 Va. 73, 75, 353 S.E.2d 745, 746-47 (1987). These liquidated damages are used because of the difficulty of establishing in advance the actual damage an owner might suffer because a project is delayed.

There are three general requirements for the enforcement of the liquidated damages clause. First, the damage caused by the breach or delay must be difficult or impossible to estimate accurately. Second, the parties must intend that the liquidated damages be compensation for damages suffered, not a penalty. Finally, the amount of liquidated damages must be a reasonable estimate of the actual amount of loss, judged from the perspective of the parties at the time the contract was formed.

The liquidated damages will be upheld even though actual damages suffered are much more or much less than the amount prescribed in the liquidated damages clause, as long as the amount of liquidated damages is reasonable. From an owner's perspective, it is important to assure that the specified amount is high enough to reimburse the owner for his damages, because he will be limited to the amount specified.

## **XV. Insurance Coverage for Construction Claims**

In Virginia, insurers face two duties, the duty to defend and the duty to pay. Insurers have a duty to defend if there a plaintiff alleges any fact or circumstance that, if proved, would fall under a risk covered by the policy. *Lerner v. Gen. Ins. Co.*, 219 Va. 101, 104, 245 S.E. 249, 251 (1978). Virginia courts will not, however, convert an otherwise unambiguous commercial general liability insurance policy into a performance bond. Since a contractor can control the quality of his own work, it is fair to hold him liable when the work is faulty. The risk that the contractor may incur liability under warranty is a normal part of doing business. *See Pulte Home Corp. v. Fid. & Guar. Ins. Co.*, No. CL04-210454, 2004 Va. Cir. LEXIS 381 (Fairfax Co. Cir. Ct. Feb. 6, 2004). Contractors must tread carefully, however, when dealing with their insurance carriers. For example, in the Chinese drywall arena, proactively replacing defective drywall rather than risking litigation may result in a lack of insurance coverage. *See Builders Mut. Ins. Co. v. Dragas Mgmt. Corp.*, No. 2:09-cv-185, 2011 WL 2473263 (E.D. Va. Jun. 13, 2011).

### **A. Subcontractor Insurance**

The subcontractor should specify the type and amount of insurance needed by the subcontractor. Standard liability policies exclude coverage on damage to property while in the "control, custody or care of the insured." This exclusion has been interpreted as meaning that the subcontractor is not insured for any property or materials involved in the execution of the subcontract while he is working on it. If possible, such exclusions should be deleted from the policy.

## **XVI. Relevant Statutes**

### **Va. Code Ann. §55-70.1**

Even in the absence of a specific contractual provision, Virginia has provided for an implied warranty on new homes. In any contract for the sale of a new dwelling, a vendor warrants that the dwelling is free from structural defects and constructed in a workmanlike manner. In addition, if the vendor is in the business of buying or selling dwellings, a vendor also warrants that the dwelling is fit for habitation.

### **Va. Code. Ann. §8.01-246.**

In Virginia, the statute of limitations for the breach of a written contract is five years, and for the breach of a non-written contract it is three years.

Va. Code Ann. § 8.01-250.

Statute of Repose. Virginia has enacted legislation that places an outside time limit of five years on all actions against design professionals, contractors, subcontractors, and suppliers. This statute is intended to establish an arbitrary termination date for construction liability irrespective of the cause of action involved.

Virginia Code Ann. § 2.2-4335.

In Virginia, “no damages for delay” clauses in public construction contracts are void and enforceable against public policy unless the provision is one of those specifically enumerated in subsection (B) or another statute.

## **XVII. Mechanic’s Liens**

The purpose of the mechanic’s lien is to provide to a contractor who has furnished labor or materials adding to the value of real property a remedy for the collection of his debt. The security for the debt owed to the contractor is the property to which the mechanic’s lien attaches. Virginia’s mechanic’s lien law can be found in the Va. Code Ann. §§ 43-1 through 43-23.2, and §§ 43-70 through 43-71.

### **A. Notice**

In Virginia, no lien is created without proper notice. The requirement for the notice is precise, jurisdictional, and must be followed exactly. If the notice given is improper, the mechanic’s lien claim may be dismissed. The Code of Virginia contains forms which, due to the strict construction of the lien statutes, must be followed exactly when filing a mechanic’s lien. These are set forth in §§ 43-5, 43-8, and 43-10.

The lien claimant must also record the Memorandum of Mechanic’s Lien at the courthouse, a process called “perfecting” the lien. See Va. Code Ann. §§ 43-4, 43-4.1, 43-7. The memorandum is then recorded in the Lien Books or Deed Books in the Clerk’s Office to ensure that anyone searching the title of the real estate on which the lien is claimed will have notice of the lien.

Except for certain residential dwelling units, Virginia does not require that general contractors file a Notice of Intention to Claim a Lien prior to commencing work. See Va. Code Ann. §§ 43-4, 43-7. The General Contractor must file the memorandum within the time prescribed by § 43-4, but is not required to give notice of its liens to any party. See *Coleman v.*

*Pearman*, 159 Va. 73, 77-78, 165 S.E. 371, 372 (1932). As a practical matter, it is advisable that the general contractor give notice of its liens to the owner and other parties (if only to obtain leverage). Subcontractors and materialmen, in addition to filing the lien, must give notice to the owner of the property (or his agent) of the amount and character of the claim. See Va. Code Ann. §§ 43-7, 43-9. Although there is no time requirement for this notice set by statute, it is advisable to give notice in a timely matter to preclude any argument that failure to provide timely notice prejudiced the owner.

#### B. Time for Filing

According to § 43-4, a general contractor or any other lien claimant (subcontractor, materialman) must file his lien within 90 days from the last day of the month in which he last performed labor or furnished material. Important to subcontractors and materialmen, in no event may the lien be filed later than 90 days after the project is completed or the work thereon otherwise terminated. *Id.*

The lien may only include the value of labor or materials furnished within 150 days from the last day labor was performed or materials furnished on the job prior to recording the lien. The 150-day rule ‘is one of the prerequisites required by Code § 43-4 in order to perfect a mechanic’s lien,’ and . . . ‘statutes dealing with the existence and perfection of a mechanic’s lien must . . . be strictly construed.’” *Smith Mountain Bldg. Supply, LLC v. Windstar Properties, LLC*, 277 Va. 387, 391, 672 S.E.2d 845, 846 (2009). Therefore, “the inclusion in the memoranda for charges for materials supplied *outside* the 150-day limitation period in Code § 43-3 renders [a claimant’s] entire mechanic’s lien invalid and unenforceable.” *Id.* (emphasis added). To avoid any issues resulting from the “150-day rule,” a claimant should consider filing a mechanic’s lien while continuing work on the project to assure payment for all work performed.

#### C. Enforcement

Pursuant to § 43-22, the only way to enforce a mechanic’s lien is through the filing of a suit to enforce the mechanic’s lien in the circuit court for the city or county wherein the building, structure or some part thereof is situated, or wherein the owner (or any of the owners, if more than one) resides. § 43-17 provides that any suit to enforce a mechanic’s lien must be brought within 6 months from the date the memorandum of lien was recorded or within 60 days from the time the building, structure or railroad was completed or the work otherwise terminated, whichever such time shall last occur. With the Complaint, the lienor must file an “itemized statement of his account,” verified by affidavit, showing (i) the amount and character of the work done or materials furnished; (ii) the prices charged; (iii) the payments made, if any; (iv) the balance due; and (v) the time from which interest is claimed thereon.

In a suit to enforce a mechanic’s lien, care must be taken to name all “necessary” parties as defendants since failing to include one necessary party results in defeat of the entire

mechanic's lien. If a necessary party is added after the statute of limitations has run, the mechanic's lien suit is subject to dismissal as being time-barred. *See Mendenhall v. Douglas L. Cooper, Inc.*, 239 Va. 71, 387 S.E.2d 468 (1990) (holding that the "date of filing" for purposes of the statute of limitations is the date that the amended complaint is filed, not the date the original suit is filed). Necessary parties for a suit to enforce a mechanic's lien generally include, (i) the owner, (ii) the general contractor, (iii) other mechanic's lienors, (iv) all judgment or lien creditors (e.g., lenders), and (v) trustees under all deeds of trust or other security agreements. *But see Peed Plumbing v. Freedland*, 78 Va. Cir. 291 (Loudoun Co. Cir. Ct. 2009) (holding that failure to include other mechanic's lien claimants as defendants in a suit to enforce was not fatal to the subcontractor's claim). Where a bond has been posted and the mechanic's lien released, the necessary parties are limited to those parties which have a pecuniary interest in the bond itself which is "likely either to be defeated or diminished" by the plaintiff's claim against the bond. *Synchronized Const. Servs., Inc. v. Prav Lodging, L.L.C.*, 764 S.E.2d 61, 66 (Va. 2014)

#### D. Defenses

Because of the strict requirements of the Virginia mechanic's lien laws, a failure to comply will result in dismissal of the lien. Further, two provisions of Virginia lien law allow an owner to defeat a mechanic's lien: §§ 43-7 and 43-16.

Under § 43-7, the amount a subcontractor can obtain from his mechanic's lien is limited to the amount remaining due from the owner to the general contractor as of (or subsequent to) the date when notice is provided. If, as of the date of notice to the owner, the owner is not indebted in *any* amount to the general contractor, the owner will have no liability to the subcontractors. *Maddux v. Buchanan*, 121 Va. 102, 92 S.E. 830 (1917).

**Note:** Where the owner of the real property acts as his own general contractor with the intent to sell the improved property upon the completion of the improvement (e.g. a real estate developer), a different situation exists from the ones discussed above. Under § 43-1, a "general contractor" is defined as a laborer or materialman who contracts directly with the owner. When the owner acts as his own general contractor and hires any subcontractor directly, the subcontractor becomes the "general contractor" for the purposes of Virginia's mechanic's lien statutes. Thus, a subsequent homeowner cannot claim the benefit of § 43-7 and may have to pay the subcontractor's claim, regardless of the fact that he has paid the full contract price to the developer.

Further, § 43-16 provides that if an owner is compelled to complete his building, or any part thereof, as a consequence of the general contractor's failure or refusal to complete the work, the amount expended by the owner for such completion will have priority over *all* mechanic's liens which have been or may be placed on the building.

Any right to file or enforce any mechanics' lien may be waived in whole or in part at any time by any person entitled to such lien, except that a subcontractor, lower-tier subcontractor, or material supplier may not waive or diminish his lien rights in a contract in advance of furnishing any labor, services, or materials. Va. Code § 43-3 (2015).

### **About the Authors**

**Nicole Hardin Brakstad.** Ms. Brakstad is a partner in LeClairRyan's Government Contracts, Construction Litigation, and Business Litigation teams. Her practice involves a mix of litigation and day-to-day counseling for corporate and construction clients of all types, sizes, and levels of experience, in matters ranging from a few thousand dollars to several million dollars. She routinely advises her clients on public contracting matters arising out of both state and federal projects, as well as private construction and business disputes. She has also represented individual and corporate clients in complex commercial litigation, including trademark, copyright and trade secret disputes, antitrust, contract disputes, business torts, and other civil litigation matters.

**John "Jack" M. Robb, III.** Mr. Robb is a partner at LeClairRyan, and litigates commercial disputes in Virginia federal and state courts, representing owners, developers and contractors in construction disputes, real estate litigation and land use matters. He represents closely held corporations and limited liability companies in business matters and litigation and represents financial service providers in breach of contract, fraud and consumer class action lawsuits.

**This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.**