

## CONSTRUCTION LAW

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This article will review recent case law and legislative enactments in Virginia of significance to Virginia's contractors, subcontractors, material suppliers and design professionals. The article will also discuss the growing sustainable or "green" building trend in Virginia and elsewhere and the potential issues that this relatively new phenomenon will raise.

### I. LEGISLATIVE ENACTMENTS

The 2010 bill that will likely have the most impact on the construction industry is the amendment to Virginia Code section 54.1-411. The amendment to the Virginia Code removes language precluding the use of limitation of liability clauses by design professionals.<sup>1</sup> In its place, the General Assembly substituted language stating that the change does not relieve individuals practicing in the covered professions from any liability arising from his or her employment with a covered entity.<sup>2</sup>

The change, while a seemingly subtle one, reinstates the long-standing Virginia maxim that the contract is king by explicitly allowing architects, professional engineers, land surveyors, certified interior designers, and landscape architects to limit their liability by contract for certain damages arising from their acts.<sup>3</sup> Furthermore, it will allow these construction professionals the freedom of contract to assure both themselves and their insurance

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1. Act of Mar. 9, 2010, ch. 99, 2010 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 54.1-411 (Cum. Supp. 2010)).

2. *Id.*

3. *Id.*

carriers that they are held harmless in the event of design or engineering defects.<sup>4</sup>

In an unsurprising development, the Virginia General Assembly could not keep their hands off of the mechanics' lien statute. The latest change involves the use of a mechanics' lien agent on residential projects.<sup>5</sup> Starting on July 1, 2010, a contractor can no longer depend on the failure of the owner to list a mechanics' lien agent on the posted building permit.<sup>6</sup> The new statute requires that a contractor go beyond merely reading the building permit and make a reasonable inquiry with the local building authority to determine the identity of the mechanics' lien agent.<sup>7</sup>

Another key change to this provision allows an owner to amend a building permit to add a mechanics' lien agent at a date sometime after the beginning of construction.<sup>8</sup> Based on this new change to the statute, contractors must be constantly vigilant to file their required notices to the agent because the owner may claim that the contractor or subcontractor failed to notify the mechanics' lien agent named on the permit (regardless of if the work to be performed by the contractor or subcontractor is complete).<sup>9</sup>

These two statutory changes will have a great impact on the practice of law as it relates to construction projects.

## II. RECENT JUDICIAL DECISIONS

### A. *Mechanics' Liens*

In the past two years, the courts have decided several interesting cases relating to the Virginia mechanics' lien statutes.<sup>10</sup> Each of these decisions highlights the fact that the Virginia courts will strictly construe the language of the mechanics' lien statutes and

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4. *See id.* Architects and other design professionals would be wise to re-examine their standard contractual language in light of this change in the statute.

5. Act of Apr. 10, 2010, ch. 341, 2010 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 43-1, -4.01 (Cum. Supp. 2010)).

6. *Id.* (codified as amended at VA. CODE ANN. § 43-4.01(C) (Cum. Supp. 2010)).

7. *Id.*

8. *Id.* (codified as amended at VA. CODE ANN. § 43-4.01(A) (Cum. Supp. 2010)).

9. *Id.* Contractors would be well served to check with local building authorities on a regular basis throughout construction.

10. VA. CODE ANN. §§ 43-1 to -23.2 (Repl. Vol. 2002 & Cum. Supp. 2010).

require those that attempt to avail themselves of this powerful remedy to follow the letter of the statutes with total precision.<sup>11</sup>

In *Dallan Construction, Inc. v. Super Structures General Contractors, Inc.* (“*Super Structures*”), the Hanover County Circuit Court considered the question of what a general contractor could include in its lien.<sup>12</sup> In *Super Structures*, the general contractor, Super Structures, a constructor of prefabricated buildings, ordered materials and partially constructed buildings for Dallan Construction, Inc. (the plaintiff).<sup>13</sup> However, Super Structures did not deliver the materials to the project, nor did it install the buildings on the site.<sup>14</sup>

Dallan Construction then cancelled the contract, and, predictably, Super Structures recorded a memorandum of mechanics’ lien.<sup>15</sup> Dallan Construction filed suit to declare the lien invalid.<sup>16</sup> The court invalidated the lien because none of Super Structures’ work was incorporated into the site.<sup>17</sup> In short, preparatory work, no matter how substantial, is not subject to a mechanics’ lien in Virginia.<sup>18</sup>

For every seemingly harsh result, there seems to be one exception to the rule that rears its head. In *Meeks Disposal Corp. v. Circle South, L.L.C.*, the court considered an interesting question: What happens if a contractor *files* a mechanics’ lien in a timely manner and otherwise fully complies with the mechanics’ lien statutes, but the clerk of court fails to *record* that lien on the day

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11. See, e.g., *Dallan Constr., Inc. v. Super Structures Gen. Contractors, Inc.*, No. CL08000473-00, 2009 Va. Cir. LEXIS 74 (Cir. Ct. Jan. 30, 2009) (Hanover County). Of course, some other interesting cases highlight an exception or two to this strict construction.

12. *Id.* at \*1.

13. *Id.* at \*1–2.

14. *Id.* at \*2.

15. *Id.* at \*1–2.

16. *Id.* at \*1.

17. *Id.* at \*5.

18. *Id.* This circuit court decision, while seemingly harsh, is fundamentally correct. A mechanics’ lien is a remedy for recovery of the value of any improvements to real estate performed by the contractor. See VA. CODE ANN. § 43-3(A) (Cum. Supp. 2010). In this case, none of the work was incorporated into the real estate, leaving Super Structures with a run of the mill contract claim. *Super Structures*, 2009 Va. Cir. LEXIS 74, at \*5. Consider, however, how this is different from the *Summit Community Bank v. Blue Ridge Shadows Hotel & Conference Center*, 428 B.R. 231 (W.D. Va. 2010) case discussed below. See *infra* notes 34–40 and accompanying text. Which seems more substantial, the work in this case or in *Summit Community Bank*?

of filing?<sup>19</sup> The answer? The mechanics' lien is perfected as to the owner that got proper notice, but not to the "rest of the entire world."<sup>20</sup>

In a rare case of substance over form, the Norfolk City Circuit Court determined that the mere fact that the Clerk of Court did not perform its clerical duty to record the lien as requested was not enough to invalidate the memorandum where the contractor had performed all of the necessary steps to perfect that lien.<sup>21</sup> However, because the lien was never recorded, the court could not expand notice of the lien to all potential purchasers of the real estate and limited the lien's effectiveness to those that received actual notice of the lien.<sup>22</sup>

Another case in which a Virginia circuit court excused an apparent inaccuracy in a memorandum of lien is the case of *BP Realty, L.P. v. Urban Engineering & Associates, Inc.*<sup>23</sup> In this case, the defendant engineering firm performed surveying work, did not get paid, and then filed a lien in which it failed to accurately include "surveying" as part of its scope of work for which it filed its lien.<sup>24</sup> Understandably, the owner of the property pointed out this inaccuracy and sought to have the lien invalidated.<sup>25</sup> The Fairfax County Circuit Court refused to invalidate the lien for what it deemed to be an excusable inaccuracy.<sup>26</sup>

In *Comstock Potomac Yard, L.C. v. Balfour Beatty Construction, L.L.C.*, the United States District Court for the Eastern District of Virginia considered the question of what constitutes consideration sufficient to support an enforceable mechanics' lien waiver.<sup>27</sup> In *Comstock*, the dispute centered on the construction of a commercial condominium complex where the contractor had

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19. 79 Va. Cir. 469, 469 (Cir. Ct. 2009) (Norfolk City).

20. *Id.*

21. *Id.*

22. *Id.* In this case, the opinion does not indicate that a bona fide purchaser was waiting in the wings, so no issues arose on this front. *See id.*

23. 79 Va. Cir. 176 (Cir. Ct. 2009) (Fairfax County).

24. *Id.* at 176–77. The defendant did include other terms that gave some clue as to what work it had performed. *Id.* at 176.

25. *Id.* at 176.

26. *Id.* at 179. This last decision by the court begs the question of whether survey work constitutes an "improvement" such that a mechanics' lien would be initially appropriate regardless of any inaccuracy in description. *See supra* notes 11–18 and accompanying text.

27. No. 1:08-cv-894, 2009 U.S. Dist. LEXIS 61753, at \*36–39 (E.D. Va. Apr. 20, 2009).

doubts about the owner's ability to continue to finance the project.<sup>28</sup> In an attempt to get the matter resolved, the parties entered into a settlement agreement for full payment of outstanding invoices, some of the disputed claims, and retainage.<sup>29</sup> In exchange, the contractor agreed not to file any further mechanics' liens and to pay off those liens already filed by subcontractors.<sup>30</sup>

Later, after the owner refinanced, the contractor was concerned that it would not be paid for subsequent work and thus, filed liens.<sup>31</sup> Not surprisingly, the owner defended based upon the settlement agreement and lien waivers.<sup>32</sup> The court agreed with the owner and rejected the argument that the lien waivers were unsupported by consideration, finding that the owner had made payments and followed the letter of the agreement and, therefore, had provided adequate consideration.<sup>33</sup>

In another recent case, the United States District Court for the Western District of Virginia looked at the question of what types of materials supplied to a construction project are subject to lien.<sup>34</sup> In *Summit Community Bank v. Blue Ridge Shadows Hotel & Conference Center*, the court considered the mechanics' lien claim of a furniture supplier which supplied tables, chairs, and the like to a large hotel construction project.<sup>35</sup> The United States Bankruptcy Court for the Western District of Virginia held that these deliveries constituted improvements under the Virginia lien statute and therefore allowed the secured claim.<sup>36</sup> The district court disagreed and found that such easily movable objects did not con-

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28. *Id.* at \*20–21, \*31.

29. *Id.* at \*21–23. Retainage is an amount held back from each payment application to assure full completion of a project by the contractor. *Id.* at \*30–31 n.6.

30. *Id.* at \*27–28.

31. *Id.* at \*31.

32. *Id.* at \*32.

33. *Id.* at \*51. This conclusion was further based upon the fact that the contractor had sought conditions on the maintenance of reserves and on subsequent refinances but had eventually agreed to unconditional language. *Id.* at \*39–41. Yet again, the plain language of a contract prevails, and parties can essentially make their own rules in a contract so long as it does not violate some higher statutory or constitutional policy.

34. *Summit Cmty. Bank v. Blue Ridge Shadows Hotel & Conference Ctr.*, 428 B.R. 231, 232 (W.D. Va. 2010).

35. *Id.* at 232.

36. *Summit Cmty. Bank v. Blue Ridge Shadows Hotel & Conference Ctr., L.L.C. (In re Blue Ridge Shadows Hotel & Conference Ctr., L.L.C.)*, 419 B.R. 308, 313 (W.D. Va. 2009), *rev'd*, 428 B.R. 231 (W.D. Va. 2010).

stitute permanent enough additions to the buildings or realty to constitute improvements under the lien laws.<sup>37</sup>

The court reasoned that in order to constitute an “improvement” under the lien statutes, materials need not necessarily be permanently affixed to the property.<sup>38</sup> However, the materials must constitute an improvement based on more than their “mere presence” in the finished building.<sup>39</sup> The court then reversed the bankruptcy court and denied the mechanics’ lien claim.<sup>40</sup>

*Smith Mountain Building Supply, L.L.C. v. Windstar Properties, L.L.C.* reminds us that, despite some of the seeming flexibility found in some of the previously discussed cases, the mechanics’ lien statutes will be strictly construed.<sup>41</sup> In *Windstar Properties*, the claimant recorded a lien that included sums due for work outside of the 150-day window imposed by the mechanics’ lien statute.<sup>42</sup> The claimant then argued that the inclusion of these sums constituted an “inaccuracy” under Virginia Code section 43-15.<sup>43</sup> The Supreme Court of Virginia disagreed, stating that the rule only allowing inclusion of amounts due for work performed inside of the 150-day window was a prerequisite to perfection of the lien and therefore could not constitute an inaccuracy.<sup>44</sup>

### B. *Miller and “Little” Miller Act Bond Claims*

A recent decision under the Federal Miller Act limited the ability of a general contractor and its surety to use the defense of set-off.<sup>45</sup> In *United States ex rel. Acoustical Concepts, Inc. v. Travelers Casualty & Surety Co. of America*, a carpentry subcontractor completed work on two separate federal subcontracts for the same

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37. *Summit Cmty. Bank*, 428 B.R. at 233–34.

38. *Id.*

39. *Id.* at 233.

40. *Id.* at 234. The court did not, however, give much guidance on what level of permanence is necessary to be an improvement. See *id.* at 232–34. We now know only that furniture is not permanent enough. *Id.* at 234.

41. 277 Va. 387, 672 S.E.2d 845 (2009).

42. *Id.* at 389, 672 S.E.2d at 845 (discussing VA. CODE ANN. § 43-4 (Cum. Supp. 2010)).

43. *Id.*

44. *Id.* at 391–92, 672 S.E.2d at 847. Consider how this inaccuracy is different from that found in *BP Realty, L.P. v. Urban Engineering & Associates, Inc.* 79 Va. Cir. 176 (Cir. Ct. 2009) (Fairfax County). See *supra* notes 23–26 and accompanying text.

45. *U.S. ex rel. Acoustical Concepts, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 635 F. Supp. 2d 434, 435 (E.D. Va. 2009).

general contractor.<sup>46</sup> When it was not paid, the subcontractor sued the general contractor and its sureties for payment under the Miller Act.<sup>47</sup> The subcontractor sought summary judgment on the basis that the defendants were not entitled to rely on setoff provisions in the contract.<sup>48</sup>

The United States District Court for the Eastern District of Virginia, granting in part and denying in part plaintiff's motion for summary judgment, refused to enforce the broad setoff provisions found in the federal subcontracts governing the projects.<sup>49</sup> The court reasoned that the provisions found in the contracts sought to frustrate the intent of the Federal Miller Act and that they were therefore unenforceable.<sup>50</sup>

In another Federal Miller Act case, the United States District Court for the Eastern District of Virginia considered the interaction between a so called "pay-when-paid" clause and the Miller Act.<sup>51</sup> In *United States ex rel. Aarow Equipment & Services v. Travelers Casualty & Surety Co. of America*, the general contractor did not get paid certain disputed amounts by the owner and exercised its right not to pay the plaintiff pursuant to its pay-when-paid clause.<sup>52</sup> Aarow then refused to continue work, and the general contractor subsequently terminated the contract with Aarow.<sup>53</sup> Aarow sued for payment under the payment bond pursuant to the Miller Act.<sup>54</sup>

Travelers defended with a creative argument that combined the pay-when-paid clause *and* the termination clause of the contract.<sup>55</sup> Travelers argued that the pay-when-paid provision

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46. *Id.* at 435.

47. *Id.* at 436 (discussing the Miller Act, 40 U.S.C. §§ 3131–3134 (2006)).

48. *Id.* at 437.

49. *Id.* at 442.

50. *Id.* at 438. This illustrates a rare case of a court within the geographical boundaries of Virginia failing to enforce the letter of a written contract. It does, however, show that the federal courts will enforce statutory mandates strictly.

51. U.S. *ex rel.* Aarow Equip. & Servs. v. Travelers Cas. & Sur. Co. of Am., No. 1:09-cv-00861, 2010 U.S. Dist. LEXIS 24042, at \*10 (E.D. Va. Mar. 16, 2010). A pay-when-paid clause is an agreement under which a subcontractor does not get paid unless and until the general contractor gets paid. *See id.* at \*19–20.

52. *See id.* at \*5–6.

53. *Id.* at \*6.

54. *Id.* at \*6, \*13.

55. *See id.* at \*8–10. The termination and pay-when-paid clauses are laid out in the opinion and will not be reiterated here.

created a situation in which the termination of Aarow by the general contractor was a termination for default and that Aarow was not entitled to payment.<sup>56</sup> The court then went on to assure the parties and the lawyers that, absent the termination clause, the pay-when-paid clause itself would not trump the policy of the Miller Act, and absent Aarow's default, the pay-when-paid clause would not have acted as a defense to payment.<sup>57</sup>

The United States Court of Appeals for the Fourth Circuit told another cautionary tale to subcontractors that negotiate their own side deals for payment in *United States ex rel. Damuth Services, Inc. v. Western Surety Co.*<sup>58</sup> There, the court examined a side deal between a mechanical subcontractor and its supplier regarding payment for equipment supplied to a Chesapeake, Virginia project.<sup>59</sup> In this case, the plaintiff entered into an agreement with the mechanical subcontractor for full payment on other work unrelated to the present project and for payments over time on the Chesapeake project.<sup>60</sup> The mechanical subcontractor also demanded, and the plaintiff agreed, that the plaintiff not inform the general contractor of the deal.<sup>61</sup> The mechanical subcontractor reneged on the deal, and the plaintiff sued under the Federal Miller Act.<sup>62</sup>

The court refused to allow the claim to go forward.<sup>63</sup> It reasoned that, by participating in the agreement not to inform the surety or the general contractor of the deal, the plaintiff actively misled the general contractor and the surety.<sup>64</sup> This decision by the plaintiff to forego informing the general contractor of the payment issues precluded the general contractor from resolving the situation short of a claim against its bond.<sup>65</sup> Additionally, given the requirement under Virginia law that money paid to the me-

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56. *See id.* at \*19.

57. *See id.* at \*22–23. This case reiterates the policy outlined in the *Acoustical Concepts* case, favoring payment over contract in Miller Act cases. U.S. *ex rel. Acoustical Concepts, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 635 F. Supp. 2d 434 (E.D. Va. 2009). *See supra* notes 45–50 and accompanying text.

58. No. 09-1170, 2010 U.S. App. LEXIS 4607 (4th Cir. Mar. 4, 2010).

59. *Id.* at \*2–3, \*5–6.

60. *Id.* at \*4.

61. *Id.*

62. *Id.* at \*1–2, \*5–6.

63. *Id.* at \*6.

64. *Id.* at \*10, \*17.

65. *Id.* at \*17.

chanical subcontractor on the Chesapeake project be paid to its suppliers,<sup>66</sup> the court stated that the plaintiff essentially conspired to assist the mechanical subcontractor in violating the law.<sup>67</sup> Therefore, the court affirmed the district court's decision to grant summary judgment.<sup>68</sup>

### C. *Granby Towers*

One infamous construction project that produced a lot of litigation in the past year was the construction of the Granby Towers in Norfolk, Virginia.<sup>69</sup> The project had all of the elements of litigation waiting to happen, and the parties did not disappoint. The owner of the project hired Turner Construction Company ("Turner") as the general contractor.<sup>70</sup> The owner then was unable to obtain financing and did not pay Turner for certain work,<sup>71</sup> and in turn, Turner did not pay certain subcontractors.<sup>72</sup>

In the first set of consolidated cases, the Norfolk City Circuit Court considered several liens filed against the project by unpaid subcontractors.<sup>73</sup> In *W. O. Grubb Steel Erection, Inc. v. 515 Granby, L.L.C. (W.O. Grubb I)*, the court considered the interaction between the mechanics' lien statutes and a financing clause found in the prime contract between the owner and Turner.<sup>74</sup>

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66. See VA. CODE ANN. § 43-13 (Repl. Vol. 2002 & Cum. Supp. 2010).

67. *U.S. ex rel. Damuth Servs., Inc.*, 2010 U.S. App. LEXIS 4607, at \*15, \*17.

68. *Id.* at \*19. The lesson for contractors and lawyers from this unpublished opinion is that side deals must be made carefully and in a way that does not violate the law in order for even a strict liability claim, such as one under the Miller Act, to be upheld by the courts.

69. See, e.g., *W.O. Grubb Steel Erection, Inc. v. 515 Granby, L.L.C. (W.O. Grubb II)*, 79 Va. Cir. 400 (Cir. Ct. 2009) (Norfolk City); *W.O. Grubb Steel Erection, Inc. v. 515 Granby, L.L.C. (W.O. Grubb I)*, 78 Va. Cir. 463 (Cir. Ct. 2009) (Norfolk City).

70. *W.O. Grubb II*, 79 Va. Cir. at 401.

71. *W.O. Grubb I*, 78 Va. Cir. at 465.

72. *W.O. Grubb II*, 79 Va. Cir. at 401.

73. See *W.O. Grubb I*, 78 Va. Cir. at 468.

74. *Id.* at 464–65 (citing VA. CODE ANN. §§ 43-7, -11 (Repl. Vol. 2002 & Cum. Supp. 2010)). The operative clause at issue reads as follows:

This Agreement and any liability and obligations of the Owner (other than liability and obligations of Owner for Preconstruction Services) shall be subject to and expressly conditioned upon the closing by the Owner, and the initial funding by its lender, of the construction loan (on terms satisfactory to Owner) and Owner shall have no obligation or liability to Construction Manager for any costs for the Construction Phase under this Agreement unless such construction loan closing is completed.

*Id.* at 464.

In response to the large numbers of liens filed on the project, the owner filed a plea in bar based upon the fact that it failed to obtain the financing made a prerequisite to payment.<sup>75</sup> Because the owner had no obligation to make payment to Turner, it argued that it was not indebted to Turner in any amount, and therefore, none of the liens could be sustained.<sup>76</sup>

In response, the subcontractors argued that the owner could subsequently become indebted to Turner, and therefore, Virginia Code section 43-7 required that their liens remain in force.<sup>77</sup> Additionally, the subcontractors argued the statute was meant to keep the owner from paying *twice*, whereas here, the owner was trying to keep from paying once.<sup>78</sup>

The court in *W.O. Grubb I* rejected both of these arguments.<sup>79</sup> It rejected the first because it held that the evidence showed that no financing or construction would occur.<sup>80</sup> It rejected the second because the strict language of the statute required that a fully paying owner, or in this case, an owner that was never obligated to pay in the first place, will not have to pay at all.<sup>81</sup>

Some more interesting arguments were made by Turner, though these too were rejected by the court.<sup>82</sup> Turner made a three-pronged attempt to overcome the fact that the contract specifically precluded payment under the circumstances of the case.<sup>83</sup> The first of these arguments was that the contract as a whole required payment even if a specific clause did not.<sup>84</sup> The second was that the owner impliedly waived its right to refuse payment when it issued “the notice to proceed, its directions to continue the work, and its approval of payment” to Turner.<sup>85</sup> The third was

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75. *See id.* at 464–65.

76. *See id.* The owner relied upon Virginia Code section 43-7 and the specific provision that “[i]t shall be an affirmative defense . . . to a suit to perfect a lien of a subcontractor that the owner is not indebted to the general contractor . . .” *Id.* at 465 (quoting VA. CODE ANN. § 43-7 (Repl. Vol. 2002 & Cum. Supp. 2010)).

77. *Id.* at 465.

78. *Id.*

79. *Id.* at 465–66.

80. *Id.* at 465.

81. *Id.* at 465–66.

82. *Id.* at 466–68.

83. *Id.*

84. *Id.* at 466.

85. *Id.* at 466–67.

that the owner was estopped from failing to pay by its actions.<sup>86</sup> The court rejected all three of these arguments and upheld the plea in bar.<sup>87</sup>

In a second opinion in this set of consolidated cases under the same caption, *W. O. Grubb Steel Erection, Inc. v. 515 Granby, L.L.C. (W.O. Grubb II)*, the Norfolk City Circuit Court considered the claims of yet another subcontractor on the Granby Towers project.<sup>88</sup> In this opinion, the court considered the “pay-if-paid” clause found in Turner’s contract with its subcontractor.<sup>89</sup>

Despite the unambiguous nature of the contract’s pay-if-paid clause, the subcontractor argued that the terms of the contract between the owner and Turner rendered the provision ambiguous.<sup>90</sup> The subcontractor used two provisions to argue that Turner must pay its subcontractors before it receives payment because Turner could only bill the owner for payments made.<sup>91</sup> The court refused to read such an ambiguity into the contract because, the court stated, these two provisions concern the amounts paid to the contractor and not the timing of those payments.<sup>92</sup>

In yet a third decision that fell in favor of Turner and the owner, the United States Court of Appeals for the Fourth Circuit reached the same conclusion as the Norfolk City Circuit Court.<sup>93</sup>

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86. *Id.* at 467–68.

87. *Id.* at 468. The court lamented the fact that Turner and its subcontractors would be financially harmed by the decision but stated that its hands were tied by “the statutes and contract as written.” *Id.*

88. 79 Va. Cir. 400 (Cir. Ct. 2009) (Norfolk City).

89. *Id.* at 401. The operative language of the contract required that the subcontractor provide a pay application on or before the last day of the month and further provided that “[t]he obligation of Turner to make a payment under this Agreement, whether a progress or final payment, or for extras or change orders or delays to the Work, is subject to the express condition precedent of payment therefor by the Owner.” *Id.* at 401–02.

90. *Id.* at 402.

91. *Id.* The two provisions argued by the subcontractor stated:

§ 6.1.1 The term “Cost of the Work” shall mean costs incurred by the Construction Manager [Turner] in the proper performance of the Work. . . . The Cost of the Work shall include only the items set forth in this Article 6.

§ 6.1.3 *Subcontract Costs*: Payments made by the Construction Manager to Subcontractors in accordance with the requirements of the subcontracts.

*Id.*

92. *Id.* The court then went on to state that the contract’s “priority” clause resolves any ambiguities in favor of the subcontract documents. *Id.* at 404. Once again, strict construction of contract overcomes the alleged unfairness of any result leading to non-payment. Also, Turner had not paid much, if any, of the money at issue. *Id.* at 401.

93. *Universal Concrete Prods. Corp. v. Turner Constr. Co.*, 595 F.3d 527, 532 (4th Cir.

In *Universal Concrete Products Corp. v. Turner Construction Co.*, the court considered the same set of arguments made in the *W.O. Grubb II* case.<sup>94</sup> Not surprisingly, the court upheld the unambiguous pay-if-paid clause and cited *W.O. Grubb II* in its opinion.<sup>95</sup>

These cases relating to this disastrous project starkly illustrate that the contract is king in construction regardless of the potential lack of equity that may result.

#### D. Arbitration and Waiver

A recent case acts as a reminder that arbitration rights created by contract can be waived through failure of enforcement. In *Forrester v. Penn Lyon Homes, Inc.*, homeowners sued a modular home manufacturer for breach of the written warranties.<sup>96</sup> The warranties contained a mandatory arbitration clause requiring that all disputes arising under the warranty be decided by arbitration.<sup>97</sup> The parties then proceeded through eighteen months of discovery, motions, and settlement discussions until, after much preparation in anticipation of trial, Penn Lyon Homes moved to compel arbitration.<sup>98</sup>

The court refused to compel arbitration at such a late date and found that Penn Lyon was “in default in proceeding with such arbitration” under the Federal Arbitration Act.<sup>99</sup> The court stated that Penn Lyon was clearly on notice of the express warranty claim, and despite this notice, Penn Lyon moved toward trial for almost two years before making its demand.<sup>100</sup> Therefore, the Fourth Circuit upheld the district court’s denial of Penn Lyon’s motion and remanded the case back to the district court for further proceedings.<sup>101</sup>

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94. *See id.* at 528 (reviewing applicability and enforceability of pay-when-paid clause).

95. *Id.* at 531–32. As of the date of the *W.O. Grubb I* decision, a hole remains where this project was to be built and acts as a reminder that construction is a risky business and that economic times can create serious issues for contractors and subcontractors alike. *W.O. Grubb I*, 78 Va. Cir. 463, 465 (Cir. Ct. 2009) (Norfolk City).

96. 553 F.3d 340, 341 (4th Cir. 2009).

97. *Id.*

98. *Id.* at 341–42.

99. *Id.* at 342–43 (quoting 9 U.S.C. § 3 (2006)).

100. *Id.* at 343.

101. *Id.* at 344. This result is a just one. Parties should not be allowed to drive up costs and proceed down the road to litigation only to sandbag the opponent at the last minute.

In another important interpretation of an arbitration clause in a contract, the Fairfax County Circuit Court looked at language stating that any claim “relating to” the contract must be resolved through arbitration.<sup>102</sup> In *Comer v. Goudie*, the plaintiff homeowners sued the Goudies, principals of the company that was the actual party to the contract at issue, under various theories of personal liability after the construction company that was to build their home did so poorly and went out of business.<sup>103</sup>

In response to these various claims, the Goudies pointed to the contract and argued that, despite the fact that they were not actually parties to the contract, the claims made by the homeowners related to the contract and therefore must be arbitrated as opposed to litigated before the court.<sup>104</sup> The circuit court agreed, stating that the claims of the homeowners fell within the plain language of the contract and clearly related to the contract and the work to be performed.<sup>105</sup>

#### E. Other Interesting Cases

Aside from the cases in the above mentioned categories, the Virginia courts produced a few other interesting cases in the construction field.

One such case is *Commonwealth v. AMEC Civil, L.L.C.*<sup>106</sup> AMEC sued the Virginia Department of Transportation (“VDOT”) seeking more than \$21 million in damages.<sup>107</sup> The Mecklenburg County Circuit Court granted AMEC almost all of its damages and found that AMEC’s written notice of intent to make a claim was proper under the Virginia Code.<sup>108</sup>

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Another state court case reiterates this principal. In *Shoosmith Bros., Inc. v. Hopewell Nursing Home, L.L.C.*, Kenbridge Construction went too far down the road to trial before attempting to invoke its arbitration clause. 78 Va. Cir. 427, 429–30 (Cir. Ct. 2009) (Hopewell City). The Hopewell City Circuit Court reached the same conclusion as the Fourth Circuit in *Forrester*. See *id.* at 431.

102. *Comer v. Goudie*, 78 Va. Cir. 70, 71–72 (Cir. Ct. 1990) (Fairfax County).

103. *Id.* at 71.

104. *Id.* at 71–72.

105. *Id.* at 73. This case demonstrates the need to clearly outline what must and must not be arbitrated. It also illustrates the Virginia courts’ penchant for strict construction of contractual language, even in the face of seeming injustice.

106. 54 Va. App. 240, 677 S.E.2d 633 (Ct. App. 2009).

107. *Id.* at 246, 677 S.E.2d at 636.

108. *Id.* (citing VA. CODE ANN. § 33.1–386(A) (Cum. Supp. 2010)). The purported notice-

VDOT appealed, claiming that the notice was not in fact proper.<sup>109</sup> The Court of Appeals of Virginia agreed with VDOT and overturned the trial court's findings that the notice was both timely and sufficient.<sup>110</sup> In so holding, the court stated that, of the more than 500 letters relating to the project and stating various concerns, AMEC only mentioned a potential claim in a few of them, and as such, AMEC did not properly notify VDOT of its intent to file a claim.<sup>111</sup>

In *Viking Enterprise, Inc. v. County of Chesterfield*, the Supreme Court of Virginia considered the interplay between the Public Procurement Act's six-month statute of limitations and the Virginia Code requirements regarding appealing a county board decision.<sup>112</sup> In this case, the plaintiff filed its suit within the proper six-month statute of limitations under the Procurement Act, but failed to file an appeal of the county's denial of its claim within the thirty-day window required for an appeal of a county board decision.<sup>113</sup>

The circuit court dismissed Viking's case, stating that it had failed to meet the requirements of the thirty-day notice statute and therefore was not entitled to continue.<sup>114</sup> On appeal, Viking argued that the Procurement Act's filing requirements, being more specific to the particular issues, required that the court allow its claim to go forward.<sup>115</sup> The court rejected this argument and reconciled the two statutes in favor of the county, upholding the circuit court.<sup>116</sup>

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es of intent to file a claim were only a few of the over 500 pieces of correspondence relating to the project. *Id.* at 255 n.8, 677 S.E.2d at 641 n.8.

109. *Id.* at 251, 677 S.E.2d at 639.

110. *Id.* at 262-63, 280, 677 S.E.2d at 644, 653.

111. *Id.* at 255 n.8, 677 S.E.2d. at 641 n.8. The court did not, however, make clear what percentage of the correspondence that mentioned the intent to file a claim on such a large project would suffice. *See id.* at 251, 677 S.E.2d at 639.

112. 277 Va. 104, 107, 670 S.E.2d 741, 742 (2009) (discussing VA. CODE ANN. §§ 2.2-4300 to -4377 (Repl. Vol. 2008 & Cum. Supp. 2010); *id.* § 15.2-1246 (Cum. Supp. 2010)).

113. *Id.* at 107-09, 670 S.E.2d at 742-43 (discussing VA. CODE ANN. § 2.2-4363(E) (Repl. Vol. 2008 & Cum. Supp. 2010); *id.* § 15.2-1246 (Cum. Supp. 2010)).

114. *Id.* at 108, 670 S.E.2d at 743.

115. 277 Va. at 110, 670 S.E.2d at 743-44.

116. *Id.* at 113, 670 S.E.2d at 746. This is yet another case of strict statutory construction. The court determined Virginia Code section 15.2-1246 provides the exclusive method of suing a county; therefore, *both* this statute and the Procurement Act must be complied with in order to sue a county. *Id.*

In *Mears Group, Inc. v. L.A. Pipeline Construction Co.*, the court considered a disaster of a construction project.<sup>117</sup> L.A. Pipeline contracted with Mears Group for Mears Group to drill a tunnel for the laying of natural gas pipeline.<sup>118</sup> In the process, the tunnel had to be drilled under a creek that subsequently collapsed.<sup>119</sup> The litigation surrounded a contractual provision regarding abandonment of the work.<sup>120</sup> The contract at issue contained a provision that allocated the burden of payment for abandonment based upon whether the stream bed collapse was a “subsurface” or “ground” condition.<sup>121</sup>

If the condition leading to abandonment was a “subsurface condition,” Mears Group was entitled to abandon the project and be paid in full for the work performed up to the point of abandonment.<sup>122</sup> However, in the case where the site condition pertained to above ground conditions, Mears Group would not be entitled to payment.<sup>123</sup> The court agreed with Mears Group that a collapse of a creek bed was a subsurface condition and granted summary judgment for Mears Group.<sup>124</sup>

### III. SUSTAINABLE “GREEN” BUILDING

The country is moving toward a more sustainable building stock. Federal, state, and local governments are beginning to institute energy efficiency and “green” certification measures into their building codes.<sup>125</sup> Private building owners see the benefit in

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117. No. 3:08-CV-329, 2009 U.S. Dist. LEXIS 750, at \*7 (E.D. Va. Jan. 7, 2009).

118. *Id.* at \*3–5.

119. *Id.* at \*9–10.

120. *Id.* at \*15–16.

121. *Id.* at \*15–17.

122. *Id.* at \*16, \*30–31.

123. *Id.* at \*21.

124. *Id.* at \*21–26, \*35. Once again, the court looked at what it believed to be the plain meaning of the contract and concluded that a below ground collapse was a “subsurface” condition. *Id.* at \*23–24.

125. For instance, the city of Richmond will require all new city buildings to meet a Leadership in Energy and Environmental Design (“LEED”) Silver standard. Res. No. 2008-R152-2009-14, Council of the City of Richmond (Pub. Hearing 2008) (adopted Jan. 12, 2009). Additionally, California has recently instituted the country’s first green building code. Draft 2010 California Green Building Standards Code (to be codified at CAL. CODE REGS. tit. 24), available at <http://www.bsc.ca.gov/default.htm> (last visited Oct. 30, 2010); Roger Showley, *Local Builders Making Homes Earth-Friendly*, SIGN ON SAN DIEGO (Apr. 18, 2010, 12:04 AM), <http://www.signonsandiego.com/news/2010/apr/18/local-builders-making-homes-earth-friendly/>.

energy efficiency and are looking to have Leadership in Energy and Environmental Design (“LEED”) certification on their projects.<sup>126</sup> The ConsensusDOCS have issued a green building addendum.<sup>127</sup> While all of this movement is laudable, the movement toward sustainability is not without risks.

Few of these risks have been tested because the construction of these buildings is ongoing, and those buildings that are complete are so new that any litigation relating to them has yet to mature to the point that courts have issued any guidance. However, many of the risks can be anticipated.

For instance, the U.S. Green Building Council (“USGBC”) allows any third party to challenge the certification of a project.<sup>128</sup> An example can be found in a recent challenge to the certification of the Northland Pines High School in Wisconsin.<sup>129</sup> In that challenge, the challengers argued that the prerequisites for certification were not met.<sup>130</sup> The USGBC denied the challenge, and the certification stood.<sup>131</sup> Clearly, this presents a contract drafting issue when such a challenge can occur from anywhere at any time.

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126. LEED v3 is the U.S. Green Building Council (“USGBC”) system for rating the sustainability of a construction project or building. It is one of several rating systems, and the most popular. USGBC, *LEED Rating Systems*, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=222> (last visited Oct. 30, 2010); USGBC, *LEED Version 3 Frequently Asked Questions*, <http://www.usgbc.org/ShowFile.aspx?DocumentID=5733> (last visited Oct. 30, 2010).

127. ConsensusDOCS 54310, Green Building Addendum, <http://www.consensusdocs.org/catalog/300-series/consensusdocs-310-green-building-addendum/> (last visited Oct. 30, 2010). The ConsensusDOCS are a second set of widely used form documents and an alternative to the AIA series of documents. *See id.*

128. Green Building Certification Inst., *GBCI LEED Certification Policy Manual*, (Apr. 2009), [http://www.gbci.org/Libraries/Certification\\_Resources/LEED\\_ND\\_Certification\\_Policy\\_Manual.sflb.ashx](http://www.gbci.org/Libraries/Certification_Resources/LEED_ND_Certification_Policy_Manual.sflb.ashx). The wording of the challenge policy in the USGBC LEED Certification Handbook does not require that a party have standing or an interest in the project of any kind. *See id.* It also allows every certification point to be challenged. *See id.*

129. Appeal of LEED Certification for Northland Pines High School (Dec. 23, 2008), <http://www.greenbuildinglawblog.com/uploads/file/2%20Complete%20NPHS%20Appeal.pdf> (last visited Oct. 30, 2010).

130. *Id.* at 2.

131. Chris Cheatham, *Green Building Law Update* (May 7, 2010, 06:51 AM), <http://www.greenbuildinglawupdate.com/2010/05/articles/legal-developments/first-ever-leed-challenge-denied/>. However, a close inspection of the LEED certification requirements shows that without the proper prerequisites, the number of points gained on a project is irrelevant, and no certification can occur. Green Building Certification Inst., *supra* note 128.

Additionally, other third party action issues arise. The simplest of these relates to energy efficiency measures.<sup>132</sup> Human beings will occupy these buildings and will likely leave lights on, leave doors open, and perform other energy inefficient actions over the life of a building. Who is responsible for a bad energy rating one, two, or even five years down the road?

Furthermore, with such risks inherent in LEED and other green building measures, insurance companies have yet to catch up with the risk.<sup>133</sup> This leaves many contractors and design professionals without insurance coverage for certain risks.

Green construction even implicates standard of care and trademark or intellectual property issues.<sup>134</sup> If a contractor advertises that it will build to a green standard and does not meet it, has it met its standard of care? If an attorney is a LEED Accredited Professional,<sup>135</sup> does he or she have a higher standard of care toward his or her clients? Can a contracting company trade or service mark a certain green building term? All of these issues have yet to be vetted by the courts but must be dealt with by contract or statute.

Finally, the use of new materials, and old materials in new ways, creates potential product liability hazards that need to be considered, both by the insurance companies and those lawyers that advise the construction industry.<sup>136</sup>

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132. LEED v3 requires energy reporting—though it does not require a building to meet any particular energy efficiency standard—or a building risks decertification. Press Release, USGBC, Buildings Seeking LEED to Provide Performance Data (June 25, 2009), <http://www.usgbc.org/DOCS/news/MPRs%200609.pdf>.

133. Matthew Brodsky, *Making Claims on Green Buildings*, RISK & INSURANCE (May 1, 2010), <http://www.riskandinsurance.com/story.jsp?storyI=395650780>.

134. Darren A. Prum, *Greenbuilding Liability: Considering the Applicable Standard of Care & Strategies for Establishing a Different Level by Agreement* (Social Science Research Network, Working Paper, Mar. 10, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1619935](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1619935); J.R. Steele, *Green Construction: Initiatives and Legal Issues Surrounding the Trend*, BUSINESS LAW TODAY, Nov./Dec. 2007, <http://www.abanet.org/buslaw/blt/2007-11-12/steele.shtml>.

135. A LEED Accredited Professional (“LEED AP”) refers to the designation of those certified by the USGBC to supervise a LEED project. GBCI, *Glossary*, <http://www.gbci.org/glossary.aspx> (last visited Oct. 30, 2010). See also GBCI, *LEED Professional Credentials*, <http://www.gbci.org/main-nav/professional-credentials/credentials.aspx> (last visited Oct. 30, 2010).

136. Jeffrey D. Masters & John R. Musitano Jr., *Managing Liability Risks in Green Construction*, LOS ANGELES LAW., Dec. 2007, at 17, 17, available at <http://www.lacba.org/Files/LAL/Vol30No9/2437.pdf>.

In short, with this new frontier comes new risks that must be considered. Green building is here to stay, so lawyers must learn to speak “green” and to account for the unique risks that this new construction world brings.

#### IV. CONCLUSION

The past two years have brought much change to the construction law world, by statute, case law, and social change. The General Assembly updated the design professional liability statute<sup>137</sup> and made a significant change to the mechanics’ lien statute.<sup>138</sup>

The courts were not to be left out, issuing significant construction law opinions in the areas of mechanics’ liens,<sup>139</sup> payment bonds,<sup>140</sup> statutory interpretations,<sup>141</sup> and contractual interpretation.<sup>142</sup> These decisions, some surprising, others not as much, continue to shape the world of construction law and should be read in their entirety.

Finally, the social landscape shifted toward sustainable building. Attorneys and their construction clients will need to stay up on these cultural changes and the governmental mandates that they will bring.

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137. Act of Mar. 9, 2010, ch. 99, 2010 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 54.1-411 (Cum. Supp. 2010)).

138. Act of Apr. 10, 2010, ch. 341, 2010 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 43-1, -4.01 (Cum. Supp. 2010)).

139. See, e.g., *Smith Mountain Bldg. Supply, L.L.C. v. Windstar Props. L.L.C.*, 277 Va. 387, 672 S.E.2d 845 (2009).

140. See, e.g., *Viking Enter., Inc. v. Cnty. of Chesterfield*, 277 Va. 104, 670 S.E.2d 741 (2009).

141. See, e.g., *U.S. ex rel Acoustical Concepts, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 635 F. Supp. 2d 434, 435 (E.D. Va. 2009) (discussing the Miller Act, 40 U.S.C. §§ 3131–3134 (2006)).

142. See, e.g., *W.O. Grubb II*, 79 Va. Cir. 400 (Cir. Ct. 2009) (Norfolk City).