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VIRGINIA Construction Law Compendium

The Virginia Construction Law Compendium is not intended to provide specific legal advice or opinions, but rather to provide general information. If you need additional information regarding Construction law, or in relation to a specific claim, please do not hesitate to call upon us. (February 2019)

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This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics as they existed at the time of drafting. 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..... 18

This outline is intended to provide a general overview of Virginia's construction law. The discussion on any particular topic is not necessarily an indication of the totality of the law related to any particular area of Virginia's construction law.

I. BREACH OF CONTRACT

A. Statutes of limitation

In general, a breach of contract claim on a written contract, in Virginia, must be brought within five years from the time of accrual.[1] The running of the statute is triggered by the "accrual" of the action. However, if the injured party is seeking only equitable relief for a breach of contract, the accrual may begin upon discovery of the breach.[2] If the claim of breach of contract is based on an oral or unwritten or implied contract, the cause of action accrues on the date of the breach and must be brought within three years from the date of breach. [3]

There is a distinction in Virginia between divisible and indivisible contracts. If an indivisible contract is anticipatorily breached or breached while the contract is executory, the injured party may elect to either sue at the time of breach or wait until full performance. Regardless of when the injured party elects to file suit, the statute of limitations does not begin to run until the time for final performance fixed by the contract has passed.[4] With respect to a divisible contract, a different analysis is required to determine when the statute of limitations has run. It must be determined when each phase of a divisible contract ends, as the statute of limitations begins to run at the completion of the phase in question. See *Comptroller of Virginia ex rel. Virginia Military Institute v. King*, 217 Va. 751, 232 S.E.2d 895 (1977). With respect to a general contractor's claim against sub-contractors, it will need to be determined whether the parties identified in their contract when a breach is deemed to have occurred. If the subcontract contains a "flow down" clause, that clause will determined when the statute of limitations will expire. *Steasfast Ins. Co. v. Brodie Contractors, Inc.* 2008 WL 4780099 (W.D. Va. 2008); see also *Kohls Dept. Stores Inc. v. Target Stores Inc.*, 290 F.Supp.2d 674 (E.D. Va. 2003).

The statute of limitations does not apply to suits brought by the Commonwealth of Virginia or on its behalf unless it is explicitly stated in the applicable statute.[5]

B. Measure of damages for breach of contract

The amount of damages recoverable for breach of contract is that which will put the injured party in the monetary position he would have been in had the contract been performed. *Nichols Const. Corp. v. Virginia Machine Tool Co., LLC*, 276 Va. 81, 661 SE2d 467 (2008); *Mann v. Clowser*, 190 Va. 887, 59 SE2d 78 (1950).

The breaching party is generally held responsible for all direct and proximate

[1] Va. Code Ann § 8.01- 246. However, Va. Code Ann § 8.01-246(2), 8.01-230; 8.01-233; 8.1-245(c); 8.01-249; and 8.01-250 prescribe the time of accrual in different types of breach of contract actions.

[2] Va. Code Ann § 8.01-230; also see Va. Code Ann § 8.01-246(2), 8.01-230; 8.01-233; 8.1-245(c); 8.01-249; and 8.01-250 which also prescribe the time of accrual in different types of breach of contract actions.

[3] Va. Code Ann. § 8.01-246 (4) and *Goode v. Rehrig Inter. Inc.* 683 F Supp 1051 (E.D. Va. 1988) order aff'd 865 F.2d 1257 (4th Cir.1989)

[4] *Suffolk City School Bd. v. Conrand Bros., Inc.*, 255 Va. 171, 495 S.E. 2d 470, 123 Ed Law Rep. 950 (1998) Court's determination of what constitutes final performance of a contract is vitally important in determining if a cause of action has been brought within the statutory time limit. See also, *Andrews v. Sams* 233 Va. 55, 353 S.E. 2d 735 (1987); *Kloser v. Chandler*, 2009 Va. Cir. Lexis 57 (June 22, 2009).

[5] Va. Code Ann § 8.01-231 and *Smith v. Liberty Nursing Home, Inc*. 31 Va. App. 281, 522 SE2d 890 (2000).

damages resulting from the breach unless the damages are so remote that they are not traceable to the breach or can be attributable to some other cause. See *Haas & Broyless Excavators Inc. v. Ramey Bros. Excavating Co., Inc*., 233 Va. 231, 355 SE2d 312 (1987); *Manss-Owens Co. v. H.S. Owens & Son*, 129 Va. 183,105 SE543 (1921). The non–breaching party, in order to recover, must prove by the preponderance of the evidence (it was more likely than not), the following factors:

1. The existence of an enforceable contract;
2. That it performed, or offered to perform, its duties in accordance with that contract;
3. That the other party failed to perform its duties or otherwise breached the contract; and
4. That the breach caused the injured party to be damaged.

See *Haas & Broyless Excavators Inc., v. Ramey Bros. Excavating Co., Inc.*, 233 Va. 231, 355 S.E.2d 312 (1987); *Abi-Najm v. Concord Condominium*, LLC, 280 Va. 350, 699 S.E.2d 483 (2010).

C. Contractual exculpatory clauses

Contractual exculpatory clauses are generally deemed valid and enforceable, as long as they are negotiated at arm's length between competent parties. Please refer to Section VII, Indemnity, below.

II. NEGLIGENCE

A. General

Negligence is defined as a failure to use ordinary care. Ordinary care is

That which a "reasonable person" would use under the given circumstances. If this breach of ordinary care is found to be the proximate cause of damage to the plaintiff, the plaintiff may recover. In order to establish a case, a plaintiff must first show what the appropriate standard of care is, i.e., what the reasonable person should have done under the circumstances. In some complicated actions, such as professional liability cases, this showing requires testimony from expert witnesses to explain to the jury and the court the appropriate standard of care required under the circumstances. Plaintiff must then show that the conduct of the defendant failed, without excuse, to meet the applicable standard.

The theory of Negligence *per se* suggests that the conduct of the defendant is negligent as a matter of course without the need for further inquiry. Plaintiffs often argue Negligence *per se* in conjunction with a statutory provision that allows persons injured by another's violation of any statute to recover for the same. *See*, Va. Code §8.01-221. Thus, plaintiffs argue that if the defendant's conduct violated any statutory obligation, the defendant is guilty of Negligence *per se* and plaintiff should automatically recover. While the defendant may be found to be Negligent *per se*, the court will still require plaintiff to prove that such negligence is the proximate cause of plaintiff's injury.

B. Comparative fault

Virginia is a "contributory negligence" jurisdiction. Therefore, in theory a lack of reasonable care on the part of the plaintiff, however slight, even one percent, is a ***complete bar*** to recovery if such negligence contributes to the plaintiff's injury. In other words, a negligent plaintiff may recover only if his negligence was a remote rather than a proximate cause of the accident. See *Williams v. Harrison,* 255 Va. 272 (1998). The evidence must show that the plaintiff's conduct did not conform to the standard of what a reasonable person of like age, intelligence, and experience would do under the circumstances for his own safety and protection. The burden is on the defendant to prove plaintiff's contributory negligence by a preponderance of evidence standard. However, in reality, a jury will not likely find a contributory negligence bar unless the plaintiff's negligence is substantial.

It should be noted there is an exception which exists to the complete bar created by a finding of contributory negligence on the part of the plaintiff. If the plaintiff pleads and proves the defendant's actions were reckless, or willful and wanton, the plaintiff will be able to overcome any possible contributory negligence on the plaintiff's part. This can arise, for example, if a defendant were contemplating admitting liability but raising contributory negligence. The plaintiff could still get all "bad facts" before the jury on the issue of willful and wanton conduct. Additionally, contributory negligence is also not a defense to an intentional tort.

There is currently a movement towards adopting the more common "comparative negligence" scheme, whereby a plaintiff's recovery is not negated by his own negligence, but is merely reduced by his share of responsibility. For now, however, Virginia remains one of the last few contributory negligence jurisdictions in the

country.

C. Violation of a statute

In Virginia, pursuant to Va. Code § 8.01-221, an injured plaintiff may recover from the offending party due to a violation of a statute. Generally, if the injured party is relying on a breach of a statute as a cause of action, they must show: 1- that the defendant violated a statute enacted for public safety; 2- that the plaintiff belonged to the class of persons the statute was enacted to protect and show that the harm that happened was the type against which the statute was designed to protect; and 3- the defendant's statutory violation was a proximate cause of the plaintiff's injury. *Gilson Delaware Canal Co.*, note, 36 Am.St.Rep. 807, 817. Cited in Wyatt v. Telephone Company, 158 Va. 470 (Va. 1932) *MacCoy v. Colony House Builders, Inc.*, 239 Va. 64, 385 S.E.2d 760 (1990); *Virginia Electric & Power Co. v. Savoy Const. Co.*, 224, Va. 36, 294 S.E. 2d 811 (1982); *McGuire v. Hodges*, 273 Va. 199, 639 S.E.2d 284 (2007); *Hellman v. Radisson Hotel Corp.*, 259 Va. 171, 523 S.E.2d 823 (2000); *Thomas v. Settle*, 247 Va. 15, 439 S.E.2d 360; and *Hack v. Nester*, 241 Va. 499, 404 S.E. 2d 42 (1990).

D. Joint and several liability

Virginia recognizes the doctrine of joint and several liability. If separate and independent acts of negligence of two defendants directly cause a single indivisible injury to a plaintiff, either or both of the defendants are responsible for the whole injury. The plaintiff has the option of pursuing the judgment from either or both of the defendants. The jury is not called upon to apportion fault between the two defendants, they are just called upon to determine if the defendants were negligent.

If a plaintiff elects to recover from just one of the liable defendants, that defendant has the right to seek contribution from the other defendants who are also liable. The right of contribution between joint tortfeasors is based on the principle that when two or more tortfeasors are responsible for a common burden, they also share the verdict rendered equally regardless of whether one tortfeasor contributed to a greater degree than another to the injury. See *Freeman v. Sproles*, 204 Va. 353 (1963); See also, Va. Code § 8.01-443.

III. BREACH OF WARRANTY

Breach of warranty claims are treated as tort claims and not contract claims. *Cauthhorn v. British Leyland*, 233 Va. 202, 355 S.E.2d 306 (1987). Warranty claims in Virginia are covered by Va. Code Ann. § 8.2 Uniform Commercial Code - Sales. et. seq.

A. Breach of Express Warranty

1. General

Express warranties may be created by affirmation, description, or sample which is part of the basis of the bargain. Va. Code Ann. § 8.2-313.

2. New Home Warranty

In Virginia, the seller of a new home is held to warrant to the purchaser that, at the time of the transfer of record title or the purchaser's taking of possession, whichever occurs first, that the home with all its fixtures is, to the best of the seller's knowledge, sufficiently free from structural defects so as to pass without objection in the trade, constructed in a workman like manner so as to pass without objection in the trade, and fit for habitation. Va. Code Ann. § 55-70.1.

If the seller of the new home is a builder, he is held to warrant to the purchaser that, at the time of the transfer of record title or the purchaser's taking of possession, whichever occurs first, that the home with all its fixtures is sufficiently free from structural defects so as to pass without objection in the trade and constructed in a workman like manner so as to pass without objection in the trade, and fit for habitation. *Id.*

The statutory warranty extends for one year from the date of the transfer of record title or the purchaser's taking possession, whichever occurs first. The warranty for structural defects in the foundation of a new dwelling extends for a period of five years from the date of transfer of record title or the purchaser's taking possession. The action for breach of warranty shall be brought within two years after the breach. However, the purchaser must first provide the seller, by registered mail at the last known address, a written notice stating the nature of the warranty claim. After the notice the seller will have a reasonable period of time, not to exceed six months, to cure the defect that is the basis of the warranty claim. Warranty claims made after January 1, 2009, the sending of the notice tolls the limitations period for six months. *Id.*

3. New Condominium Warranty

In Virginia the seller of a new condominium, is held to warrant or guarantee against structural defects, to each of the units for two years from the date each unit is conveyed and must also warrant all of the common elements for two years. With respect to each unit the seller must warrant that the unit is fit for habitation and constructed in a workmanlike manner so as to pass without objection in the trade. Va. Code Ann. § 55-79.79(B).

It should be noted that the warranties created by Va. Code Ann. § 55-79.79 (B) cannot be varied by agreement and cannot be waived. See Va. Code Ann. § 55-79.41:1

B. Breach of Implied Warranty

Implied warranty of fitness will arise if the seller knows the purpose for which the goods are required and the buyer relies on the seller's skills. Va. Code Ann. § 8.2-315. The buyer will have to show that: 1) the seller had reason to know the particular purpose for the goods; 2) the seller had reason to know that the buyer was relying on the seller's skill and judgment, and 3) the buyer had, in fact, relied on such skill. *Medcom, Inc. v. C. Arthur Weaver, Co.*, 232 Va. 80, 348 S.E.2d 243 (1986).

If a person holds themselves out as specially qualified to perform work of a particular character, there is an implied warranty that the work undertaken will be of proper workmanship and reasonable fitness for its intended use. This applies in construction contacts. *Mann v. Clowser*, 190 Va. 887, 59 S.E.2d 78 (1950).

IV. BREACH OF CONTRACT/WARRANTY UNDER THE UCC

The statute of limitations on contracts for sales of goods is four years after the cause of action accrued. Va. Code Ann. § 8.2-725. The original agreement between the parties can reduce the period of limitations to not less than one year, but may not extend it. *Id*. The cause of action accrues when the breach occurs, regardless of whether or not the injured party knows of the breach. *Id.*

V. FRAUD AND MISREPRESENTATION

In Virginia, construction fraud is a criminal offense. Under Virginia Code Ann. § 18.2-200.1 which is titled: Failure to perform promise for construction, etc., in return for advances, converts the action of obtaining money, merchandise, or other valuable consideration, with fraudulent intent, based on a promise to perform construction, removal, repair or improvements to property. The act is treated as a larceny of the money, merchandise, or other valuable consideration. In order to prevail, the Commonwealth must prove the defendant 1) obtained an advance of money from another person; 2) with fraudulent intent at the time the advance was obtained; 3) made a promise to perform construction or improvement involving real property, 4) failed to perform the promise; 5) failed to return the advance within fifteen days of a request to do so by certified mail.

As a general rule an action for Fraud must claim "misrepresentation of present pre-existing facts, and cannot ordinarily be premised on unfulfilled promises or statements as to future events…" *Lloyd v. Smith*, 150 Va. 132, 142 S.E. 363, (1928). However, an action in tort for fraud may sometimes be predicated on promises which are made with "a present intention not to perform them…the gist of fraud in such case is not the breach of the agreement to preform but the fraudulent intent…" *Id.*

VI. STRICT LIABILITY

Strict liability is not generally recognized in Virginia, except for "intrinsically dangerous and ultra-hazardous activities" (such as blasting). *See*, *Harris v. T.L., Inc.*, 243 Va. 63, 71, 413 S.E.2d. 605, 609-610 (1992*); M.W. Worley Construction Co. v. Hungerford, Inc.*, 215 Va. 377, 210 S.E.2d. 161 (1974).

VII. INDEMNITY

A. Indemnification Agreements

Generally, in Virginia "the law looks with favor upon the making of contracts between competent parties upon valid consideration and for lawful purposes…" *Shuttleworth, Ruloff & Giordano, P.C. v. Nutter*, 254 Va. 494, 498, 493 S.E.2d 364, 366 (1997). Prior to 2007, *Johnson's Adm'x v. Richmond & Danville R.R. Co, 86 Va.* 975, 11 S.E. 829 (1890) and *Hiett v. Lake Barcroft Community Ass'n*, 244 Va. 191, 418 S.E.2d 894 (1992) were interpreted as holding that "indemnity agreements involving claims for personal injury are against public policy and void…" In both the *Johnson* and *Hiett* cases, the parties who executed the documents containing the release and indemnification clauses were the injured parties.

In 2007 the Virginia Supreme Court in *W.R. Hall v. Hampton Roads Sanitation District*, 273 Va. 350, 641 S.E.2d 472 (2007) and *Estes Express Lines, Inc. et al v. Chopper Express, Inc.*, 273 Va. 358, 641 S.E.2d 476 (2007), both decided on the same day, held that indemnification clauses which applied to personal injuries for which a party was not at fault and losses for personal injuries for which a party's own negligence caused the injury were valid.

If an indemnity covenant is a crucial part of the consideration for the contract or lease, and mutually executed as an arms-length contact by the parties who are on equal footing, the indemnification clause will be valid. *Appalachian Power Company v. Earline Virginia Sanders et.al.*, 232 Va. 189, 349 S.E.2d 101 (1986).

While there is no prohibition under Virginia law preventing two sophisticated business entities from negotiating an indemnity provision in a lease contract, *Green v. Sauder Mouldings, Inc., et al.*, 345 F.Supp.2d 610 (E.D. Va. 2004), "presumably such a concession would arguably be a basis for the bargain ultimately struck between the parties." It is contemplated by the Court that an indemnification provision would be brought to the lessee's attention; the provision would be discussed and negotiated. However, where the indemnification provision constitutes a unilateral release provision, it is unenforceable. Id.

B. Indemnification Agreement and VA. Code Ann. §11.4-1- Certain Indemnification Provisions in Construction Contracts Declared Void

The Virginia Supreme Court in *Blake Construction Co. Inc./Poole & Kent v. Upper Occoquan Sewage Authority*, 266 Va. 564, 587 S.E.2d 711 (2003), stated that "[w]hen the language in a statute is clear and unambiguous, the courts are bound by the plain meaning of that language… a contract to perform an act prohibited by a statute is void…" citing *Palumbo v. Bennett,* 242 Va. 248, 409 S.E.2d 152 (1991).

The Virginia General Assembly enacted Va. Code Ann. §11-4.1 which specifically states as follows:

> " Any provision contained in any contract relating to the construction, alteration, repair or maintenance of a building, structure or appurtenance thereto, including moving, demolition and excavation connected therewith, or 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. This section applies to such contracts between contractors and any public body, as defined in §2.2-4301..."

The Virginia Supreme Court on September 16, 2010, rendered an opinion in *Uniwest Const., Inc. v. Amtech Elevator Services, Inc.*, 280 Va. 428, 699 S.E.2d 223 (2010) holding that a construction contract, containing an indemnification clause which is designed to indemnify an indemnitee from its own acts of negligence, is void as it violates Va. Code Ann. § 11-4.1.

VIII. STATUTE OF REPOSE

Virginia's statute of repose is found under Va. Code Ann. §8.01-250. The statute specifically states as follows:

> No action to recover for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction, or construction of such improvement to real property more than five years after the performance or
>
> furnishing of such services and construction.

> The limitation prescribed in this section shall not apply to the manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property, nor to any person in actual possession and in control of the improvement as owner, tenant or otherwise at the time the defective or unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought; rather each such action shall be brought within the time next after such injury occurs as provided in § 8.01-243 and 8.01- 246.

The Virginia statute of repose for improvements of real property applies to suits for indemnity, and negligence based indemnity claims but not to warranty actions. *Kohl's Dept. Stores, Inc. v. Target Stores, Inc.*, 290 F.Supp 2d 674 (E.D. Va. 2003).

IX. ECONOMIC LOSS RULE

An economic loss occurs when a product "injures itself" because a component of the product is defective. See, *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 236 Va. 419, 374 S.E.2d. 55 (1988). When the bargained for level of quality in a contract is not met, the economic loss rule provides that the law of contract provides the sole remedy. *Id.* Tort recovery is not allowed because the contract defines what the contract breach is and the damages. Under Virginia law it is clear that absent privity of contract, economic losses are not recoverable in negligence actions.[6] The exception to this rule being the statute enacted by the General Assembly which specifically states that lack of privity, in certain cases is not a defense. Specifically the statute states that in cases not provided for under Virginia's UCC where recovery of damages for injury to person, including death or to property resulting from negligence is sought, lack of privity between parties is not a defense.[7]

X. RECOVERY FOR INVESTIGATIVE COSTS

If the investigative costs are included as part of a contract, those costs will be recoverable. Conversely if investigative costs are not included as a provision in the contract between the parties, those costs are not recoverable.

XI. EMOTIONAL DISTRESS

A. Negligent Infliction of Emotional Distress

Virginia does not recognize the tort of negligent infliction of emotional distress. The courts have held that where conduct is merely negligent, not willful, wanton, or vindictive, and physical impact is lacking, there can be no recovery for emotional disturbance alone. A plaintiff can recover for "mental anguish" as an element of their damages if they can assert an action for some other tort recognized by Virginia courts. See, *Sanford*

v. Ware, 191 Va. 43, 60 S.E.2d.10 (1950).

B. Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress applies under only the most compelling circumstances, requiring a plaintiff to prove by clear and convincing evidence that: (1) the wrongdoer's conduct is intentional or reckless; (2) the conduct is outrageous and intolerable; (3) the wrongful conduct and the emotional distress

[6] *Gerald M. Moore and Sons, inc, v. Drewry*, 251 Va. 277, 467 S.E.2d 811 (1996).

[7] Va. Code Ann. § 8.01-233.

are causally connected; and (4) the resulting distress is severe. See *Russo v. White,* 241 Va. 23, 400 S.E.2d. 160 (1990); *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145 (1974).

XII. ECONOMIC WASTE

The appropriate measure of damages in a construction contract setting is "the cost to complete the contract according to its terms or the cost to repair what has been done so that the contract terms are met." See *Lochaven Company v. Master Pools by Schertile, Inc., et al*, 233 Va. 537, 357 S.E.2d 534 (1987). However, if the costs to repair are grossly disproportionate to the results, then this results in an economic waste. The Economic Waste rule is an exception to determining damages in a construction contract based on the cost measure for determining damages.

XIII. DELAY DAMAGES

If an owner delays the contractor's performance of the work, or if a prime contractor delays a subcontractor's performance of work, the delayed party is generally entitled to recover its additional costs as a result of the delay. The Virginia Supreme Court has stated "…the damages are to be measured by the direct cost of all labor and material plus fair and reasonable overhead expenses properly chargeable during the reasonable time required to complete performance…" *E.I DuPont de Nemours & Co v. Universal Moulded Prod,* 191 Va. 525, 62 S.E.2d 233 (1950).

XIV. RECOVERABLE DAMAGES

A. Damages

The damages recoverable under breach of contract are "… such as may fairly and reasonably be considered as arising naturally - that is, according to the usual course of things - from the breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract…" *Sinclair Refining Co. v. Hamilton & Dotson*, 164 Va. 203, 178 S.E. 777 (1935).

B. Quantum Meruit

A party who furnishes labor or materials to another without benefit of an enforceable contract may be entitled to recover the benefit of that labor and material under quantum meruit. There can be no valid, express, contract between the parties. *SNC-Lavalin America Ia Inc. v. Alliant Tech Sy stems, Inc.*, 2011 WL4895217 (W.D Va. 2011); *Centrex Const. v.Acs tar Ins.Co.*, 448 F. Supp. 2d 697 (E.D. Va. 2006). To state a claim under quantum meruit, the party must state that the other party accepted and received its services and that the party is entitled to reasonable compensation. Then, the party must show that it rendered valuable services to the recipient that were requested and accepted, under circumstances which reasonably notified the recipient that the party performing the work, expected to be paid by the recipient.

C. Compensatory Damages

In a breach of contract action, the damages should make the non-breaching party whole. The burden is on the non-breaching party to prove its damages with reasonable certainty. Without proof of damages, the non-breaching party cannot recover. The non-breaching party must show enough facts to allow the trier of fact to make an intelligent and probable estimate of the damages sustained. *D.C. McLain, Inc. v. Arlington County*, 249 Va. 131, 452 S.E.2d 659 (1995).

D. Consequential Damages

Also known as indirect damages, consequential damages are losses that are not immediately caused by wrongful conduct, rather they arise from the operation of an intermediate cause or causes. Consequential damages may be recoverable if they proximately result from a breach of a construction contact, unless the contract exempts the breaching party from liability for indirect damages. Consequential damages can be recovered only when both parties could have reasonably anticipated that the type of damage could be incurred in the event of a breach. The classification of damages as direct or consequential damages is a question of law. See *Roanoke Hospital Association v. Dayle E. Russell, Inc.*, 215 Va. 796, 214 S.E. 2d 155 (1975).

E. Punitive Damages

Punitive damages are not recoverable for breach of contract. *Mar Tech Mechanical, Ltd. V. Chianelli Bldg Crop.*, 54 Va. Cir. 569 (2001). To recover punitive damages, the party claiming them must prove an independent, willful tort that is beyond breach of a duty imposed by contract. *Kamlar Crop. v. Haley*, 224 Va. 699; 299 S.E.2d 514 (1983). To recover punitive damages, the party asserting the claim must plead and prove an independent tort. *Colodny v. Wines Const. Inc.*, 33 Va. Cir. 321, 1994 WL 1031115. An independent tort is one that is factually bound to the contractual breach; however, its legal elements are distinct from the breach of contract. *A&E Supply Co., Inc. v. Nationwide Mut. Fire Ins. Co.*, 798 F.2d 669 (4th Cir. 1986). It is unlikely that punitive damages will be recovered in the vast majority of construction cases because the duty tortiously or negligently breached must be a

common law duty, not one that exists between the parties only because of the contract. Kamlar.

F. Lost Profits

Ordinarily lost profits may be an element of damages which arise from a breach of contract. However, they can only be recovered to the extent that the evidence provides a sufficient basis for estimating their amount with reasonable certainty. *TechDyn Systems Corp. v. Whittaker, Corp*, 245 Va. 291, 427 SE2d 334 (1993). If the lost profits are remote, speculative, contingent or uncertain, they are not recoverable under Virginia law. *ADC Fairway Corp v. Johnmark Const. Inc.*, 231 Va. 312, 343 S.E.2d 90 (1986) If the business is new, lost profits are too speculative to be recovered. *La Vay Corp. v. Dominion Federal Sav. & Loan Assn.*, 830 F. 2d 522 (1987).

G. Duty to Mitigate

The non-breaching party has an active duty to use all ordinary care and making all reasonable attempts to mitigate damages. *Hannan v. Dusch*, 154 Va. 356, 153 SE 824 (1930). The non-breaching party must make every effort to make the damages as light as possible. The non-breaching party's failure to mitigate damages is an affirmative defense, which places the burden of proof on the breaching party by the preponderance of evidence to establish that the non-breaching party failed to mitigate damages. *National Housing Bldg. Co., v. Acordia of Virginia Insurance Agency, Inc.*, 267 Va. 247, 591 S.E.2d 88 (2004).

H. Attorney's Fees

Absent a contractual or statutory provision, Virginia follows the American Rule that the prevailing party is not entitled to its attorney's fees. Even if attorney fees are provided for by statute or contract, the award of attorney's fees is within the sound discretion of the Court. *Ingram v. Ingram*, 217 Va. 27, 225 S.E.2d 362 (1976)

XV. INSURANCE COVERAGE

Under a typical liability policy, an insurer has a duty to both provide the insured with a defense and to indemnify the insured for a judgment up to policy limits. The sole source of these duties is the insurance contract.

If excluded under the contract, commercial general liability policies do not cover

Damages that result from the insured's defective performance of a contract, if they are limited to the insured's work or product. This is because the damages are expected from the standpoint of the insured. When the insured poorly performs contractual obligations which damage only the insured's work or product, the contractual liability that results is "expected" under the terms of its general liability policy. Expected damages are those which, regardless of fault, the contractor would have to repair in order to deliver the product they promised. *Hotel Roanoke Conference Center Commission v. The Cincinnati Insurance Company*, 303 F. Supp. 2d 784 (W.D. Va. 2004).

XVI. MECHANIC'S LIENS

In Virginia, Mechanic's liens are created by statue. Va. Code § 43-1 through Va. Code § 43-23.2 and Va. Code § 43-3(A) set forth the liens enjoyed by mechanics. Va. Code Ann. § 43-3(A) states as follows:

> "…All persons performing labor or furnishing materials of the value of $150 or more, including the reasonable rental or use value of equipment, for the construction, removal, repair or improvement of any building or structure permanently annexed to the freehold, and all persons performing any labor or furnishing materials of like value for the construction of any railroad, shall have a lien, if perfected as hereinafter provided, upon such building or structure, and so much land therewith as shall be necessary for the convenient use and enjoyment thereof, and upon such railroad and franchises for the work done and materials furnished, subject to the provisions of § 43-20. …"

Perfection of the Mechanic's lien is governed by Va. Code § 43-4, 43-7, and 43-9 which set forth the procedures and requirements to perfect a lien by a general contractor, subcontractor and sub-subcontractor, respectively. The forms to be used to perfect a lien by general contractors is contained in **Va. Code Ann § 43-5:**

Memorandum for Mechanic's Lien Claimed by General Contractor.
Name of owner:
Address of owner:
Name of claimant:
Address of claimant:

1. Type of materials or services furnished:
2. Amount claimed: $
3. Type of structure on which work done or materials furnished:
4. Brief description and location of real property:
5. Date from which interest on the above amount is claimed:

Date:

It is the intent of the claimant to claim the benefit of a lien. The undersigned hereby certifies that he has mailed a copy of this memorandum of lien to the owner of the property at the owner's last known address:

..... (address), on ..... (date of mailing).

(Name of claimant).
Affidavit.
State of Virginia,
County (or city) of ....., to wit:

I, ... (notary or other officer) for the county (or city) aforesaid, do certify that claimant, or ....., agent for claimant, this day made oath before me in my county (or city) aforesaid that .....(the owner) is justly indebted to claimant in the sum of ..... dollars, for the consideration stated in the foregoing memorandum, and that the same is payable as therein stated.

Given under my hand this the ..... day of ....., 20....
..... (Notary Public or Magistrate, et cetera.)

The forms to be used to perfect a lien by subcontractors is contained in **Va. Code Ann §43-8:**

Memorandum for Mechanic's Lien Claimed by Subcontractor.
Name of owner:
Address of owner:
Name of general contractor (if any):
Name of claimant:
Address of claimant:

1. Type of materials or services furnished:
2. Amount claimed: $
3. Type of structure on which work done or materials furnished:
4. Brief description and location of real property:
5. Date from which interest on above amount is claimed

Date:

It is the intent of the claimant to claim the benefit of a lien.

.....(Name of claimant)

Affidavit.

State of Virginia,

County (or city) of ..... to wit:

I, ... (notary or other officer) for the county (or city) aforesaid, do certify that ....., claimant, or ....., agent for claimant, this day made oath before me in my county (or city) aforesaid that ..... is justly indebted to claimant in the sum of ..... dollars, for the consideration stated in the foregoing memorandum, and that the same is payable as therein stated.

Given under my hand this the ..... day of ....., 20....

..... (Notary Public or Magistrate, et cetera.)

Notice.

To ..... (owner).

You are hereby notified that ..... (general contractor) is indebted to me in the sum of ..... dollars ($ .....) with interest thereon from the ..... day of ....., 20 ..., for work done (or materials furnished, as the case may be,) in and about the construction (or removal, etc.,) of a ..... (describe structure, whether dwelling, store, or etc.,) which he has contracted to construct (or remove, etc.,) for you or on property owned by you in the county (or city) of ....., and that I have duly recorded a mechanic's lien for the same.

Given under my hand this the ..... day of ....., 20....

..... (Subcontractor).

The forms to be used to perfect a lien by sub-subcontractors is contained in **Va. Code Ann §43-10:**

Memorandum for Mechanic's Lien Claimed by Sub-subcontractor.

Name of owner:

Address of owner:

Name of general contractor (if any) and subcontractor:

Name of claimant:

Address of claimant:

1. Type of materials or services furnished:
2. Amount claimed: $
3. Type of structure on which work done or materials furnished:
4. Brief description and location of real property:
5. Date from which interest on above amount is claimed:

Date:

It is the intent of the claimant to claim the benefit of a lien.
.....(Name of claimant).
..... (Signature of claimant or agent for claimant).
Affidavit.
State of Virginia,
County (or city) of ....., to wit:

I, ... (notary or other officer) for the county (or city) aforesaid do certify that ..... claimant, or ....., agent for claimant, this day made oath before me in my county (or city) aforesaid that ..... is justly indebted to claimant in the sum of ..... dollars for the consideration stated in the foregoing memorandum, and that the same is payable as therein stated.
Given under my hand this the ..... day of ....., 20....
..... (Notary Public or Magistrate, et cetera.)

Notice.
To ..... and

(owner) (general contractor):
You are hereby notified that ....., a subcontractor under you, said ..... (general contractor) for the construction (or removal, etc.,) of a ..... (describe structure) for you, or on property owned by you, said ..... (owner) is indebted to me in the sum of ..... dollars ($ .....) with interest thereon from the day of ....., 20....., for work done (or materials furnished) in and about the construction (or removal, etc.,) of said ..... (naming structure), situate in the county (or city) of Virginia, and that I have duly recorded a mechanic's lien for the same. Given under my hand this the day of ....., 20.....
..... (Sub-subcontractor).

In perfecting a lien, it is imperative that the statutes and case law be strictly complied with or the lien will be deemed invalid.

The 90 day rule is contained in Va. Code Ann. § 43-4 which states that a claimant (as defined in the statute) "…shall file a memorandum of lien at any time after the work is commenced or material furnished, but not later than 90 days from the last day of the month in which he last performed labor or furnished material and in no event later than 90 days from the time such building, structure, or railroad is completed or work thereon is otherwise terminated…" It is mandatory that the time limits be complied with. *Britt Const., Inc. v. Magazzine Clean, LLC*, 271 Va. 58, 623 S.E.2d 886 (2006). It is important to understand the interplay between the above two clauses. Depending on when the claimants last day of work falls they may actually have more than 90 days within which to file their lien; especially if their last day of work falls before the last day of a month in which the overall work on the project is not completed or terminated. Some claimants only have 90 days in which to file their lien from the date the project is completed or terminated. However, the rules change if the work is terminated. Therefore all claimants must keep track of the project completion or termination in order to ensure that the 90 day requirement is complied with. There are other factors which affect the applicability of the 90 day rule. There are essentially three statutory triggers for the running of the 90 day period: 1 the day work was last performed, 2- the completion of all work or 3- termination of all work.

The 150 day rule is contained in Va. Code Ann. §43-4. The Code specifically states:

> "...The lien claimant may file any number of memoranda but no memorandum filed pursuant to this chapter shall include sums due for labor or materials furnished more than 150 days prior to the last day on which labor was performed or material furnished to the job preceding the filing of such memorandum. However, any memorandum may include (i) sums withheld as retainages with respect to labor performed or materials furnished at any time before it is filed, but not to exceed 10 percent of the total contract price and (ii) sums which are not yet due because the party with whom the lien claimant contracted has not yet received such funds from the owner or another third party…"

The 150 day rule is not considered a filing deadline, but rather reflects the limit of how far back in time a lien claimant can go in any lien memorandum for money owed. *Caroline Builders Corp. v. Cenit Equity Co.,* 257 Va. 405, 512 SE2d 550 (1999). The 150 day rule is also referred to as the 150 daylook-back rule.

The provisions of the enforcement statutes are loosely interpreted, while the requirements of the perfection statutes are strictly construed. *American Standard Homes Corp. v. Reinecke*, 245 Va. 113, 425 S.E.2d 515 (1993).

Effective July 1, 2015, any provision of a construction contract or lien waiver that "waives or diminishes" the payment bond or mechanic's lien rights of a subcontractor, lower-tier subcontractor or material supplier before services are rendered is "null and void" in Virginia. The language in Va. Code § 11-4.1:1 and Va. Code § 43-3 represents a significant change from previous Virginia law on payment bonds and mechanic's liens, which expressly allowed such waivers "at any time."

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics as they existed at the time of drafting. 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.

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