

CONTRACTOR ALERT

Contractor Alert is a joint publication by this Contractor and the Law Offices of Richard M. Sissman, Esquire, located at 1485 Chain Bridge Road, Suite 105, McLean, VA 22101. This newsletter is designed to give general information on the matters covered. Space limitation prevents exhaustive treatment or analysis of this topic. This newsletter is not intended to substitute for advise on specific legal problems. If you are interested in receiving a complimentary issue or to be placed on our mailing list, contact Richard M. Sissman, Esquire. We welcome and appreciate your suggestions for future article topics.

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VIRGINIA'S RULING ON THE ENFORCEABILITY OF CONTRACTUAL WAIVER OF MECHANIC'S LIEN RIGHTS

The Supreme Court of Virginia in the matter of First American Bank of Virginia v. JSC Concrete Construction in January of 2000 dealt with the issue of the enforceability of a contractual provision whereby the subcontractor waives its right to pursue a mechanic's lien claim on real property in the event it is not paid. The sister jurisdiction of Maryland holds by statute that such a "waiver clause" to be unconscionable and will not let such a provision stand. (Md. Real Property Code §9-113). In Virginia, a lien is a creature of statute, the lien must have its foundation in a contract, with which the lien must correspond.

In the case before the Virginia Supreme Court, in 1989, Drewer Development Corporation (Drewer or DDC) was a developer of multiple-lot residential projects in Northern Virginia. J.S.C. Concrete Construction, Inc. (JSC), was a concrete flatwork and walls contractor, which had worked for Drewer for a number of years on different projects.

On January 10, 1991, JSC filed memoranda of mechanic's lien against 13 lots in two different residential projects being developed by Drewer in Loudoun County. In a timely filed suit to enforce the liens, JSC's bill of complaint named multiple defendants, including Drewer, which was the record owner of the properties, and other mechanic's lien claimants. The bill also named

The Agreement contained a paragraph providing that JSC waived all rights to file liens against the property. There were work orders and a base contract signed by JSC. JSC said that the work orders were separate and distinct contracts from the base contract. The work orders contained language for lien waiver that was conditioned upon receipt of payment from the Owner while the base contract contained language stating that there was never a right to file a lien no with no condition of payment. The Supreme Court ruled that the one must look to the base contract and the work orders to determine the "complete contract". The Supreme Court then looked to Virginia Code §43-13(C) holding that such a waiver must be established by clear and convincing evidence. The Supreme Court determined that the language in the base contract was clear and unambiguous; however, there was some ambiguity in the language of the work tickets whether or not JSC would have a right to lien the Project. The Court was able to interpret that the work ticket language supported the base contract language of waiver and not contradict the base contract's language.

What does this mean for you as a subcontractor or even prime contractor when doing work in Virginia? It means don't sign the deal until you excise the waiver language.

