



Construction Law Update:
Case Law & Legislation
Affecting the Construction Industry
(2014-2015)

Presented by

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INTRODUCTION

Division 10 is proud to present the Ninth Edition of the annual publication, ***Construction Law Update: Case Law & Legislation Affecting the Construction Industry (2014-2015)***.

The **Construction Law Update** has become a hot item, requested by many construction practitioners throughout the country. Along with this year's update, you can get access to the archive of previous updates (2006-2014) on Division 10's main website at:

<http://apps.americanbar.org/dch/committee.cfm?com=CI110000>

If you are a regular contributor, we thank you again for your help and we look forward to another year of assistance. If you are a first time reader of the **Construction Law Update** and you see a "hole" where your state should be included, then perhaps you are the one to bring us updates throughout the year. It only takes a few hours of your time and you will be assisting your fellow colleagues tremendously. You could also be named as the state representative with Division 10's *Listserve* for the **Construction Law Update**.

Personally, I would like to thank **Angela Stephens** and **Amber Floyd** for providing invaluable time and effort for bringing this year's update to publication. They both work tirelessly throughout the year to make sure the updates "keep coming in" from the contributors. The Editorial Team would also like to thank all the volunteers and contributors for their efforts this year. Finally, we would be remiss if we did not thank **Neil Alden**, an attorney with Burr & Forman LLP, who provided the final edit review, and **Cherie Wickham** of Stites & Harbison, PLLC, for her countless hours of administrative help this year.

The submissions in this publication are made throughout the 2014-2015 year, which means that some legislation may have passed, been rejected, or even tabled since the publication of this update. The case law and legislation included in this update are not intended to be an exhaustive compilation of every construction-related decision or legislative enactment from within a particular jurisdiction. We rely heavily on our authors to submit timely and accurate information. It is written by you and for you! If you would like to join this great team of contributors and authors, please contact one of our editors. Have a great year!



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Construction Law Update

Alabama

Case law:

1. In *Owners Insurance Co. v. Jim Carr Homebuilder, LLC*, 2014 WL 1270629 (Ala. Mar. 28, 2014), the Alabama Supreme Court, after withdrawing its previous opinion of September 20, 2013, held that the Commercial General Liability (“CGL”) insurance policy issued by Owners Insurance Company to a homebuilder, JCH, defined the term “occurrence” to include additional damage that resulted from faulty workmanship. In this case, JCH built a new house for the Johnsons and approximately one year later the Johnsons noticed problems with the house related to water leaking through the roof, walls, and floors, and resulting in water damage to those and other areas of the house. Owners, the insurer, filed a declaratory judgment action to determine whether it had a duty to defend and indemnify JCH for the Johnson’s claims alleging breach of contract, fraud, and negligence and wantonness. The policy defined “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” The Court, in examining previous cases, concluded that faulty workmanship itself is not an occurrence but faulty workmanship may lead to an occurrence if it subjects personal property or other parts of the structure to continue or repeated exposure to some other general harmful condition, and as a result of that exposure, personal property or other parts of the structure are damaged. In addition, the Court found that the policy’s “Your Work” exclusion did not bar coverage for the homeowners’ claims because JCH had purchased a completed operations coverage endorsement. Based on the above the Court affirmed the trial court’s judgment that Owners was required to pay the judgment entered against JCH for the Johnsons’ claims.

2. In *Guardian Builders, LLC v. Useton*, 2014 WL 1407218 (Ala. Apr. 11, 2014), the Alabama Supreme Court found that a Better Business Bureau of North Alabama (“BBB”) arbitrator exceeded the scope of its authority when it awarded attorney fees and arbitration fees to the prevailing party in a home construction dispute. The arbitration provision in the construction agreement was silent as to attorney fees and the BBB rules governing arbitration were also silent as to attorney fees except that the arbitrator was allowed to award any remedy that is permitted under applicable law, and is not bound to apply legal principles in reaching what it thinks is a fair resolution of the dispute. The Court, in applying the American rule as used in Alabama, found that the arbitrator exceeded its authority in awarding fees to the prevailing party, and found that no argument had been made indicating an exception to that rule. As for arbitration fees, the Court found that the arbitration provision in the construction agreement that the fees should be paid by both parties meant that the arbitrator exceeded its authority to award arbitration expenses to the prevailing party.

3. In *Johnson Controls, Inc. v. Liberty Mutual Insurance Co.*, 2014 WL 1874599 (Ala. May 9, 2014), the Alabama Supreme Court found that under the “little Miller Act,” Alabama Code Section 39-1-1 et seq., patterned after the Federal Miller Act, 40 U.S.C. §§ 3131-3133, a supplier was not required to have a direct contract with the contractor or subcontractor to be entitled to make a claim on a payment bond, even if the payment bond itself says otherwise. This case involved a supplier of materials for a public hospital renovation project who brought an action against the insurer seeking payment under the payment bond following suspension of the project. The supplier sold the materials directly to the owner, as opposed to a contractor or subcontractor, so that the owner could be exempt from sales taxes. The Court found that even though the terms of the payment bond limited claimants to those having a direct contract with

the contractor or subcontractor, because the bond was in satisfaction of § 39-1-1, the Court was authorized to read into it the provisions of the statute, including the lack of a privity of contract requirement. The Court ultimately found that the supplier was a proper claimant on the payment bond and ordered the trial court to enter judgment in the supplier's favor.

4. In *Southeast Constr., LLC v. WAR Constr., Inc.*, 2014 WL 1874676 (Ala. May 9, 2014), the Alabama Supreme Court considered whether a contractor had fully complied with an arbitration award, and concluded that it had not. The award required the contractor to obtain a release of all liens and claims by its subcontractors before the owner had to pay the award. One subcontractor agreed to provide a release of liens, but not a release of claims. The trial court found for the contractor, but the Supreme Court reversed, concluding that the contractor had not complied with the arbitration award because one subcontractor refused to release both liens and claims. The Court rejected the contractor's argument that the phrase "liens and claims" was a redundant phrase similar to "null and void." Therefore, a release of *liens* from the subcontractor did not also count as a release *claims* the subcontractor might have against the owner.

5. In *Tucker v. Ernst & Young, LLP*, No. 1121048 (Ala. June 13, 2014), the Alabama Supreme Court affirmed the trial court's denial of a motion to vacate an arbitration award. This was a shareholder-derivative action instead of a construction case, but the holding underscores the difficulty in trying to appeal the merits of an arbitration decision in Alabama. HealthSouth asserted audit-malpractice claims against Ernst & Young for failing to discover accounting fraud at HealthSouth. At the close of HealthSouth's case, the arbitrators granted a dispositive motion filed by Ernst & Young, thereby denying all of HealthSouth's claims. HealthSouth attempted to vacate the arbitrators' decision under 9 U.S.C. §10(a)(3) & (a)(4), arguing that the arbitrators had both exceeded their powers and committed misconduct. The Supreme Court dismissed HealthSouth's arguments as an attempt to assert a "manifest disregard" challenge against the arbitrators' decision, and the Court reiterated that manifest disregard is no longer a valid basis for vacating an arbitration award in Alabama.

Legislation:

1. H.B. 24, Act 2014-404 "An Act to amend Section 39-2-2, Code of Alabama 1975, and Section 39-2-12, Code of Alabama 1975, relating to public works contracts," approved by the Governor April 9, 2014. Revised Section 39-2-2 requires that if a pre-bid meeting is held, it shall be held at least seven (7) days prior to the bid opening except when the project is declared an emergency, and that the awarding authority may not offer a contract for bidding unless confirmation of any applicable grant has been received and any required matching funds have been secured or are available. Revised Section 39-2-12 requires partial payments made as work progresses no later than thirty-five (35) days after the authority accepts that the estimate and terms of the contract have been fulfilled, and that a "person" shall be designated to review the progress of completed work.

2. Public Works Bid Advertising - Act No. 2014-373. Effective July 1, 2014, Sections 39-2-2, 41-16-24, and 41-16-54 are amended to allow an awarding authority to let a public works contract even if a newspaper failed to run an advertisement for sealed bids submitted by the awarding authority, provided the authority can prove that it submitted the advertisement to the newspaper in good faith.

3. Fair and Open Competition in Governmental Construction Act - Act No. 2014-107. In awarding government construction contracts, public agencies may not favor or disfavor bidders, contractors or subcontractors based on whether they are willing or unwilling to enter into an agreement with a union relating to the project.

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Alaska

Case law:

1. In *Silver Bow Const. v. State*, 330 P.3d 922 (Alaska 2014), the Alaska Supreme Court reviewed whether the State could find that a bidder whose bid exceeded the 10-page limit for bids could nonetheless be awarded the contract in question. Silver Bow protested the bid and argued that the over-length bid was non-responsive and that the successful bidder should have been disqualified. The State countered that the page count was a matter of form and did not confer an advantage on the winning bidder. The Alaska Supreme Court concluded that the State reasonably found that the over-length bid did not confer an unfair advantage on the winning bidder. It then upheld the State's bid award as being within its discretion.

Legislation:

1. AS 18.60.180, AS 18.60.210(a): The Legislature directed the Department of Labor and Workforce Development to utilize the American Society of Mechanical Engineers Boiler and Pressure Vessel Code for promulgating regulations and changed the relevant exemptions to include residential boilers that contain only water, do not exceed 120 gallons and 140 degrees Fahrenheit, and comply with the American Society of Mechanical Engineers Boiler and Pressure Vessel Code. Ch.9 SLA 2014 § 9.

2. AS 08.48.221, AS 08.48.331: These statutes relating the architects, engineers, land surveyors and landscape architects were amended to change the process for approving documents by requiring that the person in question sign their seal and changing the certification to require that the work be within the signatory's field of practice or constitute design work of minor importance. The statutory exemptions were changed accordingly and changed in some instances to require board approval for the exemption to be valid. Ch. 65. SLA 2014 §§ 1-4.

3. AS 08.18.071, AS 08.18.101, AS 08.18.161: These statutes were amended to change several bonding requirements for contractors and specialty contractors, including (a) increasing the amount of the mandatory license bond for contractors and specialty contractors, (b) eliminating the project size exception for insurance, and (c) changing the project size exception to bonding to require a bond (but a smaller bond than the general license bond) and reducing the project size. Ch. 70 SLA 2014 §§ 1-7.

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Arizona

Case law:

1. In *Weitz Co. L.L.C. v. Heth*, CV-13-0378-PR, 2014 WL 4197398 (Ariz. Aug. 26, 2014), the Arizona Supreme Court had its "first opportunity to address the interplay between

equitable subrogation and the priority granted to mechanics' liens by [Arizona Revised Statutes] § 33-992(A)." The Court vacated all lower court rulings, including the Court of Appeals' decision. *Weitz Co. v. Heth*, 233 Ariz. 442, 314 P.3d 569 (Ct. App. 2013).

For many years, Arizona courts had sorted out competing interests among lenders and contractors by applying not only the mechanics' and materialmen's lien priority statute enacted by the legislature, A.R.S. § 33-992(A), but also the common law doctrine of "equitable subrogation," which allows certain lenders to step into the shoes of another lender's priority. Specifically, previous Arizona cases held that the equitable subrogation doctrine allowed a subsequent lender to step into the original lender's shoes in terms of priority, which trumped the contractors' intervening mechanics' lien interests.

The Arizona Court of Appeals in *Wietz* addressed this issue and held that the lien statute alone controls how priority is to be established. Essentially, the court held that A.R.S. § 33-992(A) means exactly what it says: but for one exception applicable to the original lender who provides funding, contractors' liens have priority over "all [other] encumbrances upon the property attaching subsequent to the time the labor was commenced." The court further held that the subsequent lenders who provided funding after construction commenced could not piggyback off the original lender's lien priority under the doctrine of "equitable subrogation," but instead were behind the contractor who built the project. This result, according to the court, was mandated by the lien priority statute.

This Court of Appeals' decision was short lived, however, as the decision was vacated by the Arizona Supreme Court in August of 2014. The Court concluded that Arizona's lien statute, § 33-992(A), does not preclude "assignment by equitable subrogation of a lien that attached before construction began on the project at issue."

The case involved lenders and owners on one side and a general contractor (Weitz) on the other, claiming priority on a Phoenix condominium project. During the course of construction, the project developed financial problems; as it neared completion, the developer failed to make a payment to Weitz of approximately \$4M, prompting Wietz's mechanics' lien case. Below is a short chronology of relevant events:

April 2005	Bank records its first deed of trust securing the developer's construction loan of \$44M before construction starts.
November 2005	Shovel hits the ground and construction officially begins to trigger the contractor's right to mechanics' liens.
December 2005	Bank increases loan by approximately \$8M and records a modification to its original deed of trust.
February 2007	Bank records second deed of trust to secure approximately \$10M in additional loaned funds.
September 2007	Developer begins selling condominium units to buyers who either financed or paid cash. Some of the purchase money for these units was applied to the construction loan, resulting in the Bank releasing these units from both of its deeds of trust. Deeds of trust securing the owners' purchase money loans were then recorded against the units.
May 2008	Contractor records its mechanics' lien for billings unpaid by the developer.
November 2008	Contractor files a foreclosure lawsuit against developer, the unit owner and their lenders, claiming its mechanics' lien rights in November 2005 have priority.

At the trial court, the Owners and Lenders moved for partial summary judgment, arguing that because they had paid the portions of the construction loan allocated to their units, they were equitably subrogated to the Bank's April 2005 deed of trust and therefore had priority over Weitz's mechanics' lien. Weitz filed a cross-motion for partial summary judgment, and argued that A.R.S. § 33-992(A) precluded equitable subrogation, or alternatively, that the Owners and Lenders were not eligible to invoke the equitable subrogation doctrine because they did not fully discharge the Developer's obligations to the Bank. The Arizona Supreme Court's recent decision established the following principles regarding equitable subrogation and Arizona mechanics' lien law:

- "When equitable subrogation occurs, the superior lien and attendant obligation are not discharged but are instead assigned by operation of law to the one who paid the obligation."
- "Because an equitably subrogated lien 'attaches' when the superior lien was recorded, § 33-992(A) does not require that an intervening mechanics' lien be given priority."
- "[N]othing in § 33-992(A) suggests that the legislature intended to preclude equitable subrogation in the mechanics' lien context. ... When a lien that is superior to a mechanics' lien is assigned to another through equitable subrogation, the mechanics' lien remains in the same position it occupied before subrogation."
- "[P]ermittting equitable subrogation of a lien that is superior to a mechanics' lien is consistent with the legislature's treatment of junior lienholders' interests in foreclosure actions."
- "[A] prospective subrogee is required to discharge only the portion of an obligation that is secured by the property at issue."

The Arizona Supreme Court held "that when a single mortgage is recorded against multiple parcels, a third party is not precluded from attaining equitable subrogation rights when it pays the pro rata amount of the superior obligation and obtains a full release of the parcel at issue from the mortgage lien."

In the aftermath of this case, contractors in Arizona must recognize that the principle of equitable subrogation may trump their mechanics' lien rights. Contractors should therefore evaluate the owner/developer's financial wherewithal (via the property or otherwise) to pay and the amount of prior encumbrances on the property. Insisting on payment bonds or other financing alternatives may be a better alternative for contractors in many situations in light of this case.

2. In *BMO Harris Bank N.A. v. Wildwood Creek Ranch, LLC*, 234 Ariz. 100, 317 P.3d 641 (Ct. App. 2014), as amended (Jan. 21, 2014), the Arizona Court of Appeals held that a developer of vacant land cannot invoke the Arizona anti-deficiency statute as a matter of law, regardless of the borrower's professed intent to eventually reside on that property. Interestingly, the same court held nearly three years prior that the anti-deficiency statute protects a borrower who never completed construction of a single-family dwelling before defaulting on its loan.

The statute at issue, A.R.S. § 33-814(G), provides that no deficiency action may be maintained "if trust property of two and one-half acres or less which is limited to and utilized for either a single one-family or a single two-family dwelling is sold pursuant to [a] trustee's power of sale." The statute is silent as to whether borrowers whose dwellings are under construction at the time of default deserve the same protection as those who lived in a completed home. The Arizona Court of Appeals addressed that question in *M&I Marshall & Isley Bank vs. Mueller*, 228 Ariz. 478, 268 P.3d 1135 (Ct. App. 2011), and held that a borrower need not physically occupy a completed structure: regardless of how far construction had progressed, the salient issue was whether a borrower purchased the property with the purpose of occupying a dwelling upon

completion. However, the *Wildwood* court failed to follow *Mueller's* rationale and instead held that since the vacant lot "was never used as a dwelling prior to the trustee's sale . . . the Rudgears' professed intent to construct a home on the Property is irrelevant."

The new decision is significant beyond just the fact that lenders may seek a deficiency judgment against borrowers who default very early-on before construction commences. In fact, a concurring opinion broke new ground by indicating that even when construction is well underway, courts should not simply take the borrower's word that he or she intends to eventually occupy the property.

Legislation:

1. H.B. 2018 – Relating to property deficiency actions. This bill closes a long-standing loophole that potentially allowed commercial homebuilders to take advantage of Arizona's anti-deficiency statute, even though the statute was originally enacted to protect only homeowners. In sum, for loans secured by residences that are originated after December 31, 2014, commercial homebuilders will no longer be able to avoid liability based on Arizona's anti-deficiency statute, A.R.S. § 33-814(G).

During the economic downturn, homebuilders found themselves in precisely the "rare case" described in *Mid Kansas Federal Savings and Loan Association of Wichita v. Dynamic Development Corporation*, 167 Ariz. 122, 804 P.2d 1310 (1991). Developers owned "dwellings" that were worth far less than the debt they owed. After the lender foreclosed, the *Mid Kansas* decision allowed the developers to take advantage of Arizona's anti-deficiency statute much to the chagrin of commercial lenders.

H.B. 2018 closes the *Mid Kansas* loophole and specifically excludes from protection "[r]eal property owned by a person engaged in the business of constructing and selling dwellings that was acquired by the person in the course of that business and that is subject to a mortgage given to secure payment of a loan for construction of a dwelling on the property for same to another person." The bill also excludes from protection any dwelling that was never substantially completed, or that was never actually used as a dwelling. These changes effectively overturn *M&I Marshall & Isley Bank v. Mueller*, which granted anti-deficiency protection to homeowners even though they had never used the property as a dwelling, since construction was never completed.

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California

Case law:

1. In *E.J. Franks Construction, Inc. v. Sahota et al.*, 226 Cal.App.4th 1123 (2014), the California Court of Appeal held that a licensee who transfers its contractor's license from a sole proprietorship to a corporation during the course of a construction project is not "unlicensed" during the transition period. As a result, the contractor corporation was not prohibited from foreclosing on a mechanics lien and pursuing an action for breach of contract and quantum meruit against the property owner.

Edward Franks, a general building contractor, operated a sole proprietorship under the name E.J. Franks Construction. During the course of constructing a home for the Sahotas, Franks incorporated his company under the name E.J. Franks Construction, Inc. (EJFCI), and

his contractor's license was reissued to the corporation. EJFCI filed a complaint to foreclose on a mechanics lien, for breach of contract, common counts and quantum meruit.

The Sahotas claimed EJFCI's claim for quantum meruit was prohibited by B&P Code Section 7031 because EJFCI was an unlicensed contractor at the time the construction contract was entered and therefore EJFCI was not licensed "at all times" during the performance of the contract.

The Court of Appeal held that Section 7031 did not apply because at no time was the work on the Sahotas' home performed by an unlicensed contractor. The Sahotas entered into a contract with a sole proprietorship that was a licensed general building contractor. During the course of the project, the sole proprietor, E.J. Franks Construction, was properly licensed. The license issued to and maintained by Franks was reissued to the corporation. The Court noted that unlike the cases cited by the Sahotas, the instant matter did not involve a period in which the contractor was unlicensed or where a license previously issued lapsed during the construction project. The Court reasoned that the purpose of the statute is to deter *unlicensed* contractors from recovering, and the statute is not intended to deter *licensed* contractors from changing a business entity's status, and obtaining reissuance of the license to the new entity during a contract period.

The Court of Appeal found that the case involved "a licensed contractor and a change in business entity status." Noting that a proper license was in place at all times, the Court concluded that applying 7031 to the circumstances would lead to absurd results. Such a holding would effectively preclude licensed sole proprietor contractors from lawfully incorporating and obtaining a reissue of a general contracting license to a new business entity at any time during the construction period. The purpose of 7031 is to prevent unlicensed contractors from recovering compensation for their work. It is not intended to deter licensed contractors from changing business entity status and obtaining a reissuance of a license to the new entity during a contract period.

The Sahotas also argued that EJFCI could not recover money due under the construction contract because the contract was in the name of the sole proprietorship, not the corporation, citing to the holding in *OPP v. St. Paul Fire & Marine Ins. Co.*, 154 Cal.App.4th 71 (2007). The Court rejected the Sahotas' argument. Unlike *OPP*, Franks did not misrepresent his contractor's license by claiming it belonged to a corporate entity. In fact, the corporate entity did not exist when the contract was entered into by the sole proprietorship. The sole proprietorship was properly licensed when it entered into the contract, and the corporate entity merely continued the work of the sole proprietorship while it was properly licensed.

The Court also rejected the Sahotas' argument that the holding in *WFS Industrial Construction, Inc. v. Great West Contractors, Inc.*, 162 Cal.App.4th 581 (2008), barred EJFCI's claim. The Court distinguished the holding in this case, pointing out that *WFS* involved a subcontractor who entered into an agreement with a general contractor at a time when the subcontractor was unlicensed. In this case, Franks entered into a contract with the Sahotas in the name of his properly licensed sole proprietorship, E.J. Franks Construction. Later, that license was reissued to the corporation.

In an important aside, the Court pointed out that EJFCI did not seek or recover damages for work performed while the corporation was unlicensed or for the work performed by the sole proprietorship. Rather, the damages recovered by EJFCI included only extra work over and above the contract, and only for a period following the reissuance of the contractor's license from the sole proprietorship to the corporation. This leaves open the question of whether EJFCI should have recovered damages owed for work performed by the sole proprietorship before the license was transferred to EFJCI.

The Court also affirmed the trial court's decision allowing EJFCI to proceed on its quantum meruit claim. While B&P Section 7164 requires a written contract – and there was no written contract between EJFCI and the Sahotas – even without a written contract and despite Frank's failure to obtain the Sahotas' signatures on several change orders, EJFCI was not precluded from bringing a quantum meruit claim for the services it rendered. The Court reasoned that the Sahotas would be unjustly enriched by the numerous changes and upgrades performed by EJFCI if EJFCI were prohibited from such recovery.

2. In *Beacon Residential Community Assn. v. Skidmore, Owings & Merrill LLP*, 59 Cal.4th 568 (2014), the California Supreme Court issued a decision confirming that construction design professionals do owe a duty of care to third party property purchasers who did not hire the professionals, and with which the professionals did not have any contract. The Court here restricted the applicability of earlier case law often relied upon by design professionals to avoid liability if they only prepared plans or made design recommendations. The Court held that design professionals owe a duty to purchasers and can be liable for negligence even when they do not actually build the project and do not exercise control over construction decisions.

A condominium homeowners association, on behalf of its homeowner members, sued the developer of the project and the project architect for construction defects caused by negligent architectural design work. The Court held that where the design professional is not subordinate to any other design professional, a duty of care is owed to future purchasers.

The Court noted that in hiring the architect, the developer relied upon the architect's specialized training, technical expertise, and professional judgment, and that the architect applied its expertise throughout the construction of the project, conducting inspections, monitoring contractors' compliance with plans, and altering design requirements as issues arose. So even though the developer made final decisions on the architect's recommendations, and the contractors had control over the construction process and implementation of plans and recommendations, the developer relied on the architect, and the architect exercised control over the quality and conformance of the contractor's work.

The California Supreme Court distinguished *Weseloh Family Ltd. Partnership v. K.L. Wessel Construction Co.*, 125 Cal.App.4th 152 (2004), which is often cited to support the argument that a design professional does not owe a duty of care to a third party property owner that did not hire it. The Court explained that *Weseloh* did not broadly hold that a design professional that provides only professional advice and opinions, without having ultimate decision-making authority, cannot be liable to third parties for negligence. Rather, *Weseloh* holds only that a design professional's role can be so minor or subordinate to another professional in the same discipline as to foreclose liability to third persons. In making its point, the Court limited the applicability of *Weseloh*.

Beacon increases the liability exposure of design professionals for construction claims, at least where the design professional is the principal professional in its discipline for the project. It provides another source of direct recovery for homeowners by solidifying the right of property owners to bring claims directly against design professionals for construction deficiencies, and, in those circumstances where the design professional's indemnity obligations are not established by contract, it strengthens the ability of builders, developers, and contractors to bring claims for equitable indemnity against design professionals.

Owners and developers may have difficulty hiring architects to design residential projects. Architects will be more charge more and add protective language to their contracts. Architects will likely become more concerned about whether their plans are built as designed, about documenting changes to the plans made by the owner, and more hesitant to make value

engineering recommendations and give other input during the Construction Administration phase of the project.

In addition, owners will likely take the position that architects have unlimited liability for all design defects in residential construction projects, even where the architects didn't make the ultimate decisions about how the project should be built. Architects will be more hesitant about the role they play on the project, contractual limits on their liability, and the availability of insurance coverage. Architects may also become more concerned about the processes a developer establishes for the resolution of defect and design claims.

3. In *Regional Steel Corporation v. Liberty Surplus Insurance Corporation*, 226 Cal.App.4th 1377 (2014), the California Court of Appeal held defective steel work performed by a rebar sub did not constitute "property damage" and that the destructive work required to repair it (tearing out poured concrete walls, removing the rebar and other building elements framing into the walls) did not transform it into property damage caused by an occurrence. As a result, the contractor's insurance carrier (Liberty) was not obligated to cover the cost of repair.

JSM Florentine, LLC (JSM) was the owner of an apartment building being constructed in North Hollywood in 2004. Regional Steel Corporation (Regional) was a subcontractor engaged to provide reinforcing steel for the columns, walls and floors. Regional prepared and submitted shop drawings which specified both 90 and 135 degree seismic hooks in the shear walls. The drawings and specifications were approved by JSM and the project architect, Babayan. Regional then began installing the rebar on the first several floors of the project, which was subsequently covered by concrete poured by Webcor. Shortly after, the city building inspector issued a correction notice requiring that only the 135 degree seismic hooks could be used, and forbidding 90 degree hooks. The city notified JSM that several levels of the garage had defective tie hooks and that they had to be removed and repaired. JSM withheld approximately \$545,000 from Regional, pending agreement over responsibility for the repairs.

Regional filed an action against JSM for payment of the \$545,000. JSM cross-complained against Regional and others, including Babayan and Webcor, for defective construction related to the use of the 90 degree hooks by Regional, pouring of concrete over the tie hooks by Webcor, and Babayan's approval of the same. JSM sought damage including cost of removal and replacement of the alleged defective tie hooks and loss of use and rental income due to delays. Webcor cross-complained seeking indemnity against JSM, Regional and Babayan, alleging its fault was passive and secondary.

JSM and Regional were both named insureds under a CGL policy issued by Liberty which was converted into a wrap policy specific to the project. The policy applied to "property damage" caused by an "occurrence" and excluded coverage for "property damage" to "impaired property" arising out of a "defect" in "your work" or "your product."

Regional tendered defense of JSM's cross complaint to Liberty, which denied that it had any duty to defend the claim. Liberty asserted that the purely economic losses caused by the need to repair did not constitute property damage. After Webcor's cross-complaint was filed, Regional tendered again to Liberty, based on allegations in Webcor's cross-complaint that the claims raised by JSM against Webcor were Regional's responsibility, specifically the out-of-level concrete floors and cracks in the floors. Liberty denied this second tender, noting that there was no evidence JSM itself was asserting claims for out-of-level floors.

Regional, JSM, Webcor and Babayan settled the claims amongst them. The settlement agreement (to which Liberty was not a party), set forth that Regional "caused or was responsible for damage to, and loss of use of, tangible property...including...out-of-level, cracked floors." Regional thereafter filed suit against Liberty, alleging claims for breach of contract and bad faith

for failure to defend and settle the claims against it. Liberty filed for summary judgment, and the court found that Liberty had no duty to defend Regional.

The Court of Appeal affirmed, holding that the defective steel work did not constitute “property damage” and that the destructive work required to repair it did not transform it into property damage caused by an occurrence. In reaching the conclusion that the defective tie hooks did not constitute “property damage,” the court noted that there was a conflict in the law as to whether construction defects that are incorporated into a whole property constitute property damage for purposes of a CGL policy.

The first line of cases follows the rule that coverage for the cost of removing and replacing the defective work or material of the insured is not covered, and that such cost is an economic loss, not physical injury to the property. The Court noted that these cases are “consistent with the basic purpose of liability policies,” which are not designed to provide contractors and developers with coverage against claims that their work is inferior or defective. According to the Court, the risk of replacing and repairing defective materials or poor workmanship has generally been considered a commercial risk which is not passed on to the liability insurer.

The second line of cases holds that incorporation of a defective part into a whole construction project may constitute property damage within the meaning of a CGL policy. In *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.*, 45 Cal.App.4th 1 (1996), the California Supreme Court held that there was property damage under a CGL policy based on the incorporation of asbestos tiles and insulation into a building because the potentially hazardous material was physically linked to the building. However, the Court noted that *Armstrong*, as well as other cases following its ruling, all generally involved contamination by hazardous defective materials or products that were incorporated into a whole. This contamination resulted in property damage to the property as a whole, not just to the defective product itself.

The Court noted that in *Armstrong*, the Court acknowledged the general rule that there was no “property damage” and thus no coverage for replacement of a defective part installed by the insured, but that because of the hazards allegedly caused by the defective asbestos tiles and insulation, that rule was not applicable. The Court of Appeal held that the *Armstrong* line of cases was not applicable here, since the allegedly defective rebar ties did not contaminate any other portion of the project or the project itself. Consequently, there was no property damage.

The builder had to break walls, concrete and other components to reach the defective hooks to replace them. It tendered defense of the claim to its insurer, Liberty. The Liberty CGL policy applied to “property damage” caused by an “occurrence,” but excluded coverage for “property damage” to “impaired property” arising out of a “defect” in “your work” or “your product.”

One recommendation for contracting parties is to eliminate any “impaired property” exclusions to any CGL policy.

4. In *Bann-Shiang Liza Yu v. Landmark American Insurance Company* (2014 WL 4162365), the California Court of Appeal affirmed a lower court’s ruling that an exclusion for the insured’s prior work barred coverage as a matter of law.

Plaintiff, the owner and developer of a hotel, contracted with ATMI to act as general contractor for the project. On November 18, 2002, ATMI entered into two subcontracts with C&A – one was to provide materials and labor, and the other was to perform the rough framing. In

May 2003, ATMI fired C&A before C&A completed the work and hired another contractor to complete the work.

The Notice of Completion for the Project was recorded on April 15, 2004, and the Certificate of Occupancy was issued April 16, 2004. In September 2004, defendant issued C&A a CGL policy for the period of September 18, 2004 to September 18, 2005. The policy was later cancelled, effective January 14, 2005.

Coverage under the policy was amended by two endorsements titled "EXCLUSION – PRE-EXISTING DAMAGE OR INJURY", and "EXCLUSION – YOUR PRIOR WORK."

5. In *Lehigh, Inc. v. California Department of Transportation* (2014 WL 4795163), the California Court of Appeal upheld an arbitrator's decision that a contractor (Lehigh) could not obtain additional compensation because (i) the contractor's license had been suspended during the project; and (ii) the contractor had not substantially complied with the CA B&P Code provisions requiring maintenance of proper licensure as a prerequisite for a claim for additional compensation; and (iii) the contractor had not acted reasonably and in good faith to maintain its license.

CA B&P Section 7031(a) states, "[e]xcept as provided in subdivision (e), no person engaged in the business of acting in the capacity of a contractor, may bring or maintain any action, or recover in law or equity in any action, in any court of this state for the collection of compensation for the performance of any act or contract where a license is required by this chapter without alleging that he or she was a duly licensed contractor at all times during the performance of that act or contract, regardless of the merits of the cause of action brought by that person..."

Section 7031(e) establishes an exception to subdivision (a). "[T]he court may determine that there has been substantial compliance with licensure requirements under this section if it is shown at an evidentiary hearing that the person who engaged in the business or acted in the capacity of a contractor (i) had been duly licensed as a contractor in this state prior to the performance of the act or contract, (ii) acted reasonably and in good faith to maintain proper licensure; (iii) did not know or reasonably should not have known that he or she was not duly licensed when performance of the act or contract commenced, and (iv) acted promptly and in good faith to reinstate his or her license upon learning it was invalid."

The court found Lehigh did not act "reasonably and in good faith" to maintain its license. When Houriani, Lehigh's VP and CFO, received CSLB's suspension notice, he did not instruct Lehigh's attorney to pay the judgment, but merely to do "whatever we have to do to take care of this matter right away." Houriani did not testify that by this he actually meant the attorney should simply pay the judgment right away, as opposed to negotiating a settlement allowing Lehigh to pay less than the full amount of the judgment plus accrued interest. In the 21 days between January 19 and February 8, Houriani never directed the attorney to pay the judgment in full, even though Houriani called almost daily. Doing so may have demonstrated good faith conduct allowing Lehigh's license to be promptly reinstated. Thus, the inference was "unavoidable" that Houriani sought to reduce the amount of the judgment it would have to pay to get its license reinstated. These actions do not satisfy the requirement that Lehigh act promptly and in good faith to reinstate its license.

In addition, Lehigh had a "pattern" of attempting to avoid paying judgments or the full amount thereof. Lehigh's license had been suspended for failure to pay judgments three times before, and suspension had been threatened on two other occasions. If anything, this effort to avoid paying the full amount of a judgment was inconsistent with acting reasonably and in good faith to maintain proper licensure.

6. In *Moorefield Construction, Inc. v. Intervest-Mortgage Investment Company*, (2014 WL), the California Court of Appeal held that, despite the constitutional and priority rights accorded to mechanics liens, a general contractor could waive its mechanics lien rights through a subordination agreement with a construction lender.

This case is significant because California is the only state in the United States where mechanics liens are a constitutional right. Article XIV of the California Constitution states:

Mechanics, persons furnishing materials, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and materials furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens.

California, like the majority of states, is a race-notice state, meaning that a subsequent bona fide purchaser without notice and who records first wins. This means that if a seller sells real property to A, and the next day sells the same property to B, and B records the conveyance before A, B will be deemed to own the property, but only if B did not have notice of the prior sale to A and recorded his conveyance before A.

Mechanics liens are special, however, and are not subject to California's recording rules. In California, a mechanics lien recorded after another encumbrance (such as a deed of trust) has been recorded, takes priority over such earlier encumbrance for work performed before the earlier encumbrance is recorded, even if the mechanics lien claimant has notice of the earlier recorded encumbrance. Thus, a mechanics lien, although recorded later, relates back to when construction first began. California Civil Code Section 8450(a) provides:

A lien under this chapter, other than a lien provided for in Section 8402, has priority over a lien, mortgage, deed of trust, or other encumbrance on the work of improvement or the real property for which the work of improvement is situated, that (1) attached after commencement of the work of improvement, or (2) was unrecorded at the commencement of the work of improvement and of which the claimant had no notice.

In 2006 DBN Parkside, LLC ("DBN"), a developer, bought land in San Jacinto, California for the purpose of building a medical office complex. DBN had Moorefield Construction Inc. ("Moorefield") who had worked on prior project for DBN, erect a temporary fence around and clear and grub the property.

While this work was ongoing, DBN obtained a construction loan secured by a deed of trust on the property from Intervest-Mortgage Investment Company ("Intervest"). DBN executed the loan agreement and recorded the deed of trust approximately one month after the DBN-Moorefield construction contract (the "Construction Contract") was executed.

In connection with the loan, Intervest required DBN to assign its rights and remedies under the Construction Contract to Intervest, and required Moorefield to subordinate its mechanics lien rights under the loan. Specifically, under the agreement, Moorefield:

"[A]gree[d] and acknowledge[d] that any and all payments made or payable to it pursuant to the [construction] Contract shall remain subordinate to the Loan at all times during the term of the foregoing assignment, and that any and all liens for labor done

and materials and services furnished pursuant to the [construction] Contract or otherwise shall be subordinate to the lien of the Deed of Trust.”

Moorefield submitted and was paid approximately \$7.2M for its work on the project; by the end of the project, Moorefield was owed approximately \$2.2M. At the same time, DBN defaulted on its construction loan and failed to pay Moorefield its \$2.2M balance.

Moorefield recorded a mechanics lien and filed suit to foreclose on the mechanics lien. Intervest filed a cross-complaint on the ground that its deed of trust was superior to Moorefield's mechanics lien under the terms of the subordination agreement Moorefield had executed in connection with the loan to DBN. The trial court found in favor of Moorefield, holding that the subordination agreement was void as to public policy because it deprived Moorefield of its “mechanics’ lien priority right that is a guarantee under the California Constitution.” Intervest appealed.

The Court of Appeal reversed the trial court, holding instead that the plain language of California Civil Code Section 3262(a) (now Section 8122) only mandates the protection of subcontractors and suppliers, not general contractors.

The Court examined California Civil Code Section 3262(a), which provides that “[n]either the owner nor original contractor by any term of a contract, or otherwise, shall waive, affect, or impair the claims and liens of other persons whether with or without notice except by their written consent, and any term of the contract to that effect shall be null and void ... unless and until the claimant executes a waiver and release.” (emphasis added)

The Court went on to explain that Section 3262(a) states only that an “owner” or “original contractor,” not a construction lender, cannot by any term of a contract waive, affect or impair the claims and liens of other persons. In addition, the Court explained that “[b]y its terms, this section limits the ability of the original contractor to waive or impair the claims and liens of other persons. The contractor may waive or release his own claim, when doing so does not affect or impair the claims or liens of other laborers or subcontractors.”

The Court examined the history of the statute, observing that in 1885, an amendment to the statute “resolved a ‘conflict in authority whether an owner and prime contractor could by a provision of their contract waive the rights of subcontractors and materialmen.’” The amendment settled the conflict by requiring a written consent to waive the lien. The statute stood largely unchanged until, ninety years later, an amendment in 1972 removed the written consent option and prohibited any waivers whatsoever. In response, construction lenders refused to advance construction loans altogether, because lenders typically require releases of existing lien rights before they will make progress payments on construction loans.

Shortly thereafter, the Legislature restored the statute in the form today, “restor[ing] the ability of ‘other persons’ to waive their mechanics’ lien rights in writing, established mandatory forms for those waivers, and confirmed those waivers are only valid if the forms were used or payment was in fact made.”

The ability of a general contractor to waive or impair its own mechanics lien rights is consistent with the proposition that those contractors have mechanics lien rights and that they are generally protected by other provisions of the statutes. Moreover the general rule that California’s mechanics lien statutes should be interpreted in favor of the lien claimant cannot override the plain language of Sections 8122 and 3268. Regardless of a general contractor’s ability to invoke other mechanics lien statutes for its own protection, Section 8122 represents an additional protection extended only to “other persons.”

To avoid this result, Moorefield should have done several things. First, it should have ensured that the construction contract contained clear payment obligations with tight deadlines and rights to stop work or terminate based on non-payment. Second, Moorefield should have demanded proof of the owner's financing before commencing work and at project intervals, and have the information reviewed by an appropriate financial professional. Proof of financing can easily be incorporated into the contract. Third, once the owner defaulted, Moorefield could have tried to negotiate with the lender settle outstanding claims.

Moorefield could have also filed a stop payment notice. Although general contractors are not generally allowed to serve stop payment notices on lender financed projects, they can serve a stop payment notice on the construction lender.

Moorefield could also have insisted that the owner post a large project security bond under California Civil Code Sections 8700 et seq. since the contract price exceeded \$5M.

7. In *Palomar Grading & Paving, Inc. v. Wells Fargo Bank, N.A.*, 230 Cal.App.4th 686 (2014), the Court of Appeal held that for innocent, noncontracting owners, that the constitutional default rate of 7% (Constitution Article XV, Section 1) applies to prejudgment interest on a mechanics lien, rather than 10%, which is specified under California Civil Code Section 3289(b) for breach of contract actions.

A developer named Inland engaged a general contractor, 361, to develop a Kohl's department store and surrounding property. The lender was Wachovia. 361 contracted with Palomar Grading to do infrastructural work on the tract. Kohl's and Wachovia ended up owning various parts of the parcels, however, neither ever contracted with Palomar Grading to do the work. Palomar Grading was not paid for substantial portions of the work, and brought a successful action to foreclose their mechanics lien on the tracts. The trial judge awarded them prejudgment interest of 10%, and Kohl's and Wells Fargo (Wachovia's successor) challenged that decision.

The important fact is that the owners had no contract with Palomar Grading. The liens on the property are therefore the result of the imposition of the mechanics lien laws, and not contract.

The California Constitution prescribes a default rate of interest for the "forbearance of any money, goods, or things in action" as 7%. "Things in action" includes the right to foreclose on a mechanics lien. The Legislature, however, enacted Section 3289(b), specifying that the default for breach of contract is 10%. However, the prejudgment interest statute, Section 3287, which is based on the California Constitution, sets 7% as the interest rate, and it applies to both contract and tort actions. Torts generally don't involve obligations incurred by contract.

This decision is limited to the facts of the case and does not address several important variations to the fact pattern. For example, it does not address what prejudgment interest would be if the owners were culpable of breaching the contract. Nor does it address the possibility of a sham change in ownership (from a breaching owner to an ostensibly non-breaching owner) deliberately done to get a better interest rate. This decision applies only to "innocent" owners who, even though they did not breach their own contracts, wound up with property subject to a mechanics lien.

8. In *Brisbane Lodging, L.P. v. Webcor Builders, Inc. et al.*, 216 Cal.App.4th 1249 (2013), the California Court of Appeal held a contract clause shortening the statute of limitations for a latent defect claim was enforceable.

A hotel developer entered into a design-build contract with Webcor for an eight-story hotel. Approximately 8 years after substantial completion, the owner discovered that a project subcontractor had used ABS pipe for the sewer line from the kitchen area, rather than the cast iron pipe required by the plumbing code. The owner discovered leaks in the ABD pipes, and promptly commenced an action against Webcor.

In the absence of an agreement to the contrary, the limitations period for plumbing and sewer deficiencies (4 years) was subject to the “discovery rule” exception. Under the discovery rule, the statutory limitations period will not commence to run until the owner discovers or should have discovered the injury and its cause. Since the discovery rule operates to prolong exposure to liability for a long time after the project is completed, contractors many times seek to eliminate the discovery rule exception in their contracts.

In this particular case, the construction contract included a clause that eliminated the discovery rule exception. It provided that for any claims arising from events prior to substantial completion, the applicable statute of limitations would commence to run, and any cause of action would be deemed to have accrued, no later than the date of substantial completion. Thus the 4 year limitations period started at the date of substantial completion, rather than upon the owner’s discovery 8 years later.

The Court held that the clause is enforceable. In reaching its conclusion, it noted that “sophisticated parties should be allowed to strike their own bargains and knowingly and voluntarily contract in a manner in which certain risks are eliminated and, concomitantly, rights are relinquished.” It also noted that it was reluctant to interfere with contract terms on public policy grounds, even though in this case no public right was harmed.

9. In *Estate of Heny Barabin v. AstenJohnson, In.*, 740 F.3d 457 (2014), the Ninth Circuit reversed the district court’s admission of expert testimony presented by the plaintiffs at trial, and remanded for a new trial. The Ninth Circuit held that the district court had abused its discretion by admitting the expert testimony without first finding it relevant and reliable under Rule 702 of the Federal Rules of Evidence and *Daubert*. The plaintiff then filed a writ of certiorari, arguing that the *Daubert* gatekeeping function should be exercised solely by the trial court, and not an appellate court. The United States Supreme Court denied the writ on October 6, 2014.

While the underlying subject matter of the case is unrelated to construction law, the Supreme Court’s decision to deny the writ may have a significant effect on construction litigation. Construction litigants rely heavily on the testimony of expert witnesses. The Ninth Circuit’s ruling and the Supreme Court’s write denial have opened the door to the idea that appellate courts can be an additional *Daubert* gatekeeper.

In its ruling, the Ninth Circuit stated that an appellate reviewing court should have the authority to make *Daubert* findings regarding relevance and reliability, as well as reverse a judgment based on those findings, relying on the district court record. Specifically, the Ninth Circuit said:

If the reviewing court decides the record is sufficient to determine whether expert testimony is relevant and reliable, it may make such findings. If it “determines that evidence [would be inadmissible] at the trial and that the remaining, properly admitted evidence is insufficient to constitute a submissible case,” the reviewing court may direct entry of judgment as a matter of law.

Legislation:

1. Labor Code § 1782, Charter Cities Required to Abide by Prevailing Wage Law. A charter city may not receive or use state funding or financial assistance for construction projects if the city's charter or a city ordinance authorizes a contractor not to comply with the prevailing wage law under Labor Code § 1770 et seq. Exempt from this statute is state funding or financial assistance awarded to the city prior to January 1, 2015 as well as state funding or financial assistance received or used to complete a contract awarded prior to January 1, 2015.

2. S.B. 315, Amends Sections of the Business and Professions Code Relating to the Contractors' State License Board Administration. 1) Provides authority to enforcement representatives of the Contractors' State License Board to issue a written notice to appear in court; 2) Allows an unlicensed person to advertise for work if the aggregate contract price is less than \$500 and he or she states in the advertisement that he or she is unlicensed; 3) Makes it a misdemeanor to engage in the business of or act as a contractor without a license; and 4) Requires the registrar to initiate disciplinary action against a licensee within 180 days of notification of the Labor Commissioner's finding of a willful or deliberate violation of the Labor Code (prior law required action within 30 days).

3. A.B. 2396, Amends Business and Professions Code § 480 Relating to Convictions: Expungement: Denial of Licenses. Prohibits the Contractors' State License Board from denying a license based only on a conviction that has been dismissed, provided that proof of dismissal is presented.

4. S.B. 1159, License Applicants Individual Tax Identification Number. Requires the Contractors' State License Board no later than January 1, 2016 to require an individual applicant to provide either a tax identification number or a social security number.

5. A.B. 26, Amends Labor Code § 1720 Relating to Construction: Prevailing Wage. Expands the definition of "construction" for the purposes of payment for prevailing wages to include "work performed during the postconstruction phases of construction, including, but not limited to, all cleanup work at the jobsite."

6. S.B. 785, Repeals and Consolidates Various Laws Regarding Design-Build Procurement Process Authorizations. Authorizes, until January 1, 2025, the Department of General Services, the Department of Corrections and Rehabilitation, and certain local agencies to use the design-build procurement process for specified public works. Authorizes the Sonoma Valley Health Care District and the Marin Healthcare District to use the design-build process related to improvements at the Sonoma Valley Hospital and the Marin General Hospital. Authorizes the San Diego Unified Port District to use the design-build procurement process related to the construction of buildings that exceed \$1M.

7. A.B. 1705, Amends Public Contract Code §§ 7201 and 10261 regarding Retention. Extends to January 1, 2018, the requirement that retention withheld by a public entity from a general contractor or by a general contractor from a subcontractor or by a subcontractor from any subcontractor thereunder, may exceed 5 percent on projects that the public entity finds are substantially complex. Requires that the bid documents include "details explaining the basis for the finding and the actual retention amount" and requires that the finding "include a description of the specific project and why it is unique and not regularly, customarily, or routinely performed by the agency or licensed contractors."

8. A.B. 2376, Amends Government Code § 11007 Relating to State Construction Projects: Insurance. Authorizes the Department of General Services to establish a master builders' risk insurance program for all state construction projects during construction. Any such

program “shall provide that if a master policy is issued, that policy shall require a deductible from the contractor, as outlined in the request for bids or proposals.”

9. A.B. 1522, Amends Labor Code § 2810.5 and adds Labor Code § 245, et seq. (the Healthy Workplaces, Healthy Families Act of 2014). Requires almost all employers to provide up to 24 hours or three days of paid sick leave annually to almost all employees beginning July 1, 2015.

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Colorado

Case law:

1. In *Jehly v. Brown*, 327 P.3d 351 (Colo.App 2014), the Defendant hired a general contractor to construct a house on his land. Before or during construction, the general contractor discovered that part of the property was located on a floodplain. The general contractor, however, did not inform the defendant of that fact. Subsequently, the defendant and the buyer entered into a contract to purchase the new home. As a part of the sale, the defendant provided buyer with a Seller’s Disclosure form regarding, among other things, whether the property was located within a governmentally designated floodplain area. Instead of answering the questions on the form, the defendant drew a line through the entire form and wrote the word “new construction.” Thus, before buying the house, the buyer was never informed that part of the property was located in a floodplain.

Approximately five years after purchasing the home, heavy rains caused severe flooding and damage to the basement of the house. The buyer sued the defendant alleging that he fraudulently concealed knowledge of the floodplain to induce plaintiff to buy the home. During the bench trial, the defendant denied having any personal knowledge of the floodplain at the time of sale. Defendant also denied that his general contractor or any subcontractors had ever informed him of the existence of the floodplain. Ultimately, the trial court found in favor of the defendant, which was affirmed on appeal.

The appellate court confirmed that, in order to prevail on a claim for fraudulent concealment, the plaintiff must show that the defendant had actual knowledge of a material fact and failed to disclose such fact. It is not enough that the defendant should have or might have known of this fact. The appellate court also considered whether knowledge of the general contractor, as the defendant’s agent, could be imputed to the defendant. The court concluded that, in the context of a fraudulent concealment claim, knowledge of information by the agent, when not communicated to the principal, cannot be imputed to the principal. Thus, the plaintiff could not rely on or impute the general contractor’s knowledge of the floodplain to establish actual knowledge on the part of the defendant for the purpose of a fraudulent concealment claim.

2. In *Sure Shock Electric, Inc. v. Diamond Lofts Venture, LLC*, 2014 WL 4242399 (Colo.App August 28, 2014), an electrical subcontractor brought an action for breach of contract, unjust enrichment, and to foreclose on its mechanic’s lien. The project owner filed a motion to compel arbitration, which was granted. Following arbitration, the arbitrator determined that the subcontractor had proved its claims and awarded it the principal amount of the amended lien statement. The arbitration award was affirmed and remanded to the trial court to determine whether the lien was procedurally valid.

After a bench trial, the trial court found that the subcontractor's lien was procedurally valid. Although the subcontractor performed work on the entire building, the court determined that the subcontractor only sought to enforce its lien against DLV and that the DLV units would only be responsible for a portion of the lien relative to each unit's square footage. The court then entered a decree of foreclosure and DLV appealed. DLV argued, among other things, that the subcontractor failed to properly perfect its lien. The subcontractor cross appealed and argued that the trial erred in apportioning the lien.

The appellate court affirmed the trial court's ruling and found that the subcontractor had properly perfected its mechanic's lien by providing the required ten days' notice before filing its original lien statement. Further, the court found that the subcontractor was not required to provide an additional ten day notice prior to filing its amended lien statement, which was filed on the same day and simply amended the amount of the lien. Also, the court found that the subcontractor properly identified the property by describing the entire property and naming the DLV project owner – even though DLV only owned seven out of twenty-nine units at the time. Since the subcontractor only named the DLV owner, the appellate court agreed that it only sought to enforce its lien rights against the DLV owner.

The appellate court also considered whether the trial court properly apportioned the subcontractor's blanket lien. The trial court apportioned the lien amount based on the square footage of each of the DLV units (in comparison to the whole project) because the amount of electrical work performed in each unit was relative to the size of the unit. According to this formula, the subcontractor was awarded 33.1 percent of the lien amount. The appellate court determined that the trial court's equitable apportionment of the lien was not manifestly unreasonable, arbitrary, or unfair.

Finally, the appellate court confirmed that because the subcontractor's mechanic's lien was determined to be valid, it had prevailed on a significant issue in the litigation and was entitled to recover its costs.

3. In *Taylor Morrison of Co., Inc. v. Bemas Construction, Inc.*, 2014 WL 323490 (Colo.App. January 30, 2014), the developer of a residential subdivision hired Terracon to perform geotechnical engineering and construction materials testing. Bemas performed the site grading. After many of the homes were constructed, the developer began receiving complaints regarding cracks in the drywall of the homes. The developer remedied the defects and then sued Terracon and Bemas for breach of contract and negligence, among other claims. Ten months after the deadline to amend pleadings had passed, the developer moved for leave to amend to add claims against Terracon for gross negligence, negligent misrepresentation, and fraudulent concealment, as well as a demand for exemplary damages. These claims were based on allegations that Terracon had ignored or concealed subsurface site conditions at the project. The motion to amend was denied as untimely.

Additionally, the developer moved for determination of whether the Homeowner Protection Act of 2007 (HPA) invalidated the limitation of liability in the contracts with Terracon. The trial court denied the motion on the ground that the HPA only applies to residential property owners but not commercial entities. Afterwards, Terracon deposited \$550,000 (the maximum liability amount) into the court registry and was dismissed with prejudice. The case went to trial against Bemas and the jury returned a verdict in favor of Bemas and the developer appealed.

The appellate court agreed with the trial court that the HPA did not invalidate the Terracon limitation of liability clause, but it reached its conclusion for different reasons. The appellate court opined, as a matter of first impression, that application of the HPA to Terracon's limitation of liability clause would be an unconstitutional retrospective application of the HPA. The court confirmed that, absent willful and wanton conduct, limitation of liability clauses are

generally enforceable under Colorado law. The court held, however, that denial of the developer's motion to amend to add allegations that Terracon had willfully and wantonly breached its duties is a separate question from whether the developer should have been permitted to present evidence of Terracon's willful and wanton conduct to invalidate Terracon's limitation of liability clause. Thus, the judgment against Bemas was affirmed and the case was remanded to determine whether the developer should have been permitted to introduce evidence of Terracon's willful and wanton conduct. Finally, the court held that a new trial, if any, against Terracon, would not require a new trial against Bemas because the actions of each of the defendants were separate and distinct.

Legislation:

1. H.B. 14-1383, Workers Compensation, Physician's Choice. Changes in the workers compensation laws may affect the construction industry. HB-14-1383 increased the number of physicians and corporate medical providers that an employer or insurer must provide to the injured worker. Specifically, the new law provides that an employer or insurer must provide a list of at least four physicians or four corporate medical providers or at least two physicians and two corporate medical providers or a combination thereof where available, in the first instance, for the injured employee to use to select a physician.

Also, the law requires that at least one of the four designated physicians or corporate medical providers offered must be at a distinct location from the other three designated physicians or corporate medical providers without common ownership. If there are not at least two physicians or corporate medical providers at distinct locations without common ownership within thirty miles of the employer's place of business, then an employer may designate physicians or corporate medical providers at the same location or with shared ownership interests.

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Connecticut

Case law:

1. In *Travelers Casualty and Surety Company of America v. The Netherlands Insurance Company*, 312 Conn. 714 (2014), the Connecticut Supreme Court held that an insurer that issued the a masonry contractor's commercial general liability (CGL) policy was entitled to recover from the contractor's successor CGL insurers, on a pro-rata basis, the costs to defend the contractor in a suit by the State of Connecticut alleging defective work by the contractor with resulting ongoing water infiltration damage that spanned over the course of the periods that coverage was effective under the policies issued by the successor insurers.

In *Travelers*, the underlying claim against the masonry contractor was part of the suit that was the subject of the Connecticut Supreme Court's decision in *State of Connecticut v. Lombardo Brothers Mason Contractors, Inc.*, 307 Conn. 412 (2012), in which the State of Connecticut brought an action against twenty-eight defendants, including design professionals, contractors and others, to recover damages for defective design and construction of the University of Connecticut Law library, more than twelve years after completion of the project. The State was seeking to recover the costs of work needed to correct water infiltration problems that the State claimed to be the result of deficient design and construction. Travelers had been the insurer on the contractor's CGL policy at the time the work was performed through two years after completion, and the defendants had issued the contractor's subsequent CGL or umbrella general policies. Prior to suit, Travelers agreed to investigate and defend the State's claim.

The defendants, however, refused to participate in the investigation and defense. Thereafter, Travelers expended nearly \$500,000 defending the contractor.

Travelers brought a declaratory judgment action against the defendant-insurers seeking their pro-rata shares of the cost of defending the contractor, and against the contractor for its pro-rata share for the period during which damage was occurring and the contractor was uninsured. The Superior Court, after trial, ruled in favor of Travelers, holding that the defendant-insurers had a duty to defend based on the allegations of the underlying complaint which stated damage that potentially fell within the coverage periods of the policies issued by the defendants. The Court's decision was based on its finding that the "occurrence" required to trigger coverage under the defendants' policies was water intrusion to the library, and rejected the defendants' arguments that the coverage was excluded by "known injury or damage" clauses in the policies. The trial court allocated the pro-rata cost of defense to the defendant Netherlands for its proportion of the total 144 months coverage period under all the policies that Netherlands' policy was in effect (70 months).

On appeal, the Connecticut Supreme Court affirmed the judgment of the trial court. After concluding that Travelers had standing to bring an action for declaratory relief against the contractor's subsequent insurers, the Court addressed whether Netherlands had a duty to defend the contractor against the State's claims. The Court rejected Netherlands' arguments that there had been no "occurrence" and that the "known injury or damage" exclusions precluded coverage. The Court rejected Netherlands' argument that all water intrusion constituted the same "occurrence" which began prior to Netherlands' policy periods, noting the policy's language requiring that "property damage," but not the "occurrence" causing the same, occur during the policy period. The Court found that the State's underlying complaint, asserting "continuous and progressive water intrusion" that began after January, 1996 and persisted until February, 2008, sufficiently alleged damage during the Netherlands' policy periods to trigger the duty to defend.

The Court also rejected Netherlands' argument that coverage was precluded under the "known loss or damage" clauses, because the State gave the contractor notice and the contractor had knowledge of the claim prior to Netherlands' policy periods. The Court reasoned that, although the allegations in the State's underlying complaint permitted an inference that the contractor knew of the damage prior to inception of the Netherlands' policies, the pleading did not specifically allege when the contractor was given notice and that the complaint alone did not compel that conclusion as a matter of law. The Court concluded that Netherlands was not excused from its duty to defend under Connecticut law, because the State's allegations left open the possibility of coverage.

The Court affirmed the trial court's allocation of Travelers defense costs over a 144 month period and allocation of Netherlands' pro-rata share based on the 70 month period its policies were in effect. The Court agreed with Travelers' argument that the trial court's decision was correct and consistent with the "continuous trigger" doctrine, under which progressive injuries that span multiple policy periods trigger all policies in effect during the progression of the injury.

2. In *C and H Electric, Inc. v. Town of Bethel*, 312 Conn. 843 (2014), the Connecticut Supreme Court held that a contractor's claims against a town for delay damages could not survive in the face of the "no damage for delay" clause in the contract between them, because the town's conduct did not constitute "active interference" for the purpose of a *contractual* exception to the no damage for delay clause.

In *C and H Electric*, the plaintiff-contractor was hired by the town to perform electrical work on a high school renovation project. The project also involved asbestos abatement work

performed by another contractor that was planned by the town to complete prior to the commencement of all other renovation work. Notwithstanding that 30% of the asbestos work remained to be completed, the town chose to move forward with other renovation work. The town instructed the contractor to commence its work, the performance of which was interrupted at times by the resumption of asbestos abatement work that restricted the contractor's access to certain areas of the project, causing the contractor to incur additional costs to relocate and re-sequence its own performance. The contractor submitted a claim for additional compensation to the town and filed suit after the town failed to pay the claim.

At trial, the contractor attempted to avoid enforcement of the no damages for delay clause through a contractual "active interference" exception that it argued applied because the town knew the asbestos work would interfere with the contractor's work, but nevertheless ordered it to begin. The town responded that its conduct was not "bad faith, wilfull, malicious or grossly negligent" as necessary to fall within the active interference exception. The trial court agreed with the town, equating the active interference exception with the *common law* bad faith exception to no damage for delay clauses, articulated in *White Oak Corp. v. Dept. of Transportation*, 217 Conn. 281 (1991), before rendering partial judgment for the town. The contractor appealed.

On appeal, the Connecticut Supreme Court first addressed the contractor's argument that the trial court improperly concluded that the town's conduct had to constitute bad faith or gross negligence to satisfy the contract's active interference exception. The contractor argued that under case law from other jurisdictions, "active interference" does not require wrongdoing, but only some affirmative, wilfull act that unreasonably interferes with the contractor, and that the town's conduct was active interference insofar as it directed the plaintiff to proceed with work knowing that asbestos work would cause interference. The Court agreed with the contractor to the extent that "active interference" requires a showing of an affirmative wilfull act that unreasonably interferes with the contractor's work, but affirmed the trial court's finding that the town's conduct did not constitute active interference because absent a showing that the town actually knew the asbestos work would cause interference, its conduct was neither wilfull nor unreasonable. The Court noted that the contractual exception did not define active interference, and was therefore ambiguous, but clearly excluded from its meaning the town's exercise of any contractual right, including the right to order changes, suspensions, rescheduling or correction of work. Relying on case law of other states that have interpreted the application of *common law* active interference exceptions, the Court interpreted "active interference," as that term was used in the contract, to require proof that the town "committed an affirmative, wilfull act that unreasonably interfered with the plaintiff's work and this act must be more than a mistake, error in judgment, lack of total effort or lack of diligence." The Court clarified that because the contract at issue contained an active interference exception, it was not required, and was expressly declining, to opine on whether Connecticut is adopting an *common law* active interference exception, either as part of or independent of the existing *White Oak* exceptions.

Applying the foregoing standard to the town's conduct, the Court held that, based on case law of other states, the town's conduct was not active interference without proof that the town directed the contractor to commence its work despite actually knowing that the contractor's work would be delayed. The Court further disagreed with the contractor's argument that the town actively interfered with its work by actively concealing the remaining asbestos work from the contractor, pointing to evidence in the record demonstrating direct disclosure and the town's open discussion of asbestos work at public meetings. The Court reasoned that that mistakes and oversight are not sufficient to satisfy the active interference exception. The Court held that the town's failure to schedule and coordinate the work of the contractor with other contractors was not active interference. The Court based its conclusion on the lack of evidence demonstrating that the town's failure to coordinate actually caused interference, the fact that the

contract language expressly excluded suspensions and rescheduling by the town from the meaning of “active interference,” the fact that asbestos related delays were fully anticipated by the contractor, and because any delay could not be considered unreasonable given that the contractor indisputably finished its work on time.

The Court next addressed the contractor’s argument that the no damage for delay clause was inapplicable by virtue of the common law exceptions for bad faith and breach of a fundamental obligation of the contract, as articulated in *White Oak*. The Court held that because the town’s conduct was not active interference, it necessarily could not rise to the level of bad faith or negligence, noting that bad faith requires proof of misconduct that “smacks of intentional wrongdoing” including fraudulent or malicious behavior. As to the contractor’s argument that the town breached fundamental obligations by failing to disclose and update specifications to reflect remaining asbestos work and by failing to provide site access, the Court stated that the fundamental breach exception requires proof of breach of an express affirmative obligation imposed on the owner by the contract (e.g., failing to make the work site available). In rejecting the contractor’s argument, the Court noted the lack of meaningful impact on the contractor’s work. The Court also pointed to the fact that the town did not fail to give the contractor site access, but required the contractor to re-sequence its work around the asbestos abatement work as permitted by the contract, and that it was insufficient that the contractor did not have access to specific areas at the times it wanted. Accordingly, the Court held that both of the contractor’s theories failed to establish fundamental breach and affirmed the decision of the trial court.

3. In *Sarrazin v. Coastal, Inc.*, 311 Conn. 581 (2014), the Connecticut Supreme Court considered under what circumstances an employee’s travel time between home and work constitutes compensable work time. In *Sarrazin*, the plaintiff-employee was a foreman for the defendant, a plumbing subcontractor that worked on large projects through Connecticut. The plaintiff worked 40 hours weeks, had regular working hours of 7a.m. to 3:30p.m., and traveled from his home directly to the location of his current job assignment, which changed periodically, and averaged 2 hours per day in addition to his regular 40 hour work week. The plaintiff was permitted to use a pickup truck owned by the defendant for commuting to the various job sites. After the truck was totaled in an accident, the plaintiff drove his own truck to and from the job sites and received an extra fifty dollars per week from the defendant as pay for the same, until the defendant eventually provided the plaintiff with a van for commuting purposes. Because he was a foreman, the plaintiff kept defendant’s equipment and tools in whatever vehicle he was using for transport to and from the job sites, and claimed that, because he was foreman, he spent an additional one-half hour at the end of each day cleaning the vehicle and organizing tools for the next day.

The plaintiff brought suit against defendant, seeking payment of overtime wages for, amongst other things, the daily commute between his home and the job sites, as well as additional time he spend each day cleaning the vehicle and arranging the defendant’s tools. The plaintiff claimed that defendant’s failure to pay overtime, as claimed, was in violation of State of Connecticut wage and hour statues and regulations, specifically, CGS §§ 31-36, 31-71b, 31-76c and Conn. Regs. § 31-60-10(b).

With regard to the claim for cleaning and tool arrangement, the trial court found against the plaintiff on the weight of the evidence. As to the claim for commuter travel time wages, the trial court first concluded that the federal Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (FLSA), preempted state law on the issue, then applied the Portal-to-Portal Act, 29 U.S.C. § 251 et. seq., as applicable law in concluding that the plaintiff was not entitled to compensation for travel time. In support of its conclusion, the trial court found that the plaintiff was employed as a plumbing foreman and not a driver, that the plaintiff’s use of the defendant’s vehicle for commuting was pursuant to an oral agreement and their understanding that use of the vehicle

was a benefit of being a foreman, that the requirement to carry tools in the vehicle was merely incidental to the plaintiff's use of the vehicle for commuting, and that the distances traveled by the plaintiff to the various job sites were within the normal commuting area for the defendant's business.

On appeal to the Connecticut Supreme Court, the plaintiff argued that the trial court improperly determined that the FLSA preempted Connecticut law governing overtime wages and travel time, and improperly applied federal law in determining that the plaintiff was not entitled to overtime wages for travel time. In addressing the preemption issue, the Court observed that federal law preempts state law when an irreconcilable conflict exists such that compliance with both is an impossibility, and that the "savings clause" of the FLSA (29 U.S.C. § 218(a)), which provides a national "minimum" level of protection on wage minimums and hour maximums, has been held to be in irreconcilable conflict with state laws that provide a lesser level of protection than the FLSA.

The Court then analyzed the protections granted employees under the FLSA and Connecticut wage and hour laws, with respect to travel time compensability. The Court concluded that under the Portal-to-Portal Act, employees are entitled to compensation for travel time if that time constitutes compensable "work," despite the general rule that there is no right to compensation for commuting time or activities preliminary and postliminary to an employee's principal work activities. The Court observed that 29 U.S.C. § 254(a) expressly provides that use of an employer's vehicle for travel and activities incidental to use of the vehicle for commuting, are not principal work activities (and therefore not compensable work), if use of the vehicle is within the normal commuting area for the employer and use of the vehicle is subject to an agreement between the employee and employer. The Court recognized prior federal case law requiring travel time to be "integral and indispensable" to the principal work activity to be compensable "work." The Court determined, however, that Connecticut's statutes and regulations fail to similarly provide employees with a right to compensation for their *regular* commuting time that does not qualify as "additional" travel time. Because the FLSA allowed for compensable travel time where Connecticut law does not, the Court held that the FLSA provides the minimum level of protection with regard to travel time compensation and, accordingly, that the Portal-to-Portal Act preempted Connecticut law.

The Court then considered whether the plaintiff had satisfied his burden, as employee, to demonstrate that his travel time was compensable. To do so, the Court stated that the plaintiff was required to prove that the requirements and restrictions placed on the plaintiff's travel time by the defendant imposed more than a minimal burden, transformed the travel time into an integral and indispensable part of the plaintiff's principal work activity (being a foreman on a construction site), and was undertaken predominantly for the defendant's benefit. Applying the factual findings made by the trial court, the Supreme Court concluded that the plaintiff was not entitled to travel time compensation. Specifically, the Court concluded that the requirement to carry tools in the vehicle was incidental to the commute itself, that the plaintiff benefitted from use of the defendant's vehicles, and that the plaintiff was in no way inconvenienced or required to alter his behavior during commute as a result of the requirement to transport tools to the job sites. To the extent the wage claim was predicated on plaintiff's use of the defendant's vehicles, the Court held that such use did not render travel time compensable under 29 U.S.C. § 254(a) because the commute was within the normal commuting area for the defendant's business and there was an oral agreement between the plaintiff and defendant concerning use of the vehicle.

4. In *Sean O'Kane A.I.A. Architect, P.C. v Puljic*, 148 Conn. App. 728 (2014), the Connecticut Appellate Court held that the "continuous representation doctrine" did not toll the six year statute of limitations in CGS § 52-576(a) for breach of contract actions brought by architects and that the statute of limitations was not tolled by a "standstill" agreement between the parties. In *Sean O'Kane*, the plaintiff, an architect, entered into an agreement to provide

architectural services in relation to the husband and wife defendants' house in Darien, Connecticut. The contract was addressed to both of the defendants, but was only signed by the wife. The defendants entered into a separate contract with a contractor, to which the architect was not a party. Of the 23 numbered invoices submitted by the architect, defendants only paid 17, leaving \$92,201.35 unpaid for work done during July through December, 2002. The parties contract expressly provided that payment for invoices was due upon receipt and was past due 15 days after the invoice date.

The architect commenced suit nearly eight years later on June 29, 2010, alleging claims for breach of contract for failure to pay invoices, as well as unjust enrichment. The defendants pleaded the statute of limitations for contract actions as a defense. At trial, the trial court held that the architect's claims were barred by the statute of limitations and entered judgment in favor of the defendants. The architect appealed, arguing that the trial court improperly determined that the statute of limitations was not tolled by the "continuous representation doctrine," that the trial court erred in concluding the statute of limitations was not tolled by a "standstill" agreement between the parties, and that the trial court erred in finding that the architect's unjust enrichment claim was barred by the doctrine of laches.

On appeal, the Appellate Court first considered whether the statute of limitations for contract actions was tolled by the continuous representation doctrine because, as argued by the architect, his services were to continue until project completion and issuance of a certificate of occupancy. The Appellate Court clarified that under existing law, the limitations period for contract actions begins at the time of breach, or more specifically, at the time at which the plaintiff could first have maintained an action. The Court noted that, contrary to architect's argument, the continuous representation doctrine has been applied only in, and is essentially limited to, the context of claims against attorneys based on alleged malpractice that occurs during the course of litigation, such that the limitations period is tolled until the end of the attorney's representation. The Court also reasoned that the cases relied on by the architect involving invoices not due until after services were complete, thereby extending the accrual of the limitations period, were incongruous with the current circumstance because the contracts in those cases did not fix the term of employment or when compensation would become payable. The Court noted that the architect's contract expressly provided that payment was past due 15 days after the invoice date; therefore, that was the date the limitations period began to run as to each payment. As such, the Court affirmed the trial court's determination that the statute of limitations was not tolled by the continuous representation doctrine.

The Appellate Court further affirmed the trial court's finding that the statute of limitations was not tolled pursuant to an alleged "standstill" agreement between the architect and the defendants that neither would assert claims against the other until resolution of the defendants' claims against the contractor in arbitration. The Appellate Court held that the trial court correctly found the architect's tolling argument to be without merit, due to the absence of credible evidence that such an agreement existed.

Lastly, the Appellate Court considered whether the trial court properly determined that the architect's unjust enrichment claim was barred by the doctrine of laches, based on its finding that a seven and one-half year delay in commencing the action was prejudicial to the defendants. The trial court found prejudice because the architect was seeking a 1.5% monthly service charge pursuant to the contract, plus interest. Thus the delay in commencing the action resulted in a greater potential damage claim under the architect's contract. The architect argued unjust enrichment was a proper claim against the defendant-husband, because he had not signed the contract. In contrast, the defendants argued that despite the lack of the husband's signature, the contract was between the architect and both defendants. The Appellate Court held that regardless of whether the husband was a party to the contract or not, which the trial court did not expressly decide, the trial court had applied an incorrect standard

regarding the prejudice component of laches because the assessment of contractual damages could not constitute prejudice for the purpose of laches as a defense to unjust enrichment, an equitable cause of action available only in the absence of a contract. Accordingly, the Appellate Court remanded the case for further proceedings, directing the trial court to further determine whether laches barred the architect's unjust enrichment claim against the husband. The Appellate Court directed the trial court to determine, on remand, if the defendant-husband was a party to the contract. If not, the trial court was to determine whether laches barred architect's unjust enrichment claim. If the defendant-husband was found to be a party to the contract, the trial court was to enter judgment for the husband under the statute of limitations.

5. In *Hoffman v. Coppola*, 2014 WL 1814049 (Conn. Super. J.D. of Hartford, Feb. 20, 2014, Vachelli, J.), the plaintiffs brought suit against the defendants, alleging abuse of process in connection with the filing and foreclosure of a mechanic's lien in a separate action, and pursuit of a prejudgment remedy for amounts substantially greater than due and owing in another separate action. As alleged in the plaintiffs' complaint, one of the defendants was president of a construction company (Contractor) that had provided construction services to the plaintiffs, and the other defendant acted as attorney for the Contractor in aid of the allegedly abusive litigation.

In the complaint, the plaintiffs alleged that the Contractor claimed a mechanic's lien on the plaintiffs' property which the attorney caused to be filed on the land records and served on the plaintiffs, and that the defendants caused the Contractor to pursue a foreclosure action on the lien and a prejudgment remedy attachment in another action. The plaintiffs alleged that after trial in the separate actions, the trial court found that the Contractor had abused process by trying to force the plaintiffs to pay for excessive and inflated claims, and that at all times the attorney knew or reasonably should have known that claims were excessive, yet he maintained the excessive claims throughout litigation and in support thereof offered evidence at trial of amounts unrelated to the subject-dispute or the plaintiffs' property, causing the plaintiffs to incur loss and damage in the form of having to post excessive cash in lieu of the lien and legal fees and expenses in excess of that which the plaintiffs would have reasonably incurred if the Contractor's claims were not inflated and excessive.

The defendant-attorney moved to strike the abuse of process claim against it as legally insufficient. The Court's consideration of the attorney's motion focused on whether the complaint sufficiently pled the elements of a claim for abuse of process, by alleging the attorney 1) used a legal process against another; 2) in an improper manner or to accomplish a purpose for which it is not designed. The Court observed that abuse of process must arise from the use of process primarily to accomplish a purpose for which it is not designed. The Court reasoned that because both mechanic's liens and prejudgment remedies have the intended purpose of attaching property of a defendant pending litigation so as to secure payment of a probable judgment, use of those processes that accomplish a different purpose would be proper grounds for an action for abuse of process. The Court found that, to the extent of their allegations that the attorney sought to make the plaintiffs pay for services or materials which were not related to the construction project in dispute or not related to the plaintiffs' property, the plaintiffs had sufficiently alleged a claim for abuse of process against the attorney. The Court refused to grant the attorney's motion to strike, reasoning that although heightened pleading requirements are required for abuse of process claims against attorneys, excessive attachments are the type of misconduct intended to cause specific injury outside of the normal contemplation of private litigation, for which an attorney may be held liable to a third-party on a claim for abuse of process.

6. In *Estate of Heiney v. Cocomo*, 2014 WL 2853768 (Conn. Super. J.D. of Middlesex, May 15, 2014, Aurigemma, J.), the Superior Court granted the plaintiffs' application to discharge a mechanic's lien which was not "subscribed and sworn" to as required under Connecticut

Mechanic's lien law. In *Estate of Heiny*, pursuant to CGS § 49-35a, the plaintiffs, co-executors of the estate of the owner of the subject property, filed an application for discharge or reduction of a mechanic's lien filed by the defendants. The lien purported to have been filed by the defendants, Thomas P. Cocco, Jr. (Cocco Jr.) and Cocco Brothers & Associates, LLC (LLC), and was accompanied by an illegible signature for an unnamed signor.

In lieu of a hearing on the plaintiffs' application, the Superior Court heard oral argument, at which the plaintiffs argued that the lien was filed by both the defendants, yet the lien had only been signed by the Cocco Jr. on behalf of the LLC, and the signature was unaccompanied by any printed indication of the signor's name or capacity. The plaintiffs argued that as a result of the foregoing, the LLC had signed but not "sworn to" the lien, and that Cocco Jr., in his individual capacity, had neither signed nor sworn to the lien. The defendants presented a second page to the lien that they asserted had been inadvertently not filed on the land records and which set forth Cocco Jr.'s name, capacity, and his oath as to the validity of the lien.

In considering the merits, the Superior Court cited to Connecticut Supreme Court case law setting forth the requirement that for a mechanic's lien to be valid, the oath must appear in writing on the lien certificate. The Superior Court granted the plaintiffs' application, discharging the lien as invalid, based on the absence of any sworn signatures on the lien itself.

7. In *Management Strategies Inc. v. West Haven Housing Authority*, 2014 WL 818601 (Conn. Super. J.D. of New Haven, Feb. 3, 20124, Wilson, J.), the Superior Court granted the defendant's, a municipal housing authority, motion to strike the plaintiff's Connecticut Unfair Trade Practices Act (CUTPA) claim, holding that the defendant was exempt from CUTPA liability based on the allegations of the complaint. In the complaint, the plaintiff-contractor alleged that it had entered into a contract with the defendant to perform certain improvements at one of the defendant's properties, and that following the completion of the work, the defendant refused to pay for the outstanding contract balance, change orders, extra work and project delays. The plaintiff alleged causes of action for breach of contract, unjust enrichment, breach of the implied covenant of good faith and fair dealing, negligent and fraudulent misrepresentation, and violation of CUTPA under CGS § 42-110 *et seq.*

The defendant moved to strike several counts of the complaint, including the plaintiff's CUTPA claim. With regard to the CUTPA claim, the defendant argued that it was exempted from CUTPA liability by the statutory exception in CGS § 42-110c applicable to "Transactions or actions otherwise permitted under law as administered by any regulatory board or officer acting under statutory authority of the state or of the United States..." In considering the defendant's argument, the Court acknowledged prior Connecticut Supreme Court and Superior Court case law, holding that municipal housing authorities acting as landlords are exempt from CUTPA liability under CGS § 42-110c, but that there is no blanket immunity from CUTPA for municipalities and that it is necessary to make a case-by-case determination of whether the exception applies.

The Court granted that portion of the defendant's motion seeking to have the CUTPA claim stricken. Specifically citing to the plaintiff's allegations that defendant is a "public corporation organized and existing" pursuant to Connecticut Statute and receives funding from the United States Department of Housing and Urban Development, the Court reasoned that the allegations indicated that the transaction with the plaintiff was incidental to the defendant's primary governmental function as a housing authority despite the commercial overtones of the relationship, and that there was no indication of profit motive on the part of the defendant. Based on the foregoing, the Court concluded the defendant was exempt from liability under CUTPA.

8. In *State of Connecticut v. Bacon Construction Co.*, 2014 WL 3360816 (J.D. of Waterbury, May 30, 2014, Dooley, J), the Superior Court considered whether it had subject matter jurisdiction over apportionment claims brought by a contractor against its subcontractors, seeking apportionment of liability, pursuant to CGS § 52-572h, on negligent misrepresentation claims brought directly against the contractor by the State of Connecticut. In *Bacon Construction*, the State brought suit against numerous defendants alleging faulty design and construction in connection with a multi-building corrections facility campus in Connecticut. Among the claims alleged by the State was a negligent misrepresentation claim against the contractor. Pursuant to CGS § 52-102b, the contractor filed apportionment complaints against two of its subcontractors seeking apportionment of the subcontractor's proportionate share of the State's damages. The subcontractors moved to dismiss the apportionment complaints for lack of subject matter jurisdiction.

In support of the motions to dismiss, the subcontractors argued that apportionment complaints may only be served in actions to which CGS § 52-572h applies, and that because negligent misrepresentation seeking purely commercial losses was not a "negligence action to recover damages resulting from ... damage to property" within the scope of CGS § 52-572h, the Court was without subject-matter jurisdiction. The Court disagreed.

The Court first noted that existing Connecticut Supreme Court precedent permits apportionment of negligent misrepresentation claims that are not for purely commercial losses unaccompanied by physical damage or loss of use to tangible property. The Court further disagreed with the subcontractors' argument that the State is not seeking damages for "damage to property." The Court reasoned that the theory of liability reflected in the State's allegations was that the contractor negligently and falsely certified that the facility was completed according to design, within specifications and in workmanlike manner, and that the State made progress payments in reliance on these false certifications, leaving the State with a damaged and defective facility. The Court specifically noted that the State had alleged that the installation defects had "caused tangible and physical harm" to the facility and caused the State to incur costs to correct defective construction with loss of beneficial use of portions of the facility. Relying on the substance of the State's allegations against the contractor, the Court determined that there was direct causal chain between the contractor's alleged misrepresentation and the property damage and loss of use claimed by the State. The Court, therefore, held that apportionment of the contractor's liability was proper and denied the subcontractors' motions to dismiss.

9. In *Diversified Specialty Services v. Walsh Construction Co.*, 2014 WL 1563699 (Conn. Super. J.D. of Waterbury, Mar. 17, 2014, Dooley, J), the Superior Court enforced the contractual rights and remedies of a general contractor in its subcontract with a sewer and drainage work subcontractor, in an action by the subcontractor seeking recovery of damages arising out of a bridge construction project for the Connecticut Department of Transportation (ConnDOT). In *Diversified Specialty Services*, the defendant, a general contractor, was awarded a contract by ConnDOT for construction of the Route 34 flyover bridge from Interstate 95 in New Haven, CT. The defendant, in turn, entered into a subcontract with the plaintiff for drainage and sewer work. As found by the Court following trial, during the course of the project the subcontractor encountered problems in the timeliness and adequacy of its design activities and its performance of the subcontract scope of work, resulting in the contractor withholding payments and supplementing the subcontractor's work so that the contractor would complete the project within the time required under its contract with ConnDOT and avoid the assessment of liquidated damages. The contractor did not terminate the subcontract, but assessed backcharges against the subcontractor for the costs of supplementing the subcontractor's work.

Following the project, the subcontractor brought suit against the contractor and its payment bond surety, asserting claims for breach of contract through failure to make timely

payments; wrongful termination; violation of CUTPA, violation of CGS § 49-41a (Connecticut Public Works Prompt Payment Statute); and violation of CGS § 49-42 by the surety for failure to pay the subcontractor's payment bond claim. The contractor counterclaimed for the costs it incurred to supplement the subcontractor's work in excess of the amount satisfied by backcharges, as well as attorney's fees.

Following a bench trial, the Superior Court ruled in favor of the contractor and surety on all of the subcontractor's claims. The Court rejected the subcontractor's argument that the contractor wrongfully terminated the subcontract because its conduct that made it impractical or impossible to complete the subcontract constituted a "constructive termination." The Court concluded that the subcontractor's termination claim failed, given the lack of any Connecticut case law applying the constructive termination doctrine, and because the facts alleged in support thereof were simply not proven by the subcontractor. Pointing to the provisions of the subcontract that permitted the contractor to withhold payments and backcharge the subcontractor, the Court concluded that the contractor did not breach the subcontract by withholding periodic payments to supplement the subcontractor's work, because the subcontractor was already in material breach of the subcontract by the time the payments were withheld due to its numerous self-imposed delays and because the contractor's conduct was expressly permitted by the subcontract.

As to the subcontractor's claims that the contractor breached the subcontract by failing to pay for change order work on unpaid quantities of unit price items and unapproved extra work, the Court found that the subcontractor's right to payment on the unit price work and unapproved extra work was ultimately approved and thereafter paid for by ConnDOT, not the contractor, and that ConnDOT had never paid the contractor for the work underlying the subcontractor's claims. The Court observed that the subcontract incorporated by reference ConnDOT's standard specification Form 816, and that the payment provisions of the subcontract, when read together with Form 816, conferred final and binding decision-making authority with regard to payments on ConnDOT and made the contractor's receipt of payment from ConnDOT for changed work an express condition precedent to the contractor's obligation to pay the subcontractor for such work. Relying on *Suntech of Connecticut v. Lawrence Brunoli, Inc.*, 143 Conn. App. 581 (2013), the Court rejected the subcontractor's claim that the contractor was liable for payment of changed work, even in the absence of payment by ConnDOT, and enforced the subcontractor's "pay-if-paid" provisions in favor of the contractor, holding that the contractor's liability was limited to the amounts it received from ConnDOT. Because the subcontractor's CUTPA claim was based on the same theory as its non-payment breach claim, the Court concluded that the CUTPA claim similarly failed.

Regarding the subcontractor's claim that the contractor violated CGS § 49-41a by failing to escrow disputed payment amounts, the Court agreed with the contractor's argument that it had no obligation pursuant to CGS § 49-41a to pay or escrow the amounts underlying the subcontractor's claim, because the subcontractor had not substantially performed under the subcontract. Similarly, the Court determined that the contractor's payment bond surety had not violated CGS § 49-42, because the pleadings demonstrated that the surety issued a timely denial of the bond claim within 90 days of the subcontractor's notice of claim, and because the subcontractor's failure to prove its breach allegations against the contractor, similarly precluded relief against the surety. The Court reasoned that the surety's decision to deny payment of the claim was proper and supported by basis in law and fact given the ongoing dispute and conflicting information it was receiving from both the contractor and subcontractor, such that the surety had not denied the claim without "substantial basis in law and fact" thereby entitling the subcontractor to payment under CGS § 49-42. The Court further held that the subcontractor's lack of good faith claim against the surety failed because, absent evidence that the surety's investigation was so deficient so as to suggest improper motive, the surety had satisfied its

obligation by determining whether there was a good faith dispute before denying the bond claim, and that the surety had no obligation to conduct a rigorous independent investigation of its own.

The Court then considered the contractor's counterclaim. The Court found that the contractor had properly proven that the subcontractor breached and that the contractor had properly assessed backcharges against the subcontractor. The Court, however, limited the contractor's recovery to those labor costs proven by the contractor to have been part of the contractor's supplementation costs leading up to contract completion, excluding those costs incurred after completion due to the absence of proof that supplementation continued to be necessary after completion. The Court also awarded the contractor a percentage of the salaries of its personnel that worked as part of the contractor's supplementation staff, whom would not have otherwise worked on the project. The Court, however, reduced the amount of the contractor's backcharge for erroneously included labor charges, overhead and profit.

After accounting for all proper reductions to the contractor's claimed backcharges, the Court then applied a setoff in favor of the subcontractor for payments received by the contractor from ConnDOT on account of the subcontractor's work that had been withheld by the contractor pending resolution of the parties' claims. Application of the setoff resulted in a positive balance on the contractor's backcharge damages and the Court entered judgment in favor of the contractor on its counterclaim.

Legislation:

1. Public Act No. 14-188. An Act Concerning State Contracting, Government Administration and Notification Regarding Extensions of Polling Place Hours. This act makes changes concerning the State's contracting procedures. Among other things, it (1) increases from \$500,000 to \$1.5M, the threshold triggering requirements for a competitive bidding process for state public works projects administered by the Department of Administrative Services (DAS) and (2) establishes a separate selection process for DAS-administered projects that cost \$1.5M or less. It also requires certain subcontractors to be prequalified by DAS at the time a bid is submitted, rather than the time the project starts.

The act also allows, on DAS construction manager at risk (CMR) projects that involve renovations of existing buildings or facilities, for certain work to begin before the project's guaranteed maximum price (GMP) is determined and for a separate GMP to be determined for each phase of a multi-phase project.

Sections 2, 4, and 5: Amendment to the Competitive Bidding Thresholds and Procedures in CGS §§ 4b-91, 4b-24b, 4b-52. The act increases, from \$500,000 to \$1.5M, the project cost threshold triggering competitive bidding requirements for DAS-administered public works projects. Under prior law, if a state public works contract estimated to cost more than \$500,000 did not fall within certain statutory exceptions (e. g., Department of Transportation (DOT)-administered projects), the contract had to be awarded through competitive bidding, to the lowest responsible contractor, prequalified by DAS in accordance with CGS § 4a-100. The act retains the \$500,000 competitive bidding threshold for projects administered by agencies other than DAS (e.g., the Judicial Branch and Legislative Management Committee) and retains the statutory exceptions that exclude certain types of public works projects (e.g., DOT, Judicial Department, Corrections Department, and University of Connecticut Student Residential projects) from application of CGS § 4b-91.

The act allows the DAS commissioner to establish a list of preapproved contractors for DAS-administered public works projects estimated to cost the state \$1.5M or less. The DAS commissioner must use the department's existing prequalification classifications to determine

the specific categories of services that each contractor is prequalified to perform. The act allows the DAS commissioner to establish, for the purpose of selecting and utilizing small contractors and minority business enterprises pursuant to CGS § 4a-60g, a separate list for projects that cost less than \$500,000. The act requires the DAS commissioner to invite contractors to submit qualifications for each specific category of services by posting a notice on the State Contracting Portal that sets forth the information to be submitted and the required form of submission determined by the DAS commissioner. For each category of services, of the contractors providing submittals, the DAS commissioner is required to select those contractors who: (1) are determined to be most responsible and qualified to perform the work required; (2) have demonstrated the skill, ability, and integrity to fulfill contract obligations through their past performance, financial responsibility, and experience with projects of the size, scope, and complexity required under the specified category; and (3) can obtain requisite bonding if the project costs more than \$500,000. For projects estimated to cost the state \$1.5M or less, the DAS commissioner may only invite bids from contractors prequalified for the category of work to be completed. Contracts must be awarded to the lowest responsible and qualified bidder, unless (1) fewer than three bids are received in response to an invitation for bids, or (2) all bids exceed available project funding, in which case the DAS commissioner may directly negotiate the contract with any bidder or reject all bids and re-bid the project under the competitive bidding process described in CGS § 4b-91.

Section 3. Amendment to the Subcontractor Prequalification Procedure in CGS § 4b-91j. Existing law requires subcontractors with subcontracts worth more than \$500,000 for work on public works projects paid for in whole or in part by the state, except projects administered by DOT, to be prequalified by DAS. Prior law required the subcontractor to have been prequalified pursuant to CGS § 4a-100 by the time the subcontractor began performing work. The act changes the timing of the prequalification requirement such that the subcontractor must now be prequalified at the time of bid submission.

Section 6. Amendment to the Procedures for Price Determination on Construction Manager At-Risk Projects in CGS § 4b-103. The prior version of CGS § 4b-103 authorized the DAS commissioner to enter into Construction Manager At-Risk Projects (CMR), subject to the requirement that a Guaranteed Maximum Price (GMP) is determined no later than time of approval of bids from trade contractors and before construction begins, excepting only previously awarded site preparation and demolition project elements.

For CMR projects that involve renovations of existing buildings or facilities, the act allows work to begin prior to determination of a GMP for project elements of site preparation, demolition, public utility installation and connections, and building envelope components (e.g., roof, doors, windows, and exterior walls), provided (1) the “early” work has previously been bid and awarded and (2) the total cost of such early work is not greater than 25% of the estimated construction cost for the entire project.

For CMR projects that involve renovations of existing buildings or facilities that will be performed in multiple phases while the project remains occupied, the act authorized the DAS commissioner to enter into CMR contracts with a GMP to be determined prior to each project phase, rather than requiring a GMP for the entire project as was previously required for all CMR projects.

2. Public Act No. 14-94. An Act Concerning Connecticut’s Recycling and Materials Management Strategy, The Underground Damage Prevention Program and Revisions to Energy and Environmental Statutes. This act, among other things, makes changes to Connecticut’s “Call Before You Dig” statutes.

Section 39. Amendment of CGS § 16-346 to Include “Demolition” Among Activities Subject To Call Before You Dig Requirements. Under existing law, any person, public agency, or public utility must notify the public utilities central clearinghouse when they propose to excavate, discharge explosives at or near the location of public utility facilities, or demolish a structure containing a public utility facility. The act expands this requirement to include all demolitions and all discharge of explosives, regardless of location. The act also expands the definition of “excavation” to include reclamation processes, milling, and dredging.

Section 45. Amendment of “Soft-Digging” Requirements in CGS § 16-354. The act modifies the requirement to use “hand digging” around certain combustible utility facilities. Prior law required hand digging whenever gas facilities were likely to be exposed. The act now requires hand digging or “soft digging” when an excavation is within the approximate location of any facilities containing any combustible or hazardous fluids or gases. “Soft digging” is defined as a non-mechanical and nondestructive process used to excavate and evacuate soils at a controlled rate, using high pressure water or air jet to break up the soil, often in conjunction with a high power vacuum unit to extract the soil without damaging the facilities.

3. Public Act No. 14-227. An Act Concerning Certain Recommendations of the Auditors of Public Accounts, An Expansion of the Neighborhood Assistance Act, Certification of Minority Business Enterprises and An Allocation to the Legacy Foundation of Hartford. This act makes certain changes to Connecticut’s small business enterprise (SBE) and minority business enterprise (MBE) set-aside program.

Section 5. Amendment of CGS § 4a-60g to Change the SBE/MBE Certification Procedures. Pursuant to CGS § 4a-60g(b), Connecticut’s set-aside program requires state contracting agencies and other state entities and political subdivisions, other than municipalities, to annually set aside at least 25% of the value of their contracts for exclusive bidding by qualified small contractors. They must also set aside 25% of that amount (6.25% of the total) for exclusive bidding by qualified minority business enterprises.

Subsection (k) of CGS § 4a-60g, previously authorized the Commissioner of DAS to revoke a person’s SBE or MBE certification for cause, after notice and opportunity for a hearing in accordance with the administrative appeal procedures in CGS Chapter 54, and provided an aggrieved person with the right to judicially appeal a revocation decision. The act expands the DAS commissioner’s authority by permitting denial of the initial issuance or renewal of a certification through a written decision to the applicant that sets forth the basis for denial. The act also expands an aggrieved persons’ right to judicial appeal to include denials of the initial issuance or renewal of a certification.

4. Public Act No. 14-227. An Act Making Minor and Technical Changes to Department of Consumer Protection Statutes. CGS §§ 20-417a through 20-417j contain the Connecticut New Home Construction Act, pertaining to the registration and contracting practices of contractors performing new home construction in Connecticut.

Under CGS § 20-417i, a person who has obtained a court judgment against a new home construction contractor for loss or damage caused by any violation of CGS §§ 20-417a through 20-417j, may apply to the Commissioner of Consumer Protection for payment from Connecticut’s New Home Construction Guaranty Fund of up to \$30,000 unpaid on a judgment against the contractor. Previously, the applicant was required to provide an affidavit affirming that they, among other things, had made a good faith effort to satisfy the judgment, including that a writ of execution was returned by the executing officer showing that no bank accounts or *real* property of the contractor could be found from which the judgment could be satisfied. The act amends CGS § 20-417i so that the applicant may now affirm that the writ of execution was

returned showing no bank accounts or *personal* property of the contractor could be found to satisfy the judgment.

5. Public Act No. 14-50. An Act Concerning Swimming Pool Maintenance and Repair Work. This act makes certain revisions to CGS § 20-417aa, pertaining to swimming pool contractors.

Section 1. Expansion of the Definition of “Swimming Pool Maintenance and Repair Work” in CGS § 20-417aa(a) and Clarification of the Scope of Regulations to be Adopted Pursuant to CGS § 20-417aa(c). The definition of “swimming pool maintenance and repair work” previously included plumbing, heating and electrical work necessary to service, modify, or repair any swimming pool, hot tub, spa or similar recreational therapeutic equipment, where the work commenced at an outlet, receptacle, connection, back-flow preventer or fuel supply pipe previously installed by a person holding the proper license. The act expands this definition to now include replacement, alteration or maintenance, thereby expanding the scope of work requiring the appropriate swimming pool maintenance and repair license.

The act also expands upon the grant of authority given to the Commissioner of Consumer Protection to create regulations to implement CGS § 20-417aa. Previously, the grant of authority required the Commissioner to adopt regulations establishing the amount and type of experience and training required to qualify an applicant for an examination for any limited license for swimming pool maintenance and repair work. The act makes the grant of authority permissive, not mandatory, and expands the scope of the regulations to include: the specific trade areas for which limited licenses for swimming pool maintenance and repair work shall be issued and specific trade areas for which no such limited licenses shall be required; swimming pool maintenance and repair work trainee requirements and training specifications; continuing professional education requirements for persons licensed pursuant to CGS § 20-417aa, provided such persons must be required to complete at least three hours of continuing education biennially; qualifying criteria for accredited professional continuing education programs, and; criteria for waiver of professional continuing education requirements for good cause.

6. Public Act No. 14-210. An Act Concerning the Enforcement of Certain Occupational Licensing Statutes. This act makes certain changes to the statutes governing the enforcement of occupational licensing statutes by the Connecticut Department of Consumer Protection (DCP), against persons who commit violations of occupational licensing laws. Among other things, the act expands authority of the Commissioner of DCP and DCP occupational licensing examining boards to impose civil penalties for certain violations.

Section 2. Amendment to the Department of Consumer Protection’s Authority to Impose Civil Penalties Pursuant to CGS § 20-341. The prior version of CGS § 20-341(b) authorized the Commissioner of DCP or appropriate DCB occupational licensing examining board, to impose a civil penalty, after notice and hearing, on any person who commits certain violations of the occupational licensing laws.

Violations subject to civil penalties include: (1) engaging in or practicing the work or occupation for which a license or apprentice registration certificate is required by CGS Chapter 393 (Electricians, Plumbers, Solar, Heating, Piping and Cooling Contractors and Journeymen, Elevator and Fire Protection Sprinkler Craftsmen, Irrigation Contractors and Journeymen, and Gas Hearth Installer Contractors and Journeymen), Chapter 394 (Television and Radio Service Dealers and Electronics Technicians), Chapter 399b (Swimming Pool Contractors) or Chapter 482 (Well Drilling), without having first obtained such a license or certificate; (2) wilfully employing or supplying for employment a person who does not have such a license or

certificate or who wilfully and falsely pretends to qualify to engage in or practice such work or occupation; (3) engaging in or practicing any of the work or occupations for which a license or certificate is required by CGS Chapters 393, 394, 399b or 482 after the expiration of the license or certificate; (4) violating any of the provisions of CGS Chapters 393, 394, 399b or 482 or the regulations adopted pursuant thereto.

A person may be liable for civil penalties up to \$1,000 a first violation, up to \$1,500 for a second violation, and up to \$3,000 for each violation occurring less than three years after a second or subsequent violation, excluding first offenses for improperly registered apprentices.

The act amends CGS § 20-341b by clarifying that each of the violations above constitutes a separate violation and by expanding the Commissioner's and examining board's authority to impose a civil penalty *for each* violation.

7. Public Act No. 14-199. An Act Concerning Revisions to the Transportation Statutes. Among other various changes to the statutes relating to transportation, the act creates a new exemption to the requirement that trade contractors obtain an occupational trade license from the Connecticut Department of Consumer Protection before offering to the public or engaging in trade work for which a license is required.

Section 10. Amendment to Exemptions in CGS § 20-340 from Occupational Trade Licensing Requirements. CGS §§ 20-330 through 20-341 contain the statutory framework for Connecticut's licensing system for trades overseen by the Connecticut Department of Consumer Protection (DCP), including: Electrical Work; Heating, Piping, and Cooling Work; Plumbing and Piping Work; Elevator Installation, Repair, and Maintenance Work; Automotive Glass Work and Flat Glass Work; and Fire Protection Sprinkler Systems boards. Each area of trade work is subject to the authority of a specific examining board within the Department of Consumer Protection, authorized to determine which applicants qualify for licensure and to enforce regulatory standards against licensees through sanctions and other discipline.

CGS § 20-340 provides exemptions from occupational licensing laws for categories of persons performing trade work that would otherwise require a license. The act expands the exemptions to now include any employee of the Connecticut Airport Authority covered by a State collective bargaining agreement.

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Florida

Case law:

1. In *Trovillion Const. & Dev., Inc. v. Mid-Continent Cas. Co.*, No. 6:12-CV-914-ORL-37, 2014 WL 201678 (M.D. Fla. Jan. 17, 2014), the Middle District of Florida held that, under Florida law, the injury-in-fact approach is the appropriate test for determining an "occurrence" that triggers coverage for "property damage" under a commercial general liability policy as explained by *Axis Surplus Ins. Co. v. Contravest Const. Co.*, 921 F.Supp.2d 1338 (M.D. Fla. 2012), and disagreeing with and distinguishing cases applying the "manifestation" approach, e.g. *Travelers Insurance Co. v. C.J. Gayfer's*, 366 So.2d 1199 (Fla. 1st 1979).

2. In *Voeller Const., Inc. v. S.-Owners Ins. Co.*, No. 8:13-CV-3169-T-30MAP, 2014 WL 1779289 (M.D. Fla. May 5, 2014), the Middle District of Florida was "persuaded by the analysis in [*Trizec Properties, Inc. v. Biltmore Construction Co.*, 767 F.2d 810 (11th Cir. 1985)] and conclude[d] that the injury-in-fact trigger is the appropriate theory for this occurrence based

policy,” which, like the *Trizec* policy, required that “property damage” must occur during the policy period to trigger coverage.

3. In *Morales v. Zenith Ins. Co.*, No. SC13-696, --- So.3d ----, 2014 WL 6836320 (Fla. Dec. 4, 2014), the Florida Supreme Court held that a decedent-employee’s estate could not recover under the tortfeasor-employer’s liability policy. Although the estate had standing as a judgment creditor to sue the tortfeasor-employer’s liability insurer for breach of contract to satisfy the wrongful death judgment, the liability policy’s workers’ compensation exclusion precluded coverage because the complaint alleged the employer’s negligence caused the employee’s death, which as a matter of law left Florida Worker’s Compensation Law as the estate’s exclusive remedy. Furthermore, while the wrongful death action was pending, the parties entered into a workers’ compensation settlement agreement releasing the employer and insurer of all liability in exchange for the estate’s election of consideration (a lump-sum payment) as the sole remedy for the employee’s death, pursuant to Fla. Stat. § 440.20(11)(c), despite the estate’s subsequently procured judgment.

4. In *Snell v. Mott’s Contracting Services, Inc.*, 141 So.3d 605 (Fla. 2d DCA 2014), the Second District held that arbitration was not a “court” and thus a contractor that had prevailed in arbitration with homeowners did not satisfy statutory requirements for the award of attorney fees under Florida’s construction lien statutes as the contract had never filed an action in “court” to enforce its lien claim.

5. In *Intervest Const. of Jax, Inc. v. General Fidelity Ins. Co.*, 133 So.3d 494 (Fla. 2014), the Florida Supreme Court answered two certified questions from the Eleventh Circuit: (1) a Commercial General Liability policy with a \$1M self-insured retention endorsement to be “paid by you” can be satisfied by proceeds given to an insured pursuant to its an indemnification agreement with a third party, and (2) the policy’s transfer of rights provision did not abrogate the “made whole” doctrine, which applied to the policy as an equitable principle of subrogation absent express language to the contrary.

6. In *VMS, Inc. v. Alfonso*, 147 So.3d 1071 (Fla. 3d DCA 2014), the Third District Court of Appeal held that once an employer (e.g., contractor) acquires and maintains workers’ compensation insurance for the benefit of its employees, or ensures that a subcontractor does so for subcontractor’s employees, the employer is immune to an employee’s personal injury suit; the employer need only secure—not pay—the benefits to receive this immunity, receding from *Catalfumo Construction, LLC v. Varella*, 28 So.3d 963 (Fla. 3d DCA 2010).

7. In *CDC Builders, Inc. v. Biltmore-Sevilla Debt Investors, LLC*, --- So. 3d ---, 2014 WL 4628515, No. 3D13-603 (Fla. 3d DCA Sept. 17, 2014), the Third District held that “[i]nvestors cannot grant mortgages, contract for the improvement of the property mortgaged, and then use a network of companies to purchase and foreclose the mortgage for the primary purpose of extinguishing [junior mortgages and] the construction liens that increased the value of the property,” given that “what investors cannot do directly through a single company, investors cannot do indirectly through a network of companies.”

8. In *Diaz & Russell Corp. v. Department of Business and Professional Regulation*, 140 So.3d 662 (Fla. 3d DCA 2014), the Third District held that, under Fla. Stat. 481.229(3), a certified or registered general contractor need not be a licensed architect when negotiating or performing services under a design build contract if the contractual services offered or provided under the contract are offered and rendered by a licensed architect.

Legislation:

1. H.B. 440, Condominiums. This bill amended Fla. Stat. § 718.112, to limit the application of certain requirements relating to bylaws to residential condominiums and their associations and boards, exempting nonresidential condominiums from mandatory arbitration unless specifically provided for in their declarations, authorizing the developer to modify the plot plan as to unit or building types, and extending by 1 year the time limitation for classification as a bulk assignee or bulk buyer.

2. H.B. 807, Residential Properties. This omnibus community associate bill provides cooperative associations and homeowners' associations the same emergency powers during a natural disaster that currently exist for condominium associations; establishes a procedure to permit an association to take control of abandoned property in the community; expands the technology permitting absent board members to participate in meetings; imposes a five-day deadline for outgoing board members to turn over records to newly elected board members; and requires all condominium and homeowners' association meetings to be held at handicapped accessible areas upon request.

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Georgia

Case law:

1. In *Vinings Bank v. Brasfield & Gorrie, LLC*, 328 Ga. App. 636, 759 S.E.2d 886 (Ga. App. 2014), Vinings Bank (the "Bank"), a secured lender, froze drywall subcontractor, Wagener Enterprises, Inc.'s (WEI), deposit accounts and applied the funds towards principal due on a \$1.4M loan, which WEI defaulted on. The Bank also notified general contractor Brasfield & Gorrie, LLC ("B&G"), that it intended to collect approximately \$700,000 it believed that B&G owed to WEI for completed and invoiced work. Prior to WEI's default, B&G entered into multiple subcontracts with WEI for drywall work. Some of the projects were completed and bills properly submitted. However, other projects were not complete as WEI abandoned them and failed to pay suppliers and subcontractors for some of their work. At issue was whether WEI's subcontractors' and suppliers' payments took priority over a secured creditor's claims to payment from the general contractor.

In 2009, WEI granted the Bank collateral for a loan. The collateral consisted of all of WEI's "accounts, accounts receivable, instruments, and other receivables of any kind or nature...." The security interest also required WEI to deliver accounts that were "free and clear of any lien". The bank properly perfected its security interest by filing a UCC-1 Financing Statement. In 2010 and 2011, WEI entered into a dozen subcontracts with B&G, on distinct construction projects. In September of 2011, B&G became aware of WEI's financial instability and that the subcontractor was abandoning its work on unfinished projects. After WEI defaulted on the \$1.4M loan, the Bank froze WEI's deposit accounts in August 2011, and applied the funds to the loan's principal. The Bank believed that B&G owed WEI \$700,000 for work that was completed and invoiced before the end of September 2011. In October of 2011, the Bank notified B&G of its deposit account levy and its security interest in WEI's accounts receivable. B&G took the position that some of the funds in the frozen WEI deposit accounts were paid by B&G and held by WEI in trust for its unpaid suppliers and subcontractors. B&G also stated that it could not calculate what was actually due and payable to WEI until after the abandoned projects were completed by a substitute drywall subcontractor and after WEI's unpaid subcontractors and suppliers were paid. B&G thereafter enforced its contractual right to

withhold payment to WEI until it could determine the costs to complete the unfinished work and pay WEI's laborers, subcontractors, and suppliers.

In September 2012, The Bank filed suit against B&G, alleging that B&G owed WEI money, which was the property of the Bank's pursuant to a security deed. B&G filed a counterclaim for conversion of funds because the bank froze WEI's accounts and allegedly converted funds owed to WEI's subcontractors and suppliers. The parties filed cross-motions for summary judgment and the trial court partially granted B&G's motion. The court determined that, as a matter of law, WEI and the Bank were not entitled to payment until WEI's subcontractors and suppliers were paid and until the completion costs of finishing the abandoned work were applied to the value of the completed work. The trial court denied both parties motions for summary judgment on the conversion claims. The trial court denied the Bank's motion for summary judgment, finding an issue of fact as to whether any accounts receivable actually existed considering WEI's outstanding obligations. The bank appealed.

The Georgia Court of Appeals found no errors at the lower court level and affirmed the trial court's ruling in favor of B&G. The Court of Appeals looked to the contracts between WEI and B&G and determined that the trial court was correct in determining that progress payments made to WEI were to be held in trust and applied first to the payment of laborers, suppliers, and subcontractors upon completion of the work. Final payment was due only when work was completed and there was proof of no outstanding debts, claims, obligations, or liens. The court stated that Georgia law imposes a constructive trust on the funds in the subcontractor's accounts. The fact that the Bank's security interest required that WEI's accounts be "free and clear of any lien" was significant. The Bank could not enforce its interest here because WEI was not due any money until all liens or possible liens were satisfied, and the constructive trust on the funds properly administered.

The Bank argued that according to proffered case law, its secured interest took priority because B&G contractual right was a right of "set-off". However, the Court disagreed and distinguished WEI's obligations to its subcontractors and suppliers from the payments deemed to be set-offs in the case law relied upon by the Bank (*Continental American Life Ins. Co. v. Griffin*, 251 Ga. 412, 306 S.E.2d 285 (1983)). The Court explained that in Georgia, set-off is a counter-Demand a defendant uses against a Plaintiff, arising out of a transaction independent of the Plaintiff's cause of action. It allows the defendant to reduce the Plaintiff's claim by the amount of debt the Plaintiff owes the Defendant for a separate matter. Here, the money withheld by B&G or subtracted from WEI's invoices to pay subcontractors and to finish abandoned work, arose from the same transaction and was therefore, were not set-offs.

The Court of Appeals affirmed the trial court's ruling that the reasonableness of B&G's payments and the costs to complete the abandoned work, and the amount B&G owed to WEI were all questions of fact for a jury. Finally, with respect to both parties' conversion claims, the Court of Appeals held that trial court's decision to deny both parties' motions for summary judgment was proper because the payment rights of WEI's subcontractors and suppliers are superior to the rights of an assignee to accounts receivable, and because questions of fact about multiple issues remained.

Legislation:

1. S.B. 301, Amendment to Code Section 20-2-261 of the Official Code of Georgia Annotated. Governor Nathan Deal signed this bill on April 29, 2014. This legislation represents a significant shift in minimum facility requirements for public school facilities with respect to construction materials.

This law allows wood frame construction to be used in the construction of Georgia public schools. The Department of Education previously prohibited the use of light wood framing for public schools. The Georgia chapter of the trade association Associated General Contractors of America (AGC Georgia), stated that it neither supports nor opposes the law and is neutral. The new amendments went into effect and became law on July 1, 2014.

2. S.B. 305, Amendment to Chapter 2 of Title 25 of the Official Code of Georgia Annotated. Governor Nathan Deal signed this bill in April 21, 2014. The amendments went into effect and became law on July 1, 2014. This legislation is significant in that it addresses an important issue that arises with respect to Fire plan review and safety inspections by the state Fire Marshall's Office.

Frequently, in the field, unwarranted changes are required after project plans have been submitted, approved, and constructed in accordance with the plans. This has a significant impact on contractors' bottom lines, schedules, business operations, and can strain the relationship with the owner.

This legislation requires inspectors to provide written notification of code violations prior to requiring changes in construction or modifications to a design that has previously received approval. This new law allows for the violating party to cure as opposed to receiving a stop work order or denial of a permit or request for a certificate of occupancy or certificate of completion. The Georgia chapter of the trade association Associated General Contractors of America (AGC Georgia), supports this new law.

3. S.B. 117, Amendment to Chapter 9 of Title 25 of the Official Code of Georgia Annotated. Governor Nathan Deal signed this bill in April 24, 2014. The amendments went into effect and became law on July 1, 2014. This legislation addresses blasting and excavating near utility facilities in Georgia. This law is more widely known as "Call Before You Dig Law".

There was some initial concern about a potential conflict with new federal regulations, and opposition by the Georgia Public Service Commission (PSC). The PSC attempted to amend the bill with a controversial provision before it became law. However, after facing significant opposition to its provision, the PSC removed its opposition to the bill, which cleared the way for it to become law after over a year of being held up due to legislative limbo.

This law clarifies a few items for utilities, excavators, and other industries that are impacted by this law. Some of the changes included definition changes and additions, "dig ticket" changes, the addition of a strict liability provision for facility owners not locating their facilities and payment for associated down time.

Other changes include: reasonable care language changes for working within tolerance zones; accuracy related to tolerance zones when locating facilities; clarification of the process related to PSC notices for probable violations; revocation of licensure for repeat offenders; and changes to the make-up of PSC Advisory Board from three (3) excavators to five (5) industries that excavate (utility contractor, general contractor, plumber, landscape contractor, highway contractor).

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Hawaii

Case law:

1. *Nautilus Ins .Co. v. Lexington Ins. Co.*, 132 Haw. 283, 321 P.3d 634 (Haw. 2014). The contractor, VP & PK, required its subcontractor, Kila Kila, to name the contractor as an additional insured under its liability policy. Therefore, Nautilus included VP&PK as an additional insured under Kila Kila's policy. VP&PK was also the named insured under its own policy issued by Lexington. Both the Lexington and Nautilus policies had "other insurance" provisions providing that their policies were excess over "any other primary insurance available to you covering liability for damages arising out of the premises . . . for which you have been named as an additional insured." After completion of the construction project, the homeowners sued both VP&PK and Kila Kila. Nautilus defended both because Lexington deemed itself excess. Judgment was entered against VP&PK. Lexington indemnified for the amount of the judgment, but refused to contribute to the defense.

Nautilus sued Lexington in federal district court for a portion of the defense costs. The district court agreed that Lexington was excess. On appeal, the Ninth Circuit noted there was no relevant case law on "other insured" provisions in Hawaii. Consequently, the Ninth Circuit certified questions to Hawaii Supreme Court. In response, the Hawaii Supreme Court first held that a primary insurer could not look to another policy in disclaiming its duty to defend. Even if the insurer felt it was excess because of its "other insurance" clause, it still had a duty to defend if the allegations were covered by its policy. The insurers could litigate in a separate declaratory relief action which was excess and which was primary by virtue of competing "other insurance" provisions. In the meantime, however, both insurers had the duty to defend from the time of tender.

2. *Nordic PCL Constr., Inc. v. LPIHGC, LLC*, 2014 Haw. App. LEXIS 74 (Haw. Ct. App. Feb. 14, 2014). Nordic was the subcontractor hired by the general contractor to perform concrete-related work for a project on Maui. The general contractor disputed whether Nordic's concrete work was flat and level. The parties went to arbitration. The arbitrator found in favor of the general contractor. After the arbitration was concluded, Nordic questioned the neutrality of the arbitrator. Nordic learned the arbitrator had been represented by the general contractor's lawyers in several cases, including one ongoing matter during the arbitration. When the general contractor moved in circuit court to confirm the Arbitration Award, Nordic sought to vacate because the arbitrator failed to disclose his relationships with the general contractor's counsel. The circuit court granted the general contractor's motion, denied Nordic's motion, and issued its judgment.

The Intermediate Court of Appeals vacated the circuit court's confirmation of the award based on the arbitrator's failure to make adequate disclosures. By way of full disclosure, our office represented Nordic in the arbitration and appeal.

3. *Nishimra v .Gentry Homes, Ltd.*, 133 Haw. 222, 325 P.3d 634 (Haw. Ct. App. 2014). The homeowners filed a class action suit against Gentry for alleged failures to protect their homes from hurricane-related damage by use of hurricane straps in the construction of the homes. Gentry moved to have the case go to arbitration based upon provisions in the Home Builder's Limited Warranty. The homeowners opposed the motion, arguing that selection of the arbitrator by the Professional Warranty Services Corporation (PWC), as provided in the limited warranty, created a potential conflict of interest. The circuit court ordered that the claims be arbitrated, but severed the portion of the limited warranty which addressed selection of the arbitrator. Instead, the circuit court ordered the parties to meet and confer on the selection of a

local arbitration service. If agreement could not be reached, the court would select a local arbitration service.

On appeal, the Intermediate Court of Appeals vacated and remanded. The alleged potential conflict of interest of the PWC did not constitute bias rendering the selection process so fundamentally unfair as to be unenforceable under 9 U.S.C. § 2 and Haw. Rev. Stat. § 658 A-6 (a). The homeowners' contentions that the PWC's business relationships with Gentry and its insurers constituted only a generalized attack on PWC's impartiality. The homeowners failed to prove that the arbitration selection process would necessarily result in actual partiality or bias.

Legislation:

1. H.B. 2579, Workers' Compensation; Compromise. Provides that compromises for workers' compensation claims reached as a result of a third-party liability claims or actions do not require the approval of the Director of Labor and Industrial Relations.

2. S.B. 2475, Contractors' Licensees; Aiding and Abetting; Discipline. Clarifies that a contractor licensee who aids and abets an unlicensed contractor may be subject to additional discipline by the contractors license board.

3. H.B. 570, Unlicensed Contractor's Increased Penalties; Elders. Increases the fine against unlicensed contractors who commit licensing violations against elders.

4. S.B. 2657, Solar Energy Device; Warranty; Contractors. Requires a contractor that installs a solar energy device to notify the private entity that installation might void the roofing warranties or guarantees. Unless the private entity forgoes the roofing warranty or guarantee, requires a contractor that installs a solar energy device to obtain written approval from the roof manufacturer and follow written instructions for waterproofing roof penetrations from the roof manufacturer. Requires a roofing contractor that waterproofs roof penetrations related to the installation of a solar energy device to honor the roof warranty or guarantee; provided that if either the roofing contractor's guaranty or the roofing manufacturer's warranty is no longer in effect, the contractor who installs the solar energy device and waterproofs the penetrations shall apply the contractor's or lessor's standard labor and workmanship warranty.

5. H.B. 2413, Public Works; Prevailing Wages; Public-private Partnerships; Little Davis-Bacon. Applies provisions relating to prevailing wages for public construction work to public-private partnerships.

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Idaho

Case law:

1. *DeGroot v. Standley Trenching, Inc.*, No. 39406, 2014 Ida. LEXIS 113, 2014 WL 1266104 (Idaho Mar. 28, 2014): Plaintiff entered into an agreement with a general contractor (GC) for the construction of a dairy farm. Prior to the agreement, Plaintiff met with defendant subcontractor (SC) at a trade show and discussed manure handling systems for dairies. Plaintiff instructed GC to use defendant SC for the installation of a manure handling system, and the GC accepted SC's bid. Shortly after completion of the dairy, maintenance issues arose with the manure handling system. Plaintiff sued the SC for breach of contract, alleging it was a third-party beneficiary of the contract between the GC and SC. The court held that Plaintiff was not a third-party beneficiary, and affirmed summary judgment in favor of SC. Even though Plaintiff

and SC expressly discussed the installation of a manure system, Plaintiff instructed the GC to accept SC's bid, SC's invoices listed Plaintiff as the customer, Plaintiff's name appeared in the title of the bid contract, and SC sent warranty information directly to Plaintiff, the court recognized that I.C. § 29-102 required the contract to express an intent to benefit a third party in order for a viable third-party beneficiary claim to exist. Because the bid contract between GC and SC did not specifically express such an intention, Plaintiff did not have a viable third-party claim against SC.

Legislation:

1. Idaho Code §§ 39-4109, 39-4116 (2014), as amended by H.B. 545. House Bill 545 adopts the 2012 International Residential Code and the 2012 International Energy Conservation Code, with amendments made by the Idaho Building Code Board, as the Idaho Residential Code and the Idaho Energy Conservation Code, respectively. H.B. 545 took effect July 1, 2014, and the new Idaho Codes will go into effect on January 1, 2015.

2. Idaho Code §§ 54-4503, 54-4511, 54-4512, 67-2320 (2014), as amended by S.B. 1311. Senate Bill 1311 authorizes construction manager at-risk contracts for state and local public projects other than road and transportation projects. S.B. 1311 divides construction managers into two categories: construction manager representatives (CMR), who act solely as representatives of the city, and construction manager/general contractors (CM/GC). The CMR or CM/GC is selected through the process set forth in I.C. § 67-2320, and involves published legal notice soliciting statements of qualifications, developing criteria to rank statements of qualifications, ranking CMRs and CM/GCs based on the established criteria, and negotiating the overall price. Contracts for a CM/GC is for a fixed price, and the CM/GC assumes responsibility for any cost overruns. All construction work, materials and equipment purchased for a project must be done so using competitive bidding, and a CM/GC may bid to perform construction work or to supply materials and/or equipment for a project. The CM/GC must also provide payment and performance bonds. The CMR or CM/GC must be licensed to provide construction management services, and the CM/GC must also be licensed as a public works contractor in appropriate categories. S.B. 1311 took effect on July 1, 2014.

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Illinois

Case law:

1. In *R.L. Vollintine Construction, Inc. v. The Illinois Capital Development Board*, 2014 IL App (4th) 130824 (October 29, 2014), the Illinois Appellate Court found that a contractor's claim against the Illinois Capital Development Board ("CDB") must be brought in the Illinois Court of Claims and that the Illinois Prompt Payment Act was not implicated under the facts of the case. The dispute arose from a contract between R.L. Vollintine Construction Inc. ("Plaintiff" or "Vollintine") and the CDB that was entered into in September, 2011 for renovation work at the state capitol building. During the course of the project, there was pipe failure that led to significant water damage. CDB asserted that the water leak occurred as a direct result of Vollintine's work. Accordingly, CDB made a claim against Vollintine to recoup the costs necessary to remedy damages associated with the pipe failure.

The Appellate Court rejected the notion that CDB's issuance of a certificate of substantial completion created any duty under the Payment Act. In fact, the plain language of the certificate of substantial completion that CDB issued to Vollintine in January 2012 conveyed

that as of August 15, 2011, Vollintine was released from certain contractual obligations related to utilities and insurance, but remained responsible for items identified as requiring completion or correction, as well as maintaining “other required insurance.” The certificate of substantial completion did not address payment or the Payment Act, but rather provided additional guidance regarding obligations both parties had toward issuance of a certificate of final completion. The Payment Act neither imposes a nondiscretionary duty upon CDB nor any state agency to process payment vouchers promptly, instead it confirms the procedure that the Court of Claims must follow if it determines that claimants are due payments from State agencies. See 30 ILCS 540/3-1 (West 2012).

2. In *15th Place Condominium Association v. South Campus Development Team, LLC and Fitzgerald Associates Architects P.C. and Linn-Mathes, Inc.*, 2014 IL App (1st) 122292, the Illinois Appellate Court recently held that a developer’s express indemnity claim against a third-party defendant contractor was governed by the ten (10) year statute of limitations generally applicable to written contracts and not by the four (4) year statute of limitations for construction-related claims even though the underlying lawsuit against the developer included claims for workmanship defects. South Campus Development Team (“SCDT”) was the developer of two adjacent condominium towers located at 811 and 833 West 15th Place in Chicago, Illinois (the “Project”). SCDT contracted with Fitzgerald Associates Architects P.C. (“Fitzgerald”) for architectural services and with Linn-Mathes, Inc. (“Linn-Mathes”) to be the general contractor for the Project. In April 2005, after a number of condominium units were sold, SCDT turned over control of the Project to 15th Place Condominium Association (the “Association”).

In 2008, following the turnover, the Association discovered many design and workmanship defects and filed a lawsuit against SCDT which included claims of breach of implied warranty of fitness and habitability, breach of fiduciary duty, and negligence. In June 2011, SCDT filed a third-party complaint against Fitzgerald and Linn-Mathes alleging claims for breach of contract, breach of implied warranty of good workmanship, express indemnity, and alternatively, implied indemnity against both Fitzgerald and Linn-Mathes. Among other things, the trial court dismissed the express indemnity claim against Linn-Mathes as being barred by the four (4) year statute of limitations set forth at 735 ILCS 5/13-214.

The appellate court reversed basing its decision upon the Illinois Supreme Court’s ruling in *Travelers Casualty & Surety Co. v. Bowman*, 229 Ill.2d 461 (2008), which found that a written agreement to indemnify was not one of the activities protected under the four (4) year statute of limitations applicable to construction matters (i.e. the design, planning, supervision, observation or management of construction), and was instead subject to the ten (10) year statute of limitations applicable to written contracts. Here, like in *Travelers*, the express indemnity claim against Linn-Mathes arose from Linn-Mathes’ refusal to perform its obligation to indemnify SCDT pursuant to an *express promise to indemnify* SCDT contained *in the contract* between the parties. As such, Linn-Mathes’ action or inaction as an indemnitor was not protected under 735 ILCS 12-214(a), and therefore the ten (10) year statute of limitations applicable to written contracts applied to SCDT’s express indemnity claim against Linn-Mathes.

3. In *Perma-Pipe, Inc. v. Liberty Surplus Ins. Corp.*, No. 13 C 2898, 2014 WL 1600570 (N.D.Ill. 2014), the Court issued a first of its kind decision dramatically altering the control a policy holder has over the defense of its insured cases. Perma Pipe as policy holder was sued in a property damages case for over \$40M. Liberty as the insurer agreed to pay defense costs of Perma-Pipe in that case and Liberty then waived any possible defense it may have had to pay for any loss under the policy as a result of judgment or settlement in the property damage case. Liberty argued that a waiver of any defense allowed it to appoint its lawyers to defend Perma-Pipe and to control the defense. Perma Pipe argued that it was entitled to choose its own counsel to be paid by Liberty for the defense, rather than be forced to accept defense of

the \$40M claim by Liberty's law firm because Liberty's policy was only \$1M, thus leaving Perma Pipe exposed. Liberty refused and a lawsuit ensued.

The federal court agreed with Perma Pipe and held that a conflict still existed even though Liberty had allegedly waived all conflicts because there was a non trivial possibility that the damages would exceed the amount of insurance. The court noted that when the amount of insurance is capped, and the claim is much larger than the insurance, the insurer might be tempted to gamble with the insured's exposure. Perma-Pipe was allowed to choose its counsel to defend it in the property damages case with the defense to be paid by Liberty. This decision dramatically alters the insurance landscape. At least in Illinois, policy holders should now be able to control the defense of their cases and have those costs paid by the insurer when the amount claimed exceeds insurance.

4. In *Henderson Square Condominium Association v. LAB Townhomes, L.L.C.*, 2014 IL App (1st) 120764, the Illinois Appellate Court found that defendant LAB Townhomes' ("Developer") issuance of a marketing packet for a condominium project – which included specific grades of insulation – paired with insufficient funding of reserves, raised a question of fact as to whether the developer owed a duty to plaintiff Henderson Square Condominium Association ("Condo Association"), and whether the Developer's actions amounted to fraudulent concealment for purposes of preserving certain construction-related causes of action.

The trial court dismissed the Condo Association's complaint because certain counts were time barred and other counts failed to allege a cause of action. The Illinois Appellate Court reversed. The Condo Association argued on appeal that through the misrepresentations in the Developer's packet given to prospective purchasers, along with Developer's deceptive conduct such as failing to budget properly for reserves, the Developer concealed the true nature of the building. The Illinois Appellate Court agreed, finding that the reasonableness of budgeting for reserves is a question of fact. The Illinois Appellate Court found that the Developer's budget of reserves was a statement about the estimated useful life and condition of the Project, and Condo Association therefore did not make further inquiry into the condition of the property. Thus, the Condo Association raised a question of fact as to whether the defendants' concealment of the insulation led to their failure to reasonably fund the reserves. The Illinois Appellate Court reversed and remanded for further proceedings.

5. In *Metcalf Construction Co. v. United States*, Case No. 2013-5041 (Fed. Cir. Feb. 11, 2014), the U.S. Court of Appeals for the Federal Circuit allowed a construction company to seek damages against the U.S. government in breaching its implied duty of good faith and fair dealing. In 2002, Metcalf Construction Co., a defense contractor, was awarded a \$50M contract to design and build housing units for the U.S. Navy at a Marine Corps Base in Hawaii. Metcalf filed suit in 2007 alleging it suffered delays and incurred additional costs spending more than \$76M to finish the project due to the government's material breach of contract and stating the government's actions breached its implied duty of good faith and fair dealing under the contract. The Court of Federal Claims denied Metcalf Construction any recovery, and awarded damages of \$2.4M to the government on a counterclaim for project delays.

On appeal, the Federal Circuit reversed and rejected the lower court's view of the implied duty of good faith and fair dealing as "unduly narrow." The Federal Circuit observed that a breach of the implied duty of good faith and fair dealing does not require the violation of an express provision of the contract. The Federal Circuit also corrected the lower court's analysis of the interplay between the standard FAR Differing Site Condition Clause and the contractor's duty to investigate the site during contract performance. The lower court concluded that the risk of newly-discovered site conditions was on the contractor due to its site investigation

duties. The Federal Circuit rejected that interpretation and re-affirmed that the Differing Site Condition clause places that risk on the government.

6. In *Gillespie Community Unit School District No. 7 v. Wight & Co.*, 2014 IL 115330, the Illinois Supreme Court held that a fraudulent misrepresentation claim against an engineering firm was barred by the five-year statute of limitations as set forth in 735 ILCS 5/13-205. In the case, a school district in Benld, Illinois began plans for a new elementary school in 1998. The school district hired Wight to investigate the building site. The investigation revealed the possibility of coal mine subsidence, though the school district stated it did not receive details of those risks. The school district built the new school in 2002, but in 2009 the coal mine subsided beneath the school causing extensive damage to the building. The school district filed suit against Wight in 2009 alleging professional negligence, breach of implied warranty, and fraudulent misrepresentation by concealment of material fact. Both the circuit court and the appellate court found that all of the claims were barred by the applicable statutes of limitation.

The Illinois Supreme Court opinion focused on the fraudulent misrepresentation claim. The school district argued that because Section 13-204(e) of the construction statute of limitations expressly states that it does not apply to fraudulent misrepresentation claims such a cause of action cannot be time-barred. The Illinois Supreme Court rejected the school district's argument and affirmed the lower courts' holding that the claim of fraudulent misrepresentation was barred by the general five-year statute of limitations set forth in Section 13-205.

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Indiana

Case law:

1. In *Allen County Public Library v. Shambaugh & Son, L.P.*, 2 N.E.3d 132 (Ind. Ct. App. 2014) (affirming original decision in *Allen County Public Library v. Shambaugh & Son, L.P. et al.*, 997 N.E.2d 48 (Ind. Ct. App. 2013)), the Library was not precluded under § 11.3.7 of the standard AIA contract from seeking recovery for pollution cleanup costs for property contaminated by the contractor and its subcontractors' (the "Contractors") allegedly faulty construction that was outside the scope of "the Work" for which the Contractors were contracted to perform. The Library hired the Contractors to renovate and add to its main library branch building. Before construction commenced, the Library obtained a "Builders Risk Plus" insurance policy specifically to cover the library renovation and new addition jobsite. While installing a concrete floor in the Library's basement to support the installation of an emergency diesel generator and two diesel fuel storage tanks, a steel stake driven into the ground pierced a copper pipe. This caused approximately 3,000 gallons of fuel to leak into the ground underneath the Library. The Library cleaned up the leaked fuel and filed a claim under its "Builders Risk Plus" policy and the Library's carrier paid the \$5,000 policy limit to the Library. Then the Library sued the Contractors to recover the nearly \$500,000 it had incurred to clean up the diesel fuel leak. The Contractors argued that the Library had waived its right to seek subrogation for the diesel fuel cleanup under the terms of the AIA contract.

The trial court granted the defendants' summary judgment motions in which they argued that the parties' waiver of subrogation clause, § 11.3.7 of the AIA contract, barred the Library's suit. The court of appeals reversed the trial court's order, ruling that the clause was limited to damages to the Work itself and did not extend to cleanup costs because nothing in the parties' contract required the Library to procure insurance for damage to property surrounding the jobsite or to property outside the building project itself. Thus, the AIA contract did not bar the

Library from seeking to recover uninsured losses from the Contractors for damage caused to “non-Work” property by the Contractors.

2. In *Board of Commissioners of the County of Jefferson v. Teton Corporation*, 3 N.E.3d 556 (Ind. Ct. App. 2014), the Indiana Court of Appeals adopted the majority view and held that the waiver of subrogation clause in the contract extended to all losses covered by the County’s property insurance, whether the claimed loss was damage to work or non-work property. The County, which had entered into a construction contract with the general contractor for courthouse renovation, filed suit against the general contractor and the subcontractors alleging that the subcontractors’ negligence was the primary cause of a fire that occurred during renovation that severely damaged the courthouse. The trial court granted defendants’ motions for summary judgment, and held that the County waived its right to subrogate any and all claims covered by its property insurance pursuant to the terms of the American Institute of Architects Contract (“the AIA Contract”). The court of appeals affirmed the trial court’s decision and adopted the majority approach of addressing the waiver of subrogation issue under AIA contracts, which rejects the “Work” versus “non-Work” distinction upon which prior Indiana cases relied. The court gave great weight to the plain language of the AIA Contract, which stated that the County was “directed to insure the construction project and the building or property it pertains to, and to waive claims against the associated contractors for losses covered by its insurance.” The court also reasoned that the majority view was in line with the public policy behind the AIA Contract which “has long been recognized as having as a central tenet its intention to liquidate and settle construction-related claims through non-subrogated insurance coverage purchased specifically for the project.”

3. In *First Response Services, Inc., v. Cullers*, 7 N.E.3d 1016 (Ind. Ct. App. 2014), the court found that a contractor hired to provide water remediation services for a homeowner was not entitled to recover attorney fees on its complaint against the homeowner after he didn’t pay the full amount billed because the contractor did not comply with the Indiana Home Improvement Contract Act (“HICA”). HICA is a statute that requires home improvement contractors to provide a written contract to a homeowner before performing work. In order to protect the consumer, HICA requires that the contract contain certain provisions, such as a price for the home improvements. The contractor, First Response, violated HICA (Indiana Code §§ 24-5-10-1, 3, and 4) by failing to provide the homeowner a contract that included a reasonably detailed description of the proposed home improvements, the home improvement contract price, and starting and completion dates. The Court determined that the homeowner was contractually obligated to pay for the contractor’s services, but because of its HICA violations, the contractor was not entitled to attorney fees.

4. In *Indiana Insurance Company v. Kopetsky*, 11 N.E.3d 508 (Ind. Ct. App. 2014), the court clarified a number of concepts in insurance law including the definition of “property damage,” the concept of “occurrence,” the expected-or-intended exclusion, the contractual-liability exclusion and the common-law known-loss doctrine. In this case, KB Home Indiana, a residential home builder, entered into an agreement with George Kopetsky to purchase lots in Cedar Park to construct and sell single-family residences. In the agreement, Kopetsky represented that he was unaware of any contamination in Cedar Park and that at the closing for each lot sold to KB Home he would certify that he had not received notice that the lot was contaminated. After purchasing 60 plus lots from Kopetsky, KB Home learned that some of the lots were contaminated. KB Home sued Kopetsky alleging that he breached the agreement and negligently failed to notify KB Home of environmental issues in Cedar Park. Kopetsky tendered a claim to his insurer, Indiana Insurance Company, and the insurer filed suit against Kopetsky requesting a declaration that it had no duty to defend or indemnify Kopetsky with regard to KB Home’s claims.

The trial court entered summary judgment in favor of Kopetsky. Indiana Insurance appealed, arguing the trial court erred because the damages alleged by KB Home did not constitute “property damage,” were not the result of an “occurrence,” were barred by the expected-or-intended exclusion, the contractual-liability exclusion and the known-loss doctrine.

The court set forth that when considering what may constitute “property damage” under a typical CGL insurance policy, the proper approach is to start with the policy language and determine if (1) the loss would be covered under the general coverage clause and (2) if any exclusions apply that would preclude coverage, without regard to whether the loss constituted “economic loss.” Here, the damages alleged were “property damage” because the lots were “tangible property” that suffered “physical injury.”

The multiple policies that Indiana Insurance issued to Kopetsky (“the policies”) define “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” KB Home alleged the contamination was the result of the migration of contamination from the property immediately adjacent to the Cedar Park development. The court determined that KB Home properly pled an “occurrence” as that term is defined in the policies because the contractual provisions in the insurance policies do not contain any language requiring that the ‘occurrence’ be the insured’s fault.

The policies exclude coverage for property damage that is expected or intended by the insured. The court found that coverage is excluded under the expected-or-intended exclusion if, and only if, at the time of the acts causing the injury, the insured expected or intended the injury. Here, Kopetsky could not have expected or intended the property damage at the time of the acts causing it because he had nothing to do with the actual contamination of the lots when it occurred. Thus, the expected-or-intended exclusion does not function to bar coverage for contamination of the property.

The policies exclude coverage for property damage for which the insured is responsible due to the assumption of liability in a contract. Indiana Insurance argued assumption of risk barred the claims because KB Homes assumed liability for potential contamination under the land transaction. However, the court held that contractual liability exclusions in commercial general liability policies do not bar coverage for liability incurred by a contract breach but, rather, for liability assumed from a third party. In other words, entering into an agreement and subsequently breaching it is not the same as assuming liability pursuant to it. Thus, in this case, coverage is not barred by the policies’ contractual liability exclusion.

The Known-Loss Doctrine bars coverage for a loss that has already occurred before coverage is effective. Here, the court remanded for trial the question of whether Kopetsky had actual knowledge that a loss had occurred, was occurring, or was substantially certain to occur on or before the effective date of the first policy issued to him by Indiana Insurance.

Legislation:

1. H.E.A. 1196, Employment of Construction Managers as Constructors for Projects, permits public agencies to utilize the Construction Manger as Constructor (CMc) or “Construction Manager at Risk” method of project delivery to build public facilities with the exception of road, highway, bridge, or potable water or wastewater projects. On June 30, 2014, educational institutions may start using CMc, and on June 30, 2017, all other public agencies may start using CMc. This is Indiana’s third approved method of project delivery available to public entities: Design-Bid-Build, Design-Build and now CMc.

The Act contains certain requirements for publishing notice, evaluating proposals and even for first tier subcontractors. The owner must issue a notice or request for proposals in the same way required by the statutes applicable to the public agency. The request for proposals must include at least a statement of criteria, process and procedures by which the CMc will be evaluated, selected, and awarded a contract, information on how the guaranteed maximum price (GMP) may be established, and a description of insurance requirements. The statement of criteria for evaluation must include the offeror's history of contracting with or hiring minority, women, and veteran business enterprises. For the evaluation process, the owner must form a committee to evaluate and analyze the proposals, and the committee must give each bidder it selects equal opportunity to communicate with the committee.

The evaluation committee will select the CMc after considering the RFP responses, interviews and fees. The public agency may enter into contract negotiations with the CMc whose proposal has been selected by the evaluation committee.

The Act also contains requirements for the contract if a GMP is to be set, including the requirement that the contract describe all clarifications and assumptions on which the GMP is based. During negotiations between the public agency and selected CMc, but before the GMP is set, the public agency can select a different CMc who submitted a proposal.

First tier subcontracts must be publicly bid pursuant to the bidding procedures applicable to the public agency. In its submission, all prospective subcontractors must include a statement detailing its professional experience, its proposed plan for performing the work, equipment and personnel available to complete the work, current financial status, and best estimate of the cost of each item of work.

The Act requires the CMc to execute a payment bond in an amount equal to the GMP or proposed construction cost. The CMc must furnish proof that it is able to obtain an acceptable performance bond.

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Iowa

Case law:

1. In *Luana Sav. Bank v. Pro-Build Holdings, Inc.*, 843 N.W.2d 477 (Iowa Ct. App. 2014), the Iowa Court of Appeals declined to extend the implied warranty of workmanlike construction to a bank that lends funds to a developer to build a multi-unit residential dwelling, and that later takes possession of the dwelling in foreclosure. In other words, a bank which is neither an original or subsequent purchaser of a home cannot invoke the implied warranty of workmanlike construction.

2. In *Star Equip, Ltd. v. State of Iowa, Dep't of Transp.*, No 12-1378, 2014 WL 346521 (Iowa Jan. 31, 2014), the state hired a "targeted small business" (TSB) as the general contractor for a construction project. Iowa law allows the state to waive its statutory bond requirement for general contractors if the general contractor meets the definition of a TSB. In this case, Iowa waived the bond requirement. The general contractor then failed to fully compensate the subcontractors, and the subcontractors filed claims against the state. The case made its way to the Iowa Supreme Court. At issue was Article 7, Section 1 of the Iowa Constitution, which says, "[t]he credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual, association, or corporation; and the state shall never assume, or become responsible for, the debts or liabilities of any individual, association, or corporation...."

The state argued that this constitutional provision prohibited the subcontractors from recovering against the state. The Iowa Supreme Court disagreed and held that the state was liable to the subcontractors. Its rationale was that the constitutional provision only prohibits the state from acting as a surety, and in this case, the state was not acting as a surety when it waived its bond requirement. Therefore, the constitutional provision did not invalidate Iowa Code 573.2, which the court had interpreted to impose liability on the state for the subcontractors' claims when the state waives its bond requirement.

Legislation:

1. H.F. 2094, An Act Relating to Statute of Repose Periods for Improvement to Real Property Involving Residential and Nonresidential Construction. This bill passed the House but did *not* make it to a vote in the Senate. However, this bill had strong support from Master Builders of Iowa (MBI), and it may come up again in the future. This bill would reduce the statute of repose from 15 years to 10 years for "action[s] arising out of the unsafe or defective condition of an improvement to nonresidential construction based on tort and implied warranty and for contribution and indemnity, and founded on injury to property, real or personal, or injury to the person or wrongful death."

2. H.F. 2230, An Act Relating to Vehicle Permit Requirements for Equipment Used Primarily for Construction of Permanent Conservation Practices on Agricultural Land. This Act states that size, weight, load, and permit requirements in Iowa Code Chapter 321 do not apply to "equipment used primarily for construction of permanent conservation practices on agricultural land," so long as the vehicle (1) is not driving on the interstate, (2) does not have a payload, (3) complies with weight limitations on bridges, (4) has an amber flashing light visible from the rear, (5) has "warning flags on that portion of the vehicle which protrudes into oncoming traffic," and (6) only operates "from thirty minutes prior to sunrise to thirty minutes following sunset."

3. H.F. 2408, An Act Modifying Notification Requirements Applicable to Underground Facility Excavations where Underground Facilities are Present. This Act specifies that when an excavator contacts the notification center as required under Iowa Code Chapter 480, "[n]otices received after 5:00 p.m. shall be processed as if received at 8:00 a.m. the next business day. The notice shall be valid for twenty calendar days from the date the notice was provided to the notification center. If all locating and marking of underground facilities is completed prior to the expiration of the forty-eight-hour period, the excavator may proceed with excavation upon being notified by the notification center that the locating and marking of all underground facilities is complete." This act also requires excavators to use white paint, white flags, or white stakes to mark the proposed area of excavation after notifying the notification center, unless the proposed excavation can be precisely described during the call, "electronic means of white-lining is supported by the notification center and used by the excavator," or it would be impractical for the excavator to physically mark the area. Operators who are notified by the notification center that an excavation has been proposed in the area of the operator's underground facility must mark their facility and notify the notification center within forty-eight hours, excluding Saturdays, Sundays, and legal holidays. The notification center must then update the excavator within the 48 hour period.

4. H.F. 2423, An Act Relating to Statutory Corrections Which May Adjust Language to Reflect Current Practices, Insert Earlier Omissions, Delete Redundancies and Inaccuracies, Delete Temporary Language, Resolve Inconsistencies and Conflicts, Update Ongoing Provisions, or Remove Ambiguities and Providing Effective and Applicability Dates. This Act makes technical revisions to the Iowa Code. The relevant corrections are found in §§ 126-129. This Act makes changes to the language required in an owner notice under Iowa Code 572.13. This Act also caps mechanic's lien registry posting fees at \$40.00.

5. S.F. 2255, An Act Designating Registered Architects and Licensed Professional Engineers Employees of the State for Specified Purposes under the Iowa Tort Claims Act. This Act designates architects registered under Chapter 544A and professional engineers licensed under Chapter 542B “employees of the state” if they (1) “voluntarily and without compensation [provide] initial structural or building systems inspection services for the purposes of determining human occupancy at the scene of a disaster,” and (2) act “at the request and under the direction of the commissioner of public safety and in coordination with the local emergency management commission.” The “employee of the state” designation provides the architect or engineer immunity under Iowa Code Chapter 669 from certain lawsuits.

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Kansas

Case law:

1. *Gleason & Son Signs v. Rattan*, 2014 Kan. App. LEXIS 76. This litigation was initially brought by Gleason who was a subcontractor of Persona who was the general contractor who had contracted with Kaneb Investment Group, LLC, to make improvements to the motel property owned by Kaneb. Rattan was a partner in Kaneb and making decisions for the property. Gleason’s scope of work was to manufacture and install a sign on the property of the motel. During the construction in July 2008, Gleason spoke to Rattan and the project supervisor about placement of the sign and Gleason found the ideal spot and confirmed with Rattan that it was ok. Rattan approved the location that was ultimately questioned by the Kansas Department of Transportation and after Gleason had already dug the hole, Rattan told Gleason to “do whatever [he had] to do.” Gleason filled in the hole and moved the sign location to another area.

Gleason invoiced Kaneb directly instead of going through Persona. Kaneb then refused to pay and Gleason did not file a mechanic’s lien. Rattan stated that he refused to pay the invoice because there was not a contract between Gleason and Kaneb. On October of 2010 Gleason filed an action against Rattan and Kaneb. The action stated that Gleason was seeking to recover costs associated with the false start on the sign placement that was approved by Rattan. Rattan then moved for a judgment as a matter of law and argued that there was no privity between Kaneb and Gleason and that because Gleason failed to file a mechanic’s lien that this claim was barred. The trial court denied the motion because the court found that Gleason at the direction of Rattan was told where to place the sign. The trial court found in favor of Gleason. Rattan appealed the judgment.

On appeal the court found that a mechanic’s lien wasn’t available to Gleason as Gleason was asking for expenses that were above and beyond the original contract that Persona had with Kaneb and that Persona had with Gleason. Gleason sought to collect on a new contract that was entered into when Rattan gave the direction directly to Gleason on where to place the sign and Gleason relied upon that information. The appeals court goes on to state that the only issue before them is whether Gleason can recover on an equitable, quasi-contract theory. The court states that under the circumstances that Gleason could have reasonably expected to be paid for the mistake that Rattan made when it directed Gleason where to put the sign and Gleason relied upon that information to their detriment, which created an implied contract. The mechanic’s lien was not an option in this case and therefor the only way to recovery was under the quasi contract theory that the court felt was just as Kaneb would have been unjustly enriched had Gleason not been paid for the mistake made by Rattan.

Legislation:

1. S.B. 349, Addressing boiler inspectors and technical professions. Changes Boiler inspectors experience to five years. Deputy Boiler inspectors will have two years of education, training or work experience. This act establishes minimum qualifications for professional geologists. The board may assess costs against anyone in violation of statutes, rules and regulations, or orders of the Board.

2. S.B. 359, Successor Corporation Asbestos-Related Fairness Act. Provides that the “cumulative successor asbestos-related liabilities of a successor corporations are limited to the fair market value of the total gross assets of the transferor determined as of the time of the merger or consolidation.”

3. H.B. 2024, Roofer Registration Act. This act sets a standard list of items to be met prior to being able to obtain a registration certificate. Among this list is the applicant must be 18 years old, have workers compensation coverage, statement of experience and qualification, and compliance with this bill and all relevant federal and state laws. The Attorney General has 60 days to either issue or deny a certificate. Applicant must be given notice if denied and has 10 days to cure. This act also sets out what a contractor not in good standing means and when the Attorney General can classify a roofing contractor as not in good standing. The roofing contractor has 30 days to correct a “not in good standing” defect.

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Kentucky

Case law:

1. In *Higginbotham v. Scott & Ritter, Inc.*, 2014 Ky. App. Unpub. LEXIS 575, 1, 2014 WL 3714552 (Ky. Ct. App. July 25, 2014), the court held a contractors mechanic’s lien was superior to a leaseholders interest where the lien statement identified the property by the street address and common name and where the contractor did not file a *lis pendens*.

In *Higginbotham*, the contractor filed a mechanic lien three days before a conveyance of the property was recorded. The lien filed by the contractor identified the property by the name of the development and its street address. Subsequently, the portion of the property the contractor had improved was conveyed by deed and a lease was executed. The contractor never filed a *lis pendens*. The contractor then obtained a judgment against the owner with whom the contractor had contracted with and recorded its Notice of Judgment Lien. One day after the court entered judgment and order of sale of the property to satisfy the contractor’s lien, the leaseholder recorded its lease.

On appeal the question was whether the contractor had provided adequate notice to apprise subsequent grantees of the contractor’s interest. The court here held the street address and commonly known name was sufficient identification of the property in the lien statement. The court held further that the contractor’s filing of the lien statement sufficiently placed subsequent grantees on notice of the contractors claim without the filing of a *lis pendens*. Therefore, the contractor’s lien was valid and superior to the subsequent lease holder.

2. In *Morel Constr. Co., LLC v. Richardson Bulldozing, LLC*, 2014 Ky. App. Unpub. LEXIS 557, 2, 2014 WL 3548144 (Ky. Ct. App. July 18, 2014), the court held a venue selection

clause may be rendered invalid in an action to enforce a lien where the venue selection clause selects a venue other than the county where the property is located.

In *Morel*, a payment dispute arose between the general contractor and a subcontractor on a public project. The subcontractor filed a public improvement lien and sought to enforce the lien in the county where the property was located. The general contractor moved to dismiss pursuant to a venue selection clause in the subcontract selected a different county as the venue for any disputes. The court held that the public improvement lien statute, KRS 376.250, expressly requires a public improvement lien be filed in the county where the property is located and, therefore, renders invalid any venue selection clause to the contrary.

3. In *Ford Contr., Inc. v. Ky. Transp. Cabinet* 429 S.W.3d 397 (Ky. App. 2014) (included in the 2013 update with citation to slip opinion), the Court held that when a public construction contract is terminated for convenience (1) idle equipment is compensable and (2) FAR Cost Principles are only guidelines that may be deviated from in making a just and equitable award.

In *Ford*, the contractor was low bidder on a bridge construction project that required the closure of the existing bridge during construction. Both before and after the project was awarded, the owner received complaints from citizens who would be inconvenienced by the bridge closure. Eventually, after award of the contract, the owner cancelled the contract due to the complaints, exercising the termination for convenience clause in the contract. The contractor subsequently submitted its costs incurred to the owner for reimbursement. The owner denied the claim and the contractor prosecuted its claim.

Ford held that idle equipment was compensable. One of the disputes between the contractor and the owner was whether the contractor was entitled to expenses incurred due to idle equipment while the project was on hold. The initial fact finder, an administrative law judge, found that the contractor was not entitled to these costs. On appeal, however, the Court held that when an owner terminates for convenience—characterized by the Court as a breach of contract—a contractor is entitled to idle equipment costs with the following guidelines: (1) The contractor is only entitled to idle equipment costs for the period of delay attributable to the owner; (2) the contractor must prove that the equipment was actually idle and that the idle equipment was necessary for completion of the contract; (3) the measure of damages is the contractor's actual cost of ownership or actual rental value; and (4) that the actual costs of ownership or rental value must be reduced by 50% to reflect the absence of wear or tear during the stand-by period.

Ford adds further support that no-damage-for-delay clauses are not universally enforceable on construction projects in Kentucky. Among its reasons for allowing the contractor to recover for idle equipment was that parties are no longer able to contract away damage that results from delay. The Court recognized that case law prior to the passage of the Kentucky Fairness in Construction Act (“KFCA”), Ky. Rev. Stat. §371.400 *et seq.*, held that no-damage-for-delay clauses were generally enforceable. The Court, however, stated that it appears after 2007, when the KFCA was enacted, parties are no longer able to contract away these damages. Accordingly, the Court found this as supporting the contractor's right to damages for idle equipment, though without confirming that the contract at issue actually contained a no-damage-for-delay clause.

Ford also held that FAR Cost Principles are not mandatory. The contractor argued that Kentucky law requires the use of FAR to determine the costs incurred by the contractor when a contract is terminated for convenience. The Court, however, disagreed and, instead, found that FAR Cost Principles are mere guidelines to be used when appropriate. The Court further explained FAR Cost Principles are “appropriate” only when the “long-developed jurisprudence for determining breach-of-contract damages” “fail to make the non-breaching party whole.”

Because the court here found the more familiar breach of contract damage determining principles resulted in the contractor being justly compensated, FAR Cost Principles need not be applied.

Legislation:

1. Kentucky Revised Statute § 413.160, Actions upon written contract or not provided for by statute - Ten-year limitation. This statute was amended to reduce the statute of limitations on written contracts from fifteen years to ten.

2. Kentucky Revised Statute § 342.260, Permitted and required departmental administrative regulations - Adoption of life expectancy tables - Process and procedure - Subpoenas - Duties of sheriff and Circuit Court. This statute, as amended, provides the Department of Worker's Claims must set up an on-line system wherein businesses, e.g., contractors, will be able to obtain electronic notification if another business, e.g., one of its subcontractors, cancels its worker compensation policy. While the system is not yet up and running, it is understood that to receive such notifications contractors will need to register and enter their subcontractor's information in the system. The legislation gives the Department until December 31, 2015, to promulgate the regulations and setup the system.

3. H.B. 407, An Act relating to financing of public-private partnerships, was passed by both houses but vetoed by the Governor. This bill sought to enable the broad use of public-private partnerships for procurements in Kentucky. The bill, however, was vetoed leaving the use of public-private partnerships in Kentucky unsettled. As a result of the veto, Kentucky remains one of a handful of states without a public-private partnership enabling statute. Several industry groups have vowed to continue to push for the legislation and its re-introduction seems likely in the 2015 legislative session.

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Louisiana

Case law:

1. In *Shelter Products, Inc. v. Am. Const. Hotel Corp.*, 12-CV-2533, 2014 WL 2949444 (W.D. La. June 26, 2014), the court recognized a possible cause of action by a material supplier against an owner under the Louisiana Unfair Trade Practices Act ("LUTPA") for the owner's willful failure to notify the supplier of a project's substantial completion as required by the Louisiana Private Works Act. The supplier in *Shelter* had provided a subcontractor with lumber that was used on the project. As a result of the subcontractor's failure to pay for the lumber, the supplier filed suit against the subcontractor, general contractor, and the project owner seeking payment for amounts due. As against the owner, the supplier contended that, in accordance with La. R.S. 9:4822(K) of the Louisiana Private Works Act, it had provided notice to the owner of its contract with the subcontractor and the subcontractor's nonpayment. Accordingly, under La. R.S. 9:4822(L), the owner was required to notify the supplier within three days of the filing of a notice of termination of the work or the substantial completion of the work. A notice of substantial completion of the project was later filed, but the owner failed to notify the supplier of the substantial completion. When the supplier did find out that substantial completion had occurred, it filed a lien on the project, which the owner contended was not timely. The supplier claimed that the owner's willful failure to notify it of substantial completion as required by the Louisiana Private Works Act and the owner's subsequent reliance upon its deceptive act to build a defense to lien rights the supplier might otherwise have against the owner constituted an actionable unfair or deceptive act or practice under the LUTPA.

In the context of a motion to dismiss raised by the owner, the court acknowledged the allegations in the supplier's complaint that the owner violated an express statutory directive that it provide the supplier notice of substantial completion of the project so that the supplier could timely assert any lien rights. The supplier's complaint further alleged that the owner knew that the supplier had a claim for a significant amount of money due for lumber used on the project, but the owner did not give the supplier the statutorily required notice and it then relied on the supplier's delay in filing a lien to defend against it. The court found that these allegations, if taken as true, were sufficient to state a plausible claim under the LUTPA that survives review of the pleadings and must be resolved by more substantive means such as a motion for summary judgment that includes competent evidence regarding the underlying facts.

2. In *Jems Fabrication, Inc., USA v. Fid. & Deposit Co. of Maryland*, 13-30934, 2014 WL 1689249 (5th Cir. Apr. 30, 2014), the Fifth Circuit found that a general contractor's Miller Act surety was bound by the terms of the subcontract between the general contractor and its subcontractor. The subcontractor on a government contract to renovate pumping stations filed suit against the general contractor's payment bond surety pursuant to the Miller Act seeking payment for services rendered. The surety argued that it was entitled to a setoff against the subcontractor for additional expenses incurred by the general contractor as a result of the subcontractor's failure to procure all materials for the project. The subcontractor countered that the surety was not entitled to a setoff because the general contractor had failed to provide the subcontractor with notice of any deficiency and an opportunity to cure as required by the subcontract before incurring these additional expenses. The surety, however, contended that, unlike the general contractor, it was not bound by the "notice and cure" provisions of the subcontract and that it should not be precluded from obtaining a setoff on that basis.

The Fifth Circuit found that while a Miller Act surety is not a party to a subcontract between a subcontractor and a general contractor, it nonetheless stands in the shoes of the general contractor and is bound by the general contractor's dealings for these purposes. Therefore, the surety, like the general contractor, was bound by the terms of the subcontract, including its "notice and cure" provisions. Because the general contractor failed to comply with the "notice and cure" provisions, the court concluded that neither the general contractor nor the surety was entitled to a setoff.

4. In *Stewart Interior Contractors, L.L.C. v. MetalPro Indus., L.L.C.*, 2013-0922 (La. App. 4 Cir. 1/8/14), 130 So.3d 485, the court found that a subcontractor was not the co-solidary 59blige or agent/mandatary of the general contractor, and, therefore could not seek to recover damages on behalf of the general contractor against the manufacturer of an allegedly defective product. The case involved a lawsuit brought by a drywall subcontractor against the manufacturer of metal studs seeking damages caused by alleged defects in the studs under the Louisiana Products Liability Act ("LPLA"), for breach of contract, and in redhibition. The subcontractor claimed that after sheetrock was installed over the metal studs, finished, and painted, small indentation marks or dimples began to appear on the walls, resulting in increased costs for labor and materials to repair the indentations, expert investigations, and delays. The subcontractor claimed that the indentation marks were caused by a defect in the metal studs and filed suit against the manufacturer seeking not only its own damages resulting from the defective studs, but also the damages allegedly incurred by the general contractor (which damages were assessed by the general contractor against the subcontract under the subcontract). The subcontractor claimed it could recover damages on behalf of the general contractor because it was the general contractor's co-solidary 59blige and because it was the general contractor's agent or mandatary.

The manufacturer filed an exception of no right of action, asserting that the subcontractor was not a solidary 59blige or agent/mandatary of the general contractor, and,

therefore had no right of action to recover damages on behalf of the general contractor. The court agreed. According to the court, “[a]n obligation is solidary for the obligees when it gives each obligee the right to demand the whole performance from the common obligor.” Additionally, “solidarity of [an] obligation cannot be presumed, but must arise from a clear expression of the parties' intent or from the law.” The court went on to find that the fact that the general contractor withheld funds from the subcontractor as a result of the defective studs and that the manufacturer may have been liable to the subcontractor in indemnity while at the same time being potentially liable to the general contractor under the LPLA does not make the subcontractor and general contractor solidary obligees. Instead, the court found that, if anything, the general contractor's withholding of funds from the subcontractor pursuant to the subcontract gave the subcontractor a cause of action against the general contractor, not the manufacturer.

The court also found that there was no evidence that the subcontractor was authorized to act as an agent or mandatary on behalf of the general contractor. Louisiana Code of Civil Procedure Article 694 establishes two requisites for an agent to have a right of action to sue to enforce the right of its principal. First, the agent must have an existing agency relationship with the principal. Second, the agent can bring suit on behalf of its existing principal only “when specially authorized to do so.” The court concluded that the subcontractor did not have an interest in a judicially enforceable right on behalf of the general contractor against the manufacturer because the subcontractor does not belong to the particular class of plaintiffs to whom the law would provide a remedy against the manufacturer for damages allegedly incurred by the general contractor. Accordingly, the court maintained the manufacturer's exception of no right of action.

5. In *JP Mack Indus. LLC v. Mosaic Fertilizer, LLC*, 970 F. Supp. 2d 516, 517-18 (E.D. La. 2013), the court found that a subcontractor failed to state an unjust enrichment or third-party beneficiary claim against the owner for amounts allegedly due the subcontractor under change orders between the owner and the general contractor. The litigation at issue arose out of a construction project nonpayment dispute between the owner, general contractor, and a subcontractor. During the course of the subcontractor's work, the owner and general contractor approved change orders totaling approximately \$1M which caused the subcontractor to incur nearly \$400,000 in overtime and equipment expenses above the original contract estimate. Overall, the subcontractor incurred an approved \$1,650,000 above the original contract price. Although the subcontractor rendered all services and delivered all materials in accordance with the original contract and all change orders, it was still owed over \$600,000 for its work. Accordingly, the subcontractor filed suit against the general contractor and owner asserting open account and late payment claims against the general contractor and unjust enrichment and third-party beneficiary theories of recovery against the owner. The owner filed a motion to dismiss the unjust enrichment and third-party beneficiary claims asserted against it.

Addressing the subcontractor's unjust enrichment claim, the court held that the fact that the subcontractor had other remedies at law against the owner—particularly, a statutory claim under the Private Works Act which the subcontractor had failed to preserve—precluded an unjust enrichment claim. As support for this holding, the court explained that the Louisiana Supreme Court has observed that “[t]he mere fact that a plaintiff does not successfully pursue another available remedy does not give the plaintiff the right to recover under the theory of unjust enrichment.” *Walters v. MedSouth Record Mgmt., LLC*, 2010-0352 (La. 6/4/10), 38 So. 3d 241, 242.

The court likewise rejected the subcontractor's third party beneficiary claim, which alleged that the change orders executed between the owner and general contractor conferred a benefit on the subcontractor. The court explained that to establish a “stipulation pour autrui” (a contractual provision that benefits a third-party and gives the third-party a cause of action

against the promisor for specific performance), there must be a clear expression of intent to benefit the third-party. A stipulation pour autrui is never presumed but, rather, the intent of contracting parties to stipulate a benefit in favor of a third-party must be made manifestly clear. The third-party relationship must form the consideration for a condition of the contract, and the benefit may not be merely incidental to the contract. The court found that the subcontractor's factual allegations that it was a third-party beneficiary to the change orders between the general contractor and the owner were conclusory and fell far short of demonstrating facial plausibility because the subcontractor had not pleaded factual content that would allow the court to draw the inference that the owner was liable under a third-party beneficiary theory. Rather, the subcontractor's allegations suggested that the benefit conferred upon it as subcontractor was merely incidental to the change orders between the general contractor and the owner, and thus fell short of stating a claim for stipulation pour autrui.

6. In *F.H. Myers Construction Company v. State of Louisiana, Division of Administration Office of Facility Planning and Control*, 2013-2153 (La. App. 1 Cir. 6/18/14), 2014 La. App. Unpub. LEXIS 375, the Louisiana First Circuit Court of Appeal addressed whether a provision in the supplementary conditions (§ 7.2.7) of the contract with the general contractor -- Myers -- was void and unenforceable under La. R.S. 38:2216(H). Myers appealed the district court's grant of summary judgment in favor of the State.

Louisiana Revised Statute 38:2216(H) prohibits provisions in public contracts which purport to waive, release, or extinguish in advance a contractor's right to recover damages for delays caused in whole, or in part, by acts or omissions within the control of the contracting public entity. Section 7.2.7 of the supplementary conditions of Myers' contract with the State (a state standard form) provided that Myers would only be due extended jobsite overhead for delays when a complete stoppage of work occurred that was due to acts or omissions solely attributable to the owner. The court held that Section 7.2.7 of the supplementary conditions was void and enforceable because the terms "solely" and "complete stoppage of work" improperly attempted to circumscribe Myers' ability to recover delay damages to circumstances narrower than what La. R.S. 38:2216(H) permits. The court, therefore, reversed the trial court's summary judgment in favor of the State.

In addition the court found that there was a genuine issue of material fact as to whether certain items claimed by Myers as part of its labor burden were compensable under the contract with the State. Myers's labor burden proposal included numerous items not specifically listed in the supplementary conditions as "cost of the work." However, the fourth numbered item under the contract's definition of what constitutes "cost of the work" was "[o]ther documented direct costs." Since the language of the provision did not specifically limit labor burden to only listed items, the Court found that the labor burden markup was not limited exclusively to those items listed in the first three numbered sections under "cost of the work."

7. In *Crescent Property Partners, LLC v. American Manufacturers Mutual Insurance Company, et al*, 2013-0661 (La. App. 4 Cir. 2/28/14), 134 So.3d 85, the Louisiana Fourth Circuit Court of Appeal held that the 2003 revisions to Louisiana Revised Statute 9:2772, which shortened from five to seven years the preemptive period (a statute of repose) for construction claims, could not be retroactively applied to "vested" claims. The trial court in Crescent had issued a judgment granting the defendants' request to confirm an arbitration award, which award dismissed all of Crescent Property's claims based on retroactive application of La. R.S. 9:2772. The Fourth Circuit reversed.

In reversing the trial court's confirmation of the arbitration award, the court of appeal distinguished Crescent Property's claim from claims at issue in the Louisiana Supreme Court decision in *Ebinger v. Venus Const. Corp.*, 10-2516 (La. 7/1/11), 65 So.3d 1279. In particular, the court of appeal noted that although *Ebinger* permitted retroactive application of the 2003

amendment to La. R.S. 9:2772, the claim in that case had not accrued or vested. Here, the court of appeal found that Crescent Property's claim had accrued or vested approximately 21 days before the amendment became effective. As such, the court found that the arbitration panel's decision violated Crescent Property's due process rights by retroactively applying the five-year preemptive period of La. R.S. 9:2772 to Crescent Property's vested claims. Therefore, the trial court's confirmation of the award constituted legal error, meriting reversal.

8. In *A.P.E., Inc. v. City of New Orleans*, 2013-1091 (La. App. 4 Cir. 1/15/14), 132 So.2d 475, the Louisiana Fourth Circuit Court of Appeal held that the relevant time for determining whether a bid violates City Ordinance § 2-777, which prohibits a city officer or employee from having a financial interest in any city contract, is at the time the bid is submitted.

At the time Signal 26 submitted its bid to provide New Orleans Police Department uniforms and equipment, it was owned, in part, by the wife of a New Orleans police officer. The wife sold her shares in Signal 26 after the bid was submitted but before Signal 26 was awarded the contract for the uniforms and equipment. The City of New Orleans argued that the ordinance only prohibits a city employee from receiving a financial benefit on a public contract, and the contract at issue was not executed until the bids were opened.

In rejecting the city's position, the court relied on persuasive jurisprudence from Illinois -- *People v. Savaiano*, 359 N.E.2d 475 (1976). In *Savaiano*, the court similarly rejected an argument that an executed contract was essential for a violation of a local statute prohibiting a public official with certain financial interests from entering into a public contract. *Savaiano* was based on the purpose of the statute in deterring self-dealing conduct by a public official, rather than a strict interpretation that the word "contract" meant a completed binding agreement. In view of *Savaiano*, the court of appeal held that Signal 26's bid submission was a nullity, and the contract was required to be rebid.

9. In *Command Construction Industries, L.L.C. v. City of New Orleans*, 2013-0524 (La. App. 4 Cir. 10/23/13), 126 So.3d 716, the Louisiana Fourth Circuit Court of Appeal held that the city's award of a public contract was improper because it allowed the successful bidder to substitute the first page of its bid after the bid submissions were opened.

On the day bids were opened, Command was the lowest bidder on a public contract known as the Harrison Avenue Streetscape Project. The next day, the second lowest bidder -- Durr Heavy Construction, L.L.C. -- issued a letter and revised its bid (to be lower than Command's) because of a clerical error. Durr argued that it mistakenly included alternates in its base bid price. The city awarded the contract to Durr, and Command initiated proceedings to enjoin the city's award of the contract to Durr and to compel the city to award the contract to Command.

The court acknowledged there was no dispute that Durr's base bid mistakenly included the cost of alternates. However, the bid form specified that the base bid was not to include the cost of alternates and that modifications were only permitted until the time the bids were opened. As such, the city was required to consider Durr's bid at the time the bids were opened, and its permission granted to Durr to revise the first page of its bid to reflect the base bid without alternates was improper.

Furthermore, relying on the Louisiana Supreme Court's ruling in *Airline Const. Co., Inc. v. Ascension Parish Sch. Bd.*, 568 So.2d 1029 (La. 1990), the court held that if an unsuccessful bidder, such as Command, timely seeks an injunction (but, as here, is unsuccessful at the district court level, resulting in the project moving forward with the wrong contractor), the unsuccessful party may seek damages should the district court's determination later be found to have been in error.

10. In *Quality Design and Construction, Inc. v. City of Gonzales*, 2013-0752 (La. App. 1 Cir. 3/11/14), the Louisiana First Circuit Court of Appeal addressed whether mandamus is the appropriate procedural mechanism for pursuing claims under La. R.S. 38:2191(D). The City of Gonzales advertised for bid and entered into a public works contract with Quality Design and Construction, Inc. (QDC), the lowest bidder. After completing the work, QDC filed a petition for writ of mandamus to compel the city to pay the contract balance of \$51,200.00. The trial court granted QDC's writ of mandamus, ordering payment to be made. Thereafter, QDC filed a "Petition for Alternative Writ of Mandamus," alleging that, notwithstanding the trial court's judgment, no amount whatsoever had been paid by the City to QDC. On appeal, the City argued that mandamus was not appropriate for QDC's claims pursuant to La. R.S. 38:2191(D) for two reasons: (1) because a majority of the funds budgeted for the project had been exhausted through payments to QDC as well as payments to subsequent contractors and suppliers hired to correct and/or complete the scope of QDC's work, and (2) because QDC failed to prove that the City's withholding of payment was "arbitrary and without reasonable cause," as required by the mandamus statute.

The court upheld the judgment of the trial court, which compelled the city to pay QDC the contract balance of \$51,200.00, and held that La. R.S. 38:2191(D) specifically and unambiguously refers to appropriation "made for the award and execution of the contract." Additionally, the city cited no authority for its proposition that a writ of mandamus for La. R.S. 38:2191(D) claims is conditioned on appropriated funds remaining available. Further, the court found no merit in the city's argument that its withholding payment of the judgment was reasonable, notwithstanding the City's pending suit against QDC for warranty work and defective products.

11. In *City of New Orleans v. Advanced Environmental Consulting, Inc.*, 131 So.3d 912 (La. App. 4 Cir. 12/4/13), the City of New Orleans disqualified a low bidder on a demolition contract. In the process, the city declared the low bidder to be non-responsive in its bid, and, additionally, not "responsible" as a contractor. The contractor was allowed an administrative hearing with the City (under Louisiana Revised Statute 38:2212(J), which calls only for "an informal hearing at which such a bidder is afforded the opportunity to refute the reasons for the disqualification") on the disqualification. The City's initial decision was upheld at the informal hearing. Unsatisfied, the contractor filed suit in state court in New Orleans seeking injunctive relief, a declaratory judgment, and a writ of mandamus.

The trial court in New Orleans found in favor of the contractor, declaring the contractor to be both responsive and "responsible." In response, the City filed an appeal to the Louisiana Fourth Circuit Court of Appeal. On appeal, the issue of the responsiveness of the contractor's bid (on the issue of a potentially nonconforming DBE form) was dispensed with in short order, the court choosing instead to focus on the question of contractor "responsibility."

The City asserted that the contractor, when engaged on an earlier similar project for the City, performed in an untimely manner and in violation of state environmental rules. The Court of Appeal reviewed the records related to the two projects (the earlier project and the project that was the subject of the instant bid) and determined that the work scope which was the genesis of the City's complaints against the contractor on the first project (pertaining to treatment of asbestos-containing materials) was intentionally dealt with in a different manner in the contract documents for the second project, presumably to address unclear provisions in the specifications for the first project. Additionally, the Court of Appeal noted extensive attempts of the contractor to fulfill the first contract notwithstanding the problematic specifications.

The Court of Appeal acknowledged the axiom that a court should not, in the context of a public bid dispute, "substitute [the Court's] judgment for the good faith judgment of an

administrative agency.” Even so, the Court, based on the facts before it, upheld the finding of the trial court that the City had acted arbitrarily and capriciously in disqualifying the contractor.

Legislation:

1. La. R.S. 38:2191 – Act No. 487. Act No. 487, effective August 1, 2014, amends La. R.S. 38:2191 (B) and (D), the current law governing payments under public contracts, to revise the provisions regarding the formation of public contracts, progressive stage payments under public contracts, and payments of change orders to public contracts. Specifically, the new legislation adds language to the existing law providing for liability for reasonable attorneys’ fees when a public entity fails to make any progressive stage payments within 45 days following receipt of a certified request for payment without reasonable cause by the public entity. The prior law only allowed reasonable attorney fees when the public entity failed to make final payments after formal acceptance and within 45 days following the receipt of a lien certificate. Section (D) retains the prior law, which provides that any public entity who fails to make progressive state payments, arbitrarily or without reasonable cause, or any final payment when due, is subject to mandamus to compel the payments. The amendment adds language that a public entity is also subject to mandamus to compel payments of any authorized change orders, or plan changes.

2. La. R.S. 14:202.1 – Act No. 62. Effective August 1, 2014, Act No. 62 amends La. R.S. 14:202.1, which previously provided for “home improvement fraud,” to now provide for the crime of “residential contractor fraud.” The Act defines the crime of residential contractor fraud, and provides for imprisonment of up to 10 years, fines up to \$3,000, and full restitution to the victim and any other person who has suffered a financial loss as a result of the offense.

3. La. R.S. 38:2211, et seq. – Act No. 759. Act No. 759, effective August 1, 2014, provides for various changes to the provisions of the Louisiana Public Works Act, including La. R.S. 38:2211, 2212, 2212.5, 2212.10, 2215, 2225, and 2241.1. Generally, these changes amend and/or add definitions; amend the procedures for the advertisement and letting of bids; revise the time periods relative to awarding and executing a contract and for issuing a notice to proceed; and amend the provisions regarding the recordation and acceptance of work by a public entity upon substantial completion.

4. La. R.S. 38:2225.2.4 – Act No. 782. Act No. 782, effective August 1, 2014, enacts La. R.S. 38:2225.2.4, which permits a public entity to use the construction management at risk project delivery method to contract for a public works project when deemed in the public interest, beneficial to the owner, and in accordance with the procedures set forth in La. R.S. 38:2225.2.4. The construction management at risk project delivery method can only be used for projects exceeding twenty-five million dollars.

5. La. R.S. 23:291(E) – Act No. 335. Effective August 1, 2014, Act No. 335 amends La. R.S. 23:291(E) to provide that an employer, general contractor, owner or other third party shall not be liable for negligent hiring or supervision of an employee or independent contractor solely because that employee or independent contractor was previously convicted of a criminal offense. This amendment does not apply to the following: acts of an employee falling within the course and scope of the employee’s employment when the damages or injury are substantially related to the nature of the crime that the employee was convicted of and where the employer, general contractor, owner or third party knew or should have known of the conviction; and acts of an employee previously convicted of a crime or violence or sexual offense when the employer, general contractor, owner or third party knew or should have known of the conviction.

6. La. R.S. 9:4802(G)(1) – Act No. 357. Effective August 1, 2014, this act amends and reenacts La. R.S. 9:4802(G)(1) to provide that for a privilege under section (G)(1) or La. R.S.

9:4801(4) to arise, the lessor of movables shall deliver notice that contains the name and mailing address of the lessor and lessee and description sufficient to identify the movable property placed at the site of the immovable for use in the work. The notice, delivered to the owner and contractor not more than ten days after the movables are first placed at the site shall also state the term of rental and terms of payment and shall be signed by the lessor and lessee.

7. La. R.S. 37:1367(I) – Act No. 561. Effective August 1, 2014, the amendment to Section I provides that any person or firm not licensed by the State Plumbing Board may still perform limited main-line utility construction on private property or undedicated rights-of-way or servitudes, if the person or firm is licensed for municipal and public works utility construction pursuant to the requirements of the State Licensing Board for Contractors. This provision is not applicable to gas mains within the boundary lines of private property or service lines.

Case law nos. 1-5 and Legislation nos. 1-4 Submitted by: Danny G. Shaw, Mark W. Mercante, and Matthew R. Emmons, Baker Donelson Bearman Caldwell & Berkowitz, PC, 3 Sanctuary Blvd., Suite 201, Mandeville, Louisiana, (985) 819-8400, dshaw@bakerdonelson.com.

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Maine

Case law:

1. In *Ted Berry Co., Inc. v. Excelsior Insurance Co.*, No. 2:13–CV–342–BDH, 2014 WL 424214 (D. Me. Feb. 4, 2014), the Maine federal district court held that a commercial general liability (CGL) insurer was not obligated to defend a construction company in a breach of contract suit for damaging a municipal sewer pipe beyond repair.

The Ted Berry Company was engaged to repair a municipal sewer pipe using the “pipe-bursting” method. The company abandoned the job part-way through, after damaging the pipe beyond repair. The town sued the company for breach of contract, seeking the replacement cost of the damaged pipe. The company’s insurer refused to defend the suit, arguing that the breach fell within the “property damage” exclusion in the CGL, which excludes damages from “property that must be restored, repaired or replaced because ‘your work’ was incorrectly performed on it.” The district court agreed. Though an insurer has a duty to defend a suit “[i]f the complaint shows even a possibility that the events giving rise to it are within the policy coverage,” the court held that the breach alleged in the town’s complaint fell entirely within the “property damage” exclusion in the CGL. *Auto Europe, LLC v. Conn. Indemnity Co.*, 321 F.3d 60, 66 (1st Cir. 2003).

Ted Berry Company argued that the alleged breach fell within an exception to the exclusion - the “products-complete operations hazard” exception - which exempted “‘property damage’ occurring away from premises you own or rent and arising out of ‘your product’ or ‘your work’. . . that has not yet been completed or abandoned.” The court rejected this argument, because the exception only applies to damage that occurs after a job is completed or abandoned. Here, the damage occurred before the company abandoned the project. Because there was no way for the breach described in the complaint to fall within the CGL’s coverage, the insurer had no duty to defend.

2. In *Lyman Morse Boatbuilding, Inc. v. N. Assurance Co. of Am., Inc.*, No. 2:12–CV–313–DBH, 2014 WL 901445 (D. Me. Mar. 6, 2014), the Maine federal district court held that where an insurer improperly denies its duty to defend, its obligation is not exonerated just because a third party, here a co-defendant, paid all of its insured’s defense costs.

The underlying claim asserted defective yacht construction against a yacht-building company and its principal, in his individual capacity. After the commercial general liability insurer refused to defend the company and the individual in the arbitration, the company provided a defense for both the company and the individual. In an earlier suit, the court ruled that the insurer had breached its duty to defend the individual, but not the corporation in the arbitration. *Lyman Morse Boatbuilding, Inc. v. N. Assurance Co. of Am., Inc.*, No. 2:12–CV–313–DBH, 2013 WL 5435204 (D. Me. Sept. 27, 2013). The individual then sought recovery of all defense costs from the underlying arbitration, even though the company, and not the individual, paid those defense costs.

Under Maine’s “collateral source rule,” an injured party, although compensated in whole or in part by a third party, can nevertheless obtain full recovery against the wrongdoer. The Maine Supreme Judicial Court has reasoned that if there is to be a windfall, it should not go to the party in breach, but to the injured party. Here, the insurer was the wrongdoer and the injured party was the individual who was denied a defense by the insurer; the individual found a third party, the company, to provide the defense that the insurer should have provided; and the insurer could not use that performance to exonerate itself from its breach of duty. The federal court noted that failing to apply the collateral source rule here and permitting the insurer to escape responsibility for the insured’s defense would create the wrong incentive for insurers examining their duty to defend.

Because no clear line existed to allocate defense costs between the insured individual and the uninsured company, the court decided on a round number allocation of 50%, because it would be unfair for the insurer to pay nothing and it would be unfair for the insurer to pay the defense costs of both the insured individual and the uninsured corporation.

3. In *The Cote Corp. v. Kelley Earthworks, Inc.*, 2014 ME 93, --- A.3d ---, the Maine Law Court ruled that a mechanic’s lien judgment requires sale of the lien property, but not necessarily the entire parcel.

Here, a contractor, The Cote Corporation, filed a mechanics’ lien against real property owned by Kelley Earthworks, Inc. Kelley failed to answer the complaint perfecting the lien and did not respond to Cote’s motion for summary judgment. Based on the motion, the trial court entered judgment for Cote in the amount of \$29,990 plus interest and attorney fees and ordered sale of the property to satisfy the judgment if it was not redeemed by Kelley within 90 days. Ten days later, Kelley sought to set aside the default under M.R. Civ. P. 60(b). Though the trial court denied to motion to set aside, it treated Kelley’s motion as a motion to alter or amend the judgment under M.R. Civ. P. 59(e), and modified its order to sell what Kelley represented was a property worth \$1M, awarding Cote money damages instead.

The Law Court held that the trial court abused its discretion by setting aside the sale and substituting money judgment; the Maine mechanics’ lien statute requires sale of the Kelley property in order to satisfy the lien, but not sale of the entire parcel if that is unnecessary to satisfy the lien. 10 M.R.S.A. § 3259 (2013) (“If the court shall determine that the whole of the land on which the lien exists is not necessary therefor, it shall describe in the order of sale a suitable lot therefor; and only so much shall be sold.”) The statute does not contemplate a money judgment as an alternative to sale of the lien property; rather a money judgment is only proper if the sale proceeds are insufficient to satisfy the lien. The trial court was permitted to include a right of redemption, which it did, and going forward is authorized to partition off a “suitable lot” in lieu of ordering sale of the entire property to balance the requirements of the mechanics’ lien statute and the equities the trial court found existed.

Legislation:

1. L.D. 175, An Act to Update the Laws Governing Energy Efficiency Building Performance Standards, (126th Legis. 2013). The Maine Legislature repealed a number of provisions throughout the Maine Code related to related to energy efficiency building performance standards, including a number of definitions (ASHRAE standards, “industrial building,” “commercial building,” “public building,” and “residential building”); two provisions regarding cooperation among state and regional agencies; reference to the Maine Model Building Code; and a provision authorizing the Public Utilities Commission to establish performance-based compliance procedures for heating systems in residential buildings.

2. L.D. 833, An Act to Allow Municipalities to Place Liens for Failure to Pay Storm Water Assessments, (126th Legis. 2013). The Maine Legislature amended the statute governing service charges for sewage or storm water disposal, 30-A M.R.S.A. § 3406. Municipalities are now able to place liens on “real estate benefitted or served” by municipal storm water disposal systems when property owners fail to pay storm water service charges. Previously, the statute had authorized liens for failure to pay sewer system service charges, but not storm water charges. These municipal liens take precedence over all other claims except tax liens.

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Maryland

Case law:

1. In *Trustees of the Heating, Piping and Refrigeration Pension Fund v. Milestone Construction Services, Inc.*, Civil No. JKB-13-0598, 2014 WL 103825 (D. Md. Jan. 10, 2014), the United States District Court for the District of Maryland addressed (1) whether, under the Miller Act, both the action on a payment bond and the notice of the action must state the amount claimed with substantial accuracy; and (2) whether the plaintiff’s notice of the action failed to state the amount claimed with substantial accuracy. After navigating the legislative history of the Miller Act and applying rules of statutory interpretation, the court first concluded that the amount claimed must be stated with substantial accuracy on both the action and the notice of the action. Notably, the court explained that any other reading would render the need for notice meaningless. Next, the court concluded that the plaintiff’s notice failed to state the amount claimed with substantial accuracy because the plaintiffs’ “notice failed to give [d]efendants any estimation of the magnitude of their claim or even any clear instructions on how [d]efendants might calculate it based on the information in their possession.”

2. In *In The Appeal of Advanced Fire Protection Systems, LLC*, Docket No. MSBCA 2868 (Md. State Bd. Contract Appeals Feb. 2014), the Maryland State Board of Contract Appeals (the “Board”) denied an appeal because the underlying bid protest was not filed within seven days from the time that the basis of the protest was known or should have been known. The appellant claimed that it could not have filed a protest earlier than it did because it did not yet know the specific basis for the rejection of the bid. The Board, however, concluded that the correspondence to the appellant was specific enough to inform the appellant of the basis of the protest. Indeed, although the appellant was not aware of *all* details of the rejection, its dilemma was akin to those faced by all potential contractors. As the Board summarized, “the 7-day limitation for filing bid protests is as unforgiving as it is unambiguous.”

Legislation:

1. House Bill 207 (State Capital Projects – High Performance Buildings). This administration bill expands the definition of a high-performance building to include any building that complies with a nationally recognized and accepted green building standard that is (1) reviewed and recommended by the Maryland Green Building Council and (2) approved by the Secretaries of Budget and Management and General Services for Maryland. Legislation passed in 2008 required many new/renovated State buildings and new school buildings to be constructed as high performance buildings, subject to a waiver process. In addition to the waiver process, the law only applied to new or renovated State buildings that are at least 7,500 square feet and are built or renovated entirely with State funds. Under the law, renovations must include the replacement of HVAC, electrical, and plumbing systems, and must retain the building shell. Unoccupied buildings, such as warehouses, garages, maintenance facilities, transmitter buildings, and pumping stations, are exempt. The bill will take effect on October 1, 2014.

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Massachusetts

Case law:

1. In *Merit Construction Alliance v. City of Quincy*, 759 F.3d 122 (1st Cir. 2014), the First Circuit upheld the District Court ruling that the City of Quincy's ordinance requiring bidders on municipal public works projects "engage[] in a bona fide apprentice training program" registered with the Massachusetts Department of Labor Standards" is preempted by the federal Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.* The Court noted that ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans. By its terms, ERISA "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). The Supreme Court has expansively interpreted the statute's "relate to" language to mean that any state statute with "a connection with or reference to" an ERISA plan will result in preemption. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). ERISA specifically includes apprentice training programs in its definition of welfare benefit plans. Here, the City ordinance requires contractors on Quincy public works projects to operate a Massachusetts-approved apprentice training program which has stringent conditions related to documentation, location of apprentice activities, training and instruction, wages, reporting, instructor qualifications, and defined graduation rates. The Circuit Court held that the ordinance goes far beyond having a connection with or reference to an ERISA apprentice programs and is simply too intrusive to withstand ERISA preemption. The Court notes that permitting cities to enforce such ordinances would disrupt the balance and the uniformity that Congress sought to implement through ERISA.

2. In *National Lumber Co. v. Blackwood Development Corp.*, 9 N.E.3d 348 (Mass. App. Ct. 2014), the Court strictly construed the mechanic's lien statute in favor of the property owner and against the subcontractor materialman, holding that at the time of notice of subcontractor's lien the owner did not owe any funds to general contractor, therefore, subcontractor's lien was ineffective. Under Massachusetts' mechanic's lien law, when a subcontractor gives an owner actual notice, the subcontractor shall have a lien on the property, but such lien shall not exceed the amount due or to become due to the general contractor under the original prime contract as of the date of the notice by the subcontractor to owner. M.G.L.A. 254 § 4. Here, by the time the subcontractor materialmen had provided notice to the owner, the owner had already terminated the general contractor and taken control of the project. Therefore, any amounts owed to the general contractor, and so available to secure the subcontractor's lien, would be determined at

the completion of the project, calculated as the “contract amount less amounts incurred by [owner] in obtaining the completion of the contracts.” In the bifurcated trial, a jury found that owner’s damages as a result of general contractor’s breach, including costs to complete the project, exceeded any amount remaining of the contract sum and so nothing was due to general contractor upon completion of the project. Based on this determination, the trial judge, in the jury-waived portion of the trial, and as upheld by the appellate court, found that by the time the subcontractor materialman perfected its lien for \$98,000, the owner had already terminated general contractor and was entitled to damages to complete the project; because no amounts were due by owner to general contractor, the subcontractor had no lien rights against the owner’s property.

3. In *Kosanovich v. 80 Worcester Street Associates, LLC*, 2014 Mass. App. Div. 93 (May 28, 2014), the Massachusetts appellate court extended the warranty of habitability to newly renovated condominiums, building on the Massachusetts Supreme Judicial Court’s extension of the warranty of habitability to newly constructed condominiums in *Berish v. Bornstein*, 770 N.E.2d 961 (Mass. 2002). In *Bornstein*, Massachusetts’ highest court ruled that the warranty of habitability protected purchasers of newly constructed condominiums from “structural defects which are nearly impossible to ascertain by inspection after home [sic] is built and imposes burden [sic] of repairing latent defects on person who has opportunity to notice, avoid, or correct them during construction process” just as it protects purchasers of single family homes. As to newly renovated condominiums, though a renovator may have less of an opportunity to notice, avoid, or correct latent defects than the original contractor, the renovator is still in a better position than the purchaser, and the renovator may introduce latent defects through the renovation process. Applying the warranty to the property at hand, the appellate court held that though defects in the drywall did not render the unit unsafe or uninhabitable, the trial court could have reasonably credited the homeowner’s claim that the leaking roof and skylight installation made the renovated condominium unsafe or unfit for human habitation and therefore breached the implied warranty of habitability.

4. In *Wyman v. Ayer Properties, LLC*, 11 N.E.3d 1074 (July 2014), the Massachusetts Supreme Judicial Court agreed with the lower appellate court that for policy reasons the economic loss rule does not apply to damage caused to common areas of a condominium building as a result of the builder’s negligence. Under Massachusetts’ law the economic loss rule, a negligent supplier shall not ordinarily be liable in tort absent personal injury or physical damage to property, beyond the defective product itself. The rule was developed so that tort concepts do not undermine contract expectations. The Court goes on to note that issues with application arise in condominium ownership because the party exclusively responsible for bringing claims for defects in common areas, here the trustees of the condominium association, has no contract with the builder and therefore cannot enforce a contractual right against the builder. Therefore, application of the economic loss doctrine would bar the owner’s recovery for economic damage to the common areas. The Court therefore agrees with the lower court that the purpose of the rule does not require that a court leave a wronged party without remedy. The rationale for applying the rule is also lessened by the fact that the trustees here seek finite and foreseeable damages for repair since the doctrine is intended to preclude recovery for intangible and unknown damages for lost contract and economic activity. The Court ultimately holds that as there is no allegation of consequential damages, rather simply a reliable proven amount needed to repair the defects, the purpose of the economic loss doctrine has little applicability to such circumstance. Therefore, the Court affirms the trial judge’s decision to award economic damages for negligent construction.

5. In *Clean Properties, Inc. v. Riselli*, No. MICV2014-04742, 2014 WL 4082266 (Mass. Super. Ct. June 20, 2014), a homeowner’s acceptance of an environmental contractor’s proposal by email was enough to establish a “written contract” under the Massachusetts mechanic’s lien statute. Nothing in the Massachusetts statute requires a physical signature on a

piece of paper. Acceptance of a written proposal by electronic signature conveyed by email satisfies the mechanic's lien statute under Massachusetts' version of the Uniform Electronic Transactions Act, M.G.L.A. 110G § 7(b) ("A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation."). As requested by the environmental contractor the homeowner stated in her email: "I agree with the terms of the contract identified as Project # 0941, Order 1 dated August 2, 2013. Please start the work right away." Given the homeowner's intent that her email have the same effect as signing or accepting a written contract, the homeowner's typed name in the signature block of her email to the contractor served as her "electronic signature" creating a written contract enforceable under the mechanic's lien statute.

Legislation:

1. M.G.L.A. 149 § 29F, as amended by H.B. 4368, An Act Relative to Fair Retainage Payments in Private Construction (2014). On April 8, 2014, Governor Duvall L. Patrick signed the Act into law regulating retainage on private construction projects. The Act applies to prime construction contracts valued at \$3M or more and for which a lien is permitted by Massachusetts law (see M.G.L.A. 254 §§ 2, 4).

The new law caps retainage at 5% of each progress payments and requires the prime contractor to submit notice of substantial completion to the owner in the form set forth in the statute within 14 days of achieving substantial completion. The Act defines substantial completion as:

the stage in the progress of the project when the work required by the contract for construction with the project owner is sufficiently complete in accordance with the contract for construction so that the project owner may occupy or utilize the work for its intended use; provided further, that 'substantial completion' may apply to the entire project or a phase of the entire project if the contract for construction with the project owner expressly permits substantial completion to apply to defined phases of the project.

The project owner must accept or reject the notice of substantial completion in writing within another 14 days or else the notice is deemed accepted. Any rejection of the notice is subject to the dispute resolution provisions of the prime contract.

Fourteen days after acceptance, or deemed acceptance, of substantial completion, the owner must, in good faith, submit a punch list to the general contractor identifying both defective and incomplete work and deliverables required for final completion. Within 21 days after acceptance, or deemed acceptance, of substantial completion, the prime contractor shall, in good faith, provide each entity from whom the prime contractor is withholding retainage a written list of defective or incomplete work and deliverables necessary to close out the project. The prime contractor's list may include items not included on the owner's punch list.

The general contractor and subcontractors have a right to invoice for retainage 60 days after substantial completion. Such request shall include a written list of defective or incomplete work resolved and deliverables delivered. An application for payment of retainage shall generally be paid within 30 days following invoicing; for each tier below the prime contractor seven days are added. The owner and higher tier contractors may withhold payment for outstanding deliverables, and defective or incomplete work and claims.

Finally parties cannot contract around the Act: "A provision in a contract for construction which purports to waive, limit or subvert this section or redefine or expand the conditions for

achievement of substantial completion for payment of retainage shall be void and unenforceable.”

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Michigan

Case law:

1. After nearly a decade of litigation, the Michigan Supreme Court in *Miller-Davis Company v. Ahrens Construction, Inc. and Merchants Bonding Company*, 495 Mich. 161 (2014), ruled the statute of limitations period on a breach of contractual indemnity claim does not begin to accrue until a claim is made for indemnification. Miller-Davis, the general contractor on a commercial construction project, contracted with Ahrens to install a roofing system on the project. The roofing system leaked, and it was revealed that Ahrens failed to properly install the system within the projects plans and specifications. Miller-Davis put Ahrens on notice of the defect, declared Ahrens in default, terminated the subcontract, and demanded a remediation plan. After Ahern failed to respond, Miller-Davis repaired the roof system as required by its contract with the project owner, and subsequently filed suit against Ahern for indemnification related to the costs to repair the roof.

The Michigan Court of Appeals ruled that the Miller-Davis indemnification claim was time barred by the six – year contractual statute of limitations found in MCL 600.5807 due to the faulty construction by Ahern taking place more than six years prior to filing suit. The Michigan Supreme Court overturned this decision, concluding that Miller-Davis' indemnity claim was an independent and separate claim which did not begin to accrue until the non-conforming work was first discovered, and a claim was made by Miller-Davis to Ahern for indemnification. Specifically, Michigan Supreme Court held that Ahrens breached its contract twice. The first breach by improperly installing the roof, and the second when Ahrens failed to indemnify Miller-Davis for the costs it incurred to remedy the defective construction as provided by the parties' indemnity provision in their contract. The Supreme Court reasoned, the failure of Ahrens to indemnify Miller-Davis was a second independent cause of action, and Miller-Davis' claim for indemnification fell within the six year limitations period.

Legislation:

1. Public Act 178 of 2013 (MCL 339.2007), Technology advancement in engineering and architecture field. Architects, engineers and surveyors can now utilize electronic signatures and seals. The recent Public Act 178 of 2013 (MCL 339.2007) allows documents created by architects, engineers and surveyors to use electronic signatures and seals in place of traditional paper based signatures and seals on documents that require approvals.

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Minnesota

Case law:

1. In *Minnesota Laborers Health & Welfare Fund v. Granite Re Inc.*, 844 N.W.2d 509 (Minn. 2014), the Minnesota Supreme Court decided that a one-year limitation period for bringing a payment bond claim was tolled (or extended) when the contractor who purchased the

bond fraudulently concealed the basis for the bond claim. A remediation contractor obtained a payment bond for its contract to abate asbestos and lead work on a demolition project in 2009. The contractor was required under a collective bargaining agreement to contribute fringe benefit payments to several employee benefit plans, but failed to do so, paying employees with cash. The trustees of the benefit plans were unaware that payments were due. Over a year later, the trustees made a claim on the payment bond after uncovering the contractor's failure to make required fringe benefit payments. The surety denied the claim because the contractual one-year limitation period, provided in the bond, had passed. The trustees sued, arguing that EnviroTech's fraudulent concealment of the missed fringe benefit payments tolled the one-year limitation period. The Court held in favor of the trustees, holding that while the surety did not itself commit the fraudulent concealment, the limitations period was nevertheless tolled because the surety is bound by the acts of the contractor, its principal.

2. In *Safety Signs, LLC v. Niles-Wiese Construction, Inc.*, 840 N.W.2d 34 (Minn. 2013), the Minnesota Supreme Court held that a subcontractor working on a public project lost its bond claim for failing to strictly comply with statutory notice requirements. The general contractor had provided a payment bond in accordance with Minnesota's Public Contractors' Performance and Payment Bond Act. That law required bond claimants to give written notice to the surety and the general contractor at their respective addresses listed on the bond. The subcontractor sent its notice of claim to the surety's address on the bond, but sent notice to the general contractor at the address on the subcontract (which was different than the address on the bond). The surety refused to pay the subcontractor because the subcontractor did not provide notice to the general contractor at the address listed on the bond. The subcontractor sued, arguing that it had substantially complied with the notice requirements and was therefore entitled to payment on the bond. The Minnesota Supreme Court agreed with the surety and rejected the subcontractor's bond claim as improperly served. The Court stressed that, where a statute gives a contractor the right to file a claim, the contractor must follow all of the prerequisites strictly.

3. In *Helmberger v. Johnson Controls, Inc.*, 839 N.W.2d 527 (Minn. 2013), the Minnesota Supreme Court determined that the Minnesota Data Practices Act, Minnesota's public records law, does not require a contractor doing business with Minnesota the governments to allow public access to its files if its contract with the government does not contain a provision expressly requiring it. A school district hired a contractor to renovate existing schools and build new schools. The contractor subcontracted the design work to an architectural firm. Neither the prime contract nor the subcontract contained any language requiring compliance with the Data Practices Act, which requires all private companies performing government functions to make their records publically available if the contract notifies the company of that disclosure requirement. A local newspaper asked for copies of the subcontract and other contractor records, arguing that that the contractor was performing a government function. The contractor refused to produce the requested documents, arguing that it was not performing a government function and that the contract did not require public disclosure. The Court held that a private company is not bound to disclose its records unless the contract expressly notifies the company of its obligation. Because the contract did not include that language, the contractor need not allow public access to its private files. The Court did not address the question whether the contractor was performing a government function.

4. In *Rochester City Lines Co. v. City of Rochester*, 846 N.W.2d 444 (Minn. Ct. App. 2014), *petition for rev. granted* (Minn. _____, 2014), the Minnesota Court of Appeals rejected a contractor's bid protest, deferring to a city's "best value" award of a contract. A contractor had a contract with the city to operate a transit line for more than 40 years. The city then put the transit line up for competitive bid as a best-value bidding procurement. The incumbent contractor lost the contract and sued the city. First, the contractor argued that the city's actions were an unconstitutional "taking" of the contractor's property without compensation. The court disagreed, noting that despite the award to another bidder, the contractor was still allowed to operate its transit service on existing infrastructure - albeit without public subsidies. The loss of subsidies

was not a “taking.” The contractor also argued that the city was pervasively biased during bidding. But the court noted that the best-value bidding laws gave the city the discretion to award the contract to the contractor that provided the best value - not necessarily the lowest price. The court found that the city disclosed the criteria to be considered and employed several safeguards to ensure that all bidders would have an equal opportunity to bid and that taxpayers would get the best bargains for their money. Despite minor irregularities that did not affect the ultimate contract award, the court held that the city did not exhibit pervasive bias during bidding. Finally, the contractor argued that it was deprived of due process when the city awarded the contract to another bidder. The court disagreed, holding that the contractor did not have a protectable property interest because the city had the discretion to determine which bid package presented the best value and ultimately whether to award the contract at all. The Minnesota Supreme Court is reviewing the decision, and is expected to rule on it late in 2014 or early 2015.

5. In *Eckert/Wordell Architects, Inc. v. FJM Properties of Willmar, LLC*, ___ F.3d ___ (8th Cir. 2014), the Eighth Circuit Court of Appeals held that an arbitrator was authorized to decide whether a non-signatory was able to arbitrate a dispute because the AAA Construction Rules gave the arbitrator that power. The dispute was over the design of a laser eye clinic in Minnesota. The contract containing the arbitration agreement was between the architects and Fischer Laser Eye Center, the owner of the property where the clinic would be. The shareholders of Fischer later formed a separate company to own and develop the land for the clinic, and that second company then changed its name to FJM Properties. When it discovered problems with ventilation, FJM Properties demanded arbitration with the architects. That arbitration proceeding went on for more than a year. Just a month before the evidentiary hearing, the architects objected to participating further, based on their assertion that they had no arbitration agreement with FJM Properties. The arbitrator found he had power to determine whether the parties had an arbitration agreement and invited briefing. The federal district court agreed and, in a single paragraph of analysis, the Eighth Circuit affirmed. It reminds us that “threshold questions of arbitrability are for a court to decide, unless there is clear and unmistakable evidence the parties intended to commit questions of arbitrability to an arbitrator.” In this case, the parties’ incorporation of the AAA’s Construction Industry Arbitration Rules (which allow arbitrators to rule on their own jurisdiction) served as “a clear and unmistakable indication the parties intended for the arbitrator to decide threshold questions of arbitrability.”

6. In *Rosso v. Hallmark Homes of Minneapolis, Inc.*, 843 N.W.2d 798 (Minn. Ct. App. 2014), the Minnesota Court of Appeals held that a finding of “substantial completion,” for purposes of Minnesota Statute § 541.051, did not require the filing of a certificate of occupancy. Minnesota Statute § 541.051 provides that an owner may not bring a lawsuit for injury or property damage more than ten years after “substantial completion of the construction.” Homeowners purchased a home in Chaska that was built in the spring of 1995. The developer decorated and furnished the home, using it as a model home until November 14, 1995, when the homeowners entered into the purchase agreement. The certificate of occupancy, however, was not issued until January 19, 1996. On November 20, 2005, the homeowners discovered water damage in the home. This discovery took place more than ten years after the construction of the home was complete, but less than ten years after the certificate of occupancy was issued. The homeowners sued the developer for the water damages. The dispute focused on when “substantial completion” occurred and whether the lawsuit was barred by Minn. Stat. § 541.051. The homeowners argued that substantial completion did not occur until the certificate of occupancy was issued. The Minnesota Court of Appeals disagreed, holding that “substantial completion” refers to the substantial completion of construction, not the issuance of a certificate of occupancy. While the certificate of occupancy demonstrates the construction is complete, construction may be completed before that time, and in this case, the construction of the home was completed more than ten years before the discovery of the water damage, barring the Rossos’ lawsuit.

7. In *Zurich American Insurance Co. v. NewMech Companies, Inc.*, 2014 WL 241760 (D. Minn. Jan 22, 2014) (unpublished), the United States District Court for the District of Minnesota required a plumber to pay a separate insurance deductible for each unit damaged in a condominium building, after a pipe separation caused building-wide damage, because the policy required a deductible for each “claim” rather than for each “occurrence.” a plumber designed and installed a plumbing system at a condominium building in Minneapolis. After a pipe separation, the plumber’s insurer paid for all of the repairs and then requested reimbursement from the plumber for the deductible, charging a deductible for each unit damaged, plus one deductible for common areas. The plumber refused to pay, arguing that the separated pipe was one incident, requiring the payment of only one deductible. The insurer sued and the court held that the policy language required a deductible payment for each unit damaged because a deductible was required on a “per claim” basis rather than a “per occurrence” basis. The policy defined the term “claim” as “all damages sustained by one person because of property damage.” In contrast, it defined the term “occurrence” as all damages resulting from “one occurrence, regardless of the number of persons or organizations” who sustain damages because of the occurrence. As a result, the policy required the plumber to pay a deductible for each unit damaged.

8. In *Nassar v. U.S. Home Corporations d/b/a Lennar Homes*, 2014 WL 621700 (Minn. Ct. App. Feb. 18, 2014) (unpublished), the Minnesota Court of Appeals held that an arbitrator had broad authority to create a remedy to address construction defects. A husband and wife purchased a home with a lot that was not properly graded, causing drainage issues. During the arbitration, the developer/builder submitted a repair plan that called for the modification of the grade and drainage easements on the property. Finding this plan to be an acceptable repair, the arbitrator ordered the parties to present the repair plan to the city for approval, and if approved, to make the repairs. The homeowners sued to vacate the arbitrator’s award, arguing that the arbitrator exceeded his authority in creating his remedy. In rejecting this claim, the Minnesota Court of Appeals held that, unless expressly limited by the arbitration agreement, an arbitrator has broad authority to grant any legally available remedy or relief that the arbitrator decides is fair.

9. In *Western National Mutual Insurance Co. v. Flag Builders of Minnesota Inc.*, 2014 WL 1272126 (Minn. Ct. App. Mar. 31, 2014) (unpublished), the Minnesota Court of Appeals held that an insurer did not have a duty to indemnify or defend a general contractor under a commercial general liability insurance policy for its surveyor’s staking errors. an insurer issued the policy to the general contractor hired to construct a Walgreens store. The contractor hired an engineering firm to survey the site. The engineer staked the building corners incorrectly, which required costly repairs. After a lawsuit was filed, the insurer refused to defend or indemnify the contractor, arguing that the insurance policy excluded coverage for “property damage” stemming from the work performed directly or indirectly by the contractor or “any contractors or subcontractors working directly or indirectly on” the contractor’s behalf. The Minnesota Court of Appeals agreed with the insurer. While the contractor asserted that it did not have a written contract with Moore and did not directly pay Moore, the court held that there was no dispute that the contractor contracted with the engineer, who worked “directly or indirectly” for the contractor on the project.

10. In *Bowman Construction Co. v. LaValla Sand & Gravel, Inc.*, 2013 WL 6152194 (Minn. Ct. App. Nov. 25, 2013) (unpublished), the Minnesota Court of Appeals ordered a quarry owner to pay a contractor for rock that the contractor had blasted and stockpiled for the owner to sell. A quarry owner and a contractor orally agreed that the contractor would pay the owner a royalty for any rock that it blasted and removed; and that the owner would pay the contractor for any blast rock that the contractor stockpiled for the owner to sell. The contractor left several thousand cubic yards of blast rock when it was finished. But rather than sell the blast rock from

the contractor's stockpile, the owner hired another contractor to blast more rock in the same quarry at a cheaper rate and then sold that rock instead. The court held that the essence of the parties' agreement was that the contractor would blast rock for the owner and that the owner would pay the contractor for the blasted rock. To hold otherwise, the court stated, would mean that the contractor had agreed to blast rock for the owner at no charge—an outcome that the court refused to accept.

11. In *Gerrard v. City of Princeton*, 2014 WL 802086 (Minn. Ct. App. Mar. 3, 2014) (unpublished), the Minnesota Court of Appeals held that a city did not unconstitutionally take or trespass on landowners' property when trimming trees and that the city held a valid permit to erect a municipal welcome sign within a highway right-of-way easement. The city owned and maintained two recorded easements on the landowners' property. The easements allowed the city to construct highways across the landowners' property and gave the city exclusive control over all trees within the easement. The landowners purchased the property with notice of these easements. Later, while constructing a traffic roundabout on one of the highways, the city trimmed and removed tree branches and erected a welcome sign within one of the easements. The landowners sued the city for trespass, claiming that the city's welcome sign was an unconstitutional taking. The court held that the city did not trespass on the landowners' property because it had a right to maintain trees within the easement. The court also held that the city did not "take" the landowners' property because the welcome sign was erected within the city's easement.

Legislation:

1. Minn. Stat. § 16C.285, Minnesota Responsible Contractor Act. The Responsible Contractor Act goes into effect on January 1, 2015, and will apply to all best-value and low-bid public construction contracts over \$50,000. The Act significantly expands the traditional definition of "responsibility" in public bidding and eliminates much of the discretion public owners have enjoyed. Both prime contractors and subcontractors must submit a sworn verification with their bids certifying that they meet certain minimum criteria: Compliance with workers' compensation and unemployment insurance requirements; registered with the Department of Revenue and Department of Employment and Economic Development; has a valid tax identification number or social security number; has a certificate of authority to transact business in Minnesota if a foreign corporation; has not "repeatedly" violated wage and hour laws on one or more projects resulting in underpayment of \$25,000 or more in a three-year period; has not been found to have violated state or federal wage and hour laws by a state agency or court within the past three years; has not been sanctioned for failing to use good-faith efforts in DBE or veteran-owned business requirements more than once within the past three years; has not had certificate of compliance for affirmative action plan revoked or suspended twice within the past three years; has not failed to register as building construction & improvement service provider within the past three years; has not failed to obtain construction license within the past three years; is not debarred; and for prime contractors, has obtained verifications of compliance from their subcontractors.

Public owners may not consider any violation of the minimum criteria that occurred before July 1, 2014. If a contractor fails to verify that all minimum criteria are satisfied, or if it makes a false statement in a verification, that contractor may not be awarded the contract on that project. And if the contractor makes a false statement recklessly or with disregard for whether it is true or false, then that contractor will be ineligible to bid on any public project for 3 years. If the contract has already been awarded and the public owner later discovers that the contractor made a false statement, the public owner may terminate contract or assert a claim against the contractor under the Minnesota False Claims Act.

A prime contractor or subcontractor must include in its verification a list of all the next-tier subcontractors it intends to use. If the contractor retains additional subcontractors or substitutes one for another, it must obtain verifications of compliance from those subcontractors and revise its own verification within 14 days. A contractor or subcontractor however, is responsible for a false statement by its next-tier subcontractor only if the contractor accepts the verification with actual knowledge that it contains a false statement.

2. H.F. 2536, Women's Economic Security Act. This Act is a sprawling piece of legislation that adds and amends a host of new statutory provisions. This summary will address the new provisions that are of the most interest to those in the construction industry.

Article 2 focuses on economic security. Sections 4 and 5 ensure that applicants for unemployment benefits are still eligible to receive those benefits if they quit or engage in conduct that would be otherwise deemed "employment misconduct" because the applicant or an immediate family member was the victim of domestic abuse, sexual assault, or stalking. Section 6 establishes a new requirement for businesses with 40 or more full-time employees that would contract with the State of Minnesota or the Metropolitan Council on a project greater than \$500,000. The business must pay a \$150 filing fee and submit to the Commissioner of Administration an equal pay compliance statement signed by the business's CEO or board chair. The commissioner must issue or reject a certificate within 15 days. The commissioner may audit the business at any time to ensure compliance. The commissioner may revoke the certificate if the business has not made good-faith efforts to comply with equal pay requirements, or if the business commits multiple equal-pay violations. The commissioner may then void the contract award, or the public owner may terminate the contract.

Article 3 covers labor standards and wages. Section 2 requires an employer to grant an unpaid leave of absence of up to 12 weeks for an employee who requests leave as a parent on the birth or adoption of a child, or for a female employee for prenatal or other pregnancy- or childbirth-related health care. Section 3 extends personal sick-leave benefits to an employee caring for an in-law or grandchild, and also creates a new category entitled "safety leave." Safety leave is defined as leave taken for providing or seeking assistance because of domestic abuse, sexual assault, or stalking, and it may be taken as part of an employee's sick leave. Section 4 creates a new requirement for employers to offer accommodations to pregnant employees unless those accommodations would create an undue hardship for the employer. But an undue hardship cannot include more frequent restroom, food, or water breaks; seating; and limits on lifting over 20 pounds.

Article 4 covers employment protections. Section 2 prohibits employers from: requiring nondisclosure of an employee's wages as a condition of employment, requiring an employee to sign a waiver to deny the employee the right to disclose wages, or taking an adverse employment action against an employee for disclosing wages. Section 3 provides greater accommodations for nursing mothers, including a requirement that they have a room other than a bathroom that is protected from public view and that contains an electrical outlet. The Division of Labor Standards and Apprenticeship may investigate any complaints that an employer violated Sections 2 or 3, and employees have standing to bring a civil action against their employers for violating those sections. Finally, Sections 6–9 make it an unfair employment practice to consider familial status when making labor or employment decisions or, before a person is hired, to require information about a person's familial status.

3. HF 2543, Environmental Permitting and Regulation, Septic Tank Installer Regulation, and Penalties. On January 1, 2015, legislation will go into effect making significant modifications to environmental permitting and regulation, septic tank installers' fee payment procedures, and regulatory penalties for environmental permitting and compliance. First, this legislation aims to make the permitting review process more efficient. Section 2 creates new

efficiency goals for the DNR, requiring that “tier one” permits be issued or denied within 90 days and “tier two” permits be issued or denied within the existing 150-day period. Section 7 and Section 8 create the same new efficiency requirements for the Minnesota Pollution Control Agency (“MPCA”).

This legislation is also relevant to septic tank installers. Section 6 alters the process for submitting a tank fee (\$25 for each septic tank system installed). By January 30 of each year, all installers will now be required to submit a form indicating the number of tanks installed in the prior year. Payment of the fees is required thirty (30) days after receiving an invoice from the state government.

Finally, this legislation makes important changes in environmental permitting and compliance-based penalties. Section 9 increases the maximum penalty, imposed by the MPCA, for violations found during inspections and other compliance reviews. The maximum penalty is increased from \$10,000 to \$20,000. Section 10 allows the MPCA to issue citations for violation of certain subsurface sewage treatment system (“SSTS”) rules, such as failing to obtain permitting, working without a license, working without sufficient bonding, failing to treat septage, or failing to produce or maintain records. Finally, Section 10 provides penalty amounts for the new citations, including: \$500 for failing to comply with SSTS licensing and surety bond requirements, failing to provide controls to prevent the discharge of septage, or failing to treat septage; and \$250 for failing to produce or maintain records.

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Minnesota

Case law:

1. In *Eckert/Wordell Architects, Inc. v. FJM Properties of Willmar, LLC*, 756 F.3d 1098 (8th Cir. 2014), the Eighth Circuit Court of Appeals held that an arbitrator was authorized to decide whether a non-signatory was able to arbitrate a dispute because the AAA Construction Rules gave the arbitrator that power. The dispute was over the design of a laser eye clinic in Minnesota. The contract containing the arbitration agreement was between the architects and Fischer Laser Eye Center, the owner of the property where the clinic would be. The shareholders of Fischer later formed a separate company to own and develop the land for the clinic, and that second company then changed its name to FJM Properties. When it discovered problems with ventilation, FJM Properties demanded arbitration with the architects. That arbitration proceeding went on for more than a year. Just a month before the evidentiary hearing, the architects objected to participating further, based on their assertion that they had no arbitration agreement with FJM Properties. The arbitrator found he had power to determine whether the parties had an arbitration agreement and invited briefing. The federal district court agreed and, in a single paragraph of analysis, the Eighth Circuit affirmed. It reminds us that “threshold questions of arbitrability are for a court to decide, unless there is clear and unmistakable evidence the parties intended to commit questions of arbitrability to an arbitrator.” In this case, the parties’ incorporation of the AAA’s Construction Industry Arbitration Rules (which allow arbitrators to rule on their own jurisdiction) served as “a clear and unmistakable indication the parties intended for the arbitrator to decide threshold questions of arbitrability.”

2. In *Nassar v. U.S. Home Corporations d/b/a Lennar Homes*, No. A13-1137, 2014 WL 621700 (Minn. Ct. App. Feb. 18, 2014) (unpublished), the Minnesota Court of Appeals held that an arbitrator had broad authority to create a remedy to address construction defects. A husband and wife purchased a home with a lot that was not properly graded, causing drainage

issues. During the arbitration, the developer/builder submitted a repair plan that called for the modification of the grade and drainage easements on the property. Finding this plan to be an acceptable repair, the arbitrator ordered the parties to present the repair plan to the city for approval, and if approved, to make the repairs. The homeowners sued to vacate the arbitrator's award, arguing that the arbitrator exceeded his authority in creating his remedy. In rejecting this claim, the Minnesota Court of Appeals held that, unless expressly limited by the arbitration agreement, an arbitrator has broad authority to grant any legally available remedy or relief that the arbitrator decides is fair.

3. In *Rochester City Lines Co. v. City of Rochester*, 846 N.W.2d 444 (Minn. Ct. App. 2014), *petition for rev. granted* (Jun. 17, 2014), the Minnesota Court of Appeals rejected a contractor's bid protest, deferring to a city's "best value" award of a contract. A contractor had a contract with the city to operate a transit line for more than 40 years. The city then put the transit line up for competitive bid as a best-value bidding procurement. The incumbent contractor lost the contract and sued the city. First, the contractor argued that the city's actions were an unconstitutional "taking" of the contractor's property without compensation. The court disagreed, noting that despite the award to another bidder, the contractor was still allowed to operate its transit service on existing infrastructure—albeit without public subsidies. The loss of subsidies was not a "taking." The contractor also argued that the city was pervasively biased during bidding. But the court noted that the best-value bidding laws gave the city the discretion to award the contract to the contractor that provided the best value—not necessarily the lowest price. The court found that the city disclosed the criteria to be considered and employed several safeguards to ensure that all bidders would have an equal opportunity to bid and that taxpayers would get the best bargains for their money. Despite minor irregularities that did not affect the ultimate contract award, the court held that the city did not exhibit pervasive bias during bidding. Finally, the contractor argued that it was deprived of due process when the city awarded the contract to another bidder. The court disagreed, holding that the contractor did not have a protectable property interest because the city had the discretion to determine which bid package presented the best value and ultimately whether to award the contract at all.

4. In *Safety Signs, LLC v. Niles-Wiese Construction, Inc.*, 840 N.W.2d 34 (Minn. 2013), the Minnesota Supreme Court held that a subcontractor working on a public project lost its bond claim for failing to strictly comply with statutory notice requirements. The general contractor had provided a payment bond in accordance with Minnesota's Public Contractors' Performance and Payment Bond Act. That law required bond claimants to give written notice to the surety and the general contractor at their respective addresses listed on the bond. The subcontractor sent its notice of claim to the surety's address on the bond, but sent notice to the general contractor at the address on the subcontract (which was different than the address on the bond). The surety refused to pay the subcontractor because the subcontractor did not provide notice to the general contractor at the address listed on the bond. The subcontractor sued, arguing that it had substantially complied with the notice requirements and was therefore entitled to payment on the bond. The Minnesota Supreme Court agreed with the surety and rejected the subcontractor's bond claim as improperly served. The Court stressed that, where a statute gives a contractor the right to file a claim, the contractor must follow all of the prerequisites strictly.

5. In *Minnesota Laborers Health & Welfare Fund v. Granite Re Inc.*, 844 N.W.2d 509 (Minn. 2014), the Minnesota Supreme Court decided that a one-year limitation period for bringing a payment bond claim was tolled (or extended) when the contractor who purchased the bond fraudulently concealed the basis for the bond claim. A remediation contractor obtained a payment bond for its contract to abate asbestos and lead work on a demolition project in 2009. The contractor was required under a collective bargaining agreement to contribute fringe benefit payments to several employee benefit plans, but failed to do so, paying employees with cash. The trustees of the benefit plans were unaware that payments were due. Over a year later, the trustees made a claim on the payment bond after uncovering the contractor's failure to make

required fringe benefit payments. The surety denied the claim because the contractual one-year limitation period, provided in the bond, had passed. The trustees sued, arguing that EnviroTech's fraudulent concealment of the missed fringe benefit payments tolled the one-year limitation period. The Court held in favor of the trustees, holding that while the surety did not itself commit the fraudulent concealment, the limitations period was nevertheless tolled because the surety is bound by the acts of the contractor, its principal.

6. In *City of Minneapolis v. RW Farms, LLC*, No. A13-0309, 2013 WL 6839711 (Minn. Ct. App. Dec. 30, 2013) (unpublished), the Minnesota Court of Appeals held that a lender's security interest was not superior to a surety's right of subrogation. In this case, a contractor had agreed to compost and dispose of yard waste collected by the city of Minneapolis. A lender then loaned the contractor funds to cover start-up costs. As part of that lending agreement, the contractor gave to the lender a security interest in the contractor's business. Later, a surety issued payment and performance bonds for the contractor's work with the city. The contractor ultimately failed to perform its contract with the city, the lender foreclosed on its security interest, and the surety paid several of the contractor's subcontractors under the payment bond. The city withheld a certain amount of money that it owed the contractor until the rights of the lender and the surety could be determined. The lender and the surety both claimed that their interests were superior. The court held that, although the surety's interest came later than the lender's, a surety's equitable right to subrogation trumps any other person or business's right to collect.

7. In *Fieseler Masonry, Inc. v. City of Mabel*, No. A14-0246, 2014 WL 4389093 (Minn. Ct. App. Sept. 8, 2014) (unpublished), the Minnesota Court of Appeals held that if a second-tier subcontractor does not timely file a required bond claim, it cannot recover damages from an owner, and without a direct contract, cannot recover damages from the general contractor. In this case, the City of Mabel entered into a contract with a general contractor for the construction of a community center, and the general contractor posted performance and payment bonds as required by the City of Mabel. The general contractor then entered into a subcontract with Exact Construction LLC for a portion of the construction work, who in turn executed a lump-sum sub-subcontract with Fieseler Masonry to build a block wall. When the wall was far more expensive to build than anticipated, and Exact went out of business, Fieseler looked to the general contractor for payment and filed a mechanic's lien on the city's property, but did not file a bond claim. The court rejected the claims. First, the court held that Fieseler had no mechanic's lien claim against the owner because the general contractor posted a payment bond. Minnesota Statute § 469.155, Subd. 16 provides that if a payment bond is required on a construction job with a redevelopment agency or municipality (such as the City of Mabel), then the mechanic's lien statute is not applicable. In addition, the court held that Fieseler could not recover against the general contractor because it had no contract with the general contractor. Finally, the court held that Fieseler could not recover damages from the city or the general contractor on any other legal theory because Fieseler had a viable bond claim and a viable breach of contract claim against Exact.

8. In *Bowman Construction Co. v. LaValla Sand & Gravel, Inc.*, No. A13-0269, 2013 WL 6152194 (Minn. Ct. App. Nov. 25, 2013) (unpublished), the Minnesota Court of Appeals ordered a quarry owner to pay a contractor for rock that the contractor had blasted and stockpiled for the owner to sell. A quarry owner and a contractor orally agreed that the contractor would pay the owner a royalty for any rock that it blasted and removed; and that the owner would pay the contractor for any blast rock that the contractor stockpiled for the owner to sell. The contractor left several thousand cubic yards of blast rock when it was finished. But rather than sell the blast rock from the contractor's stockpile, the owner hired another contractor to blast more rock in the same quarry at a cheaper rate and then sold that rock instead. The court held that the essence of the parties' agreement was that the contractor would blast rock for the owner and that the owner would pay the contractor for the blasted rock. To hold otherwise, the court stated, would

mean that the contractor had agreed to blast rock for the owner at no charge—an outcome that the court refused to accept.

9. In *Tibbals v. Tibbals*, No. A13-2419, 2014 WL 5121114 (Minn. Ct. App. Oct. 14, 2014) (unpublished), the Minnesota Court of Appeals determined that a person's contribution of labor and materials to renovate a house fell within an exception to Minnesota's homestead exemption. The Court of Appeals also ruled that the individual could ask to have a receiver appointed to sell the property in order to satisfy his judgment for the cost of labor and materials. This case involved a lawsuit between two brothers who, at various times, had lived in a house on property in Duluth, Minnesota. One brother, Mark, paid taxes, made monthly lease payments, and paid off a mortgage associated with the property. Mark also paid for construction labor and materials to improve the house on the property. Following a dispute between the brothers, Mark was awarded a judgment for his costs and expenses and a constructive trust against his brother Kerry's interest in the homestead property. After reviewing Minnesota's homestead exemption, the Court of Appeals concluded that the costs Mark incurred improving the property fell within an exception to the homestead exemption and that Mark could ask the trial court to appoint a receiver to sell the property and use those funds to satisfy that portion of his judgment against Kerry. The Court found that the exception applied even though Kerry had not waived his homestead exemption.

10. In *Gerrard v. City of Princeton*, No. A13-0906, 2014 WL 802086 (Minn. Ct. App. Mar. 3, 2014) (unpublished), the Minnesota Court of Appeals held that a city did not unconstitutionally take or trespass on landowners' property when trimming trees and that the city held a valid permit to erect a municipal welcome sign within a highway right-of-way easement. The city owned and maintained two recorded easements on the landowners' property. The easements allowed the city to construct highways across the landowners' property and gave the city exclusive control over all trees within the easement. The landowners purchased the property with notice of these easements. Later, while constructing a traffic roundabout on one of the highways, the city trimmed and removed tree branches and erected a welcome sign within one of the easements. The landowners sued the city for trespass, claiming that the city's welcome sign was an unconstitutional taking. The court held that the city did not trespass on the landowners' property because it had a right to maintain trees within the easement. The court also held that the city did not "take" the landowners' property because the welcome sign was erected within the city's easement.

11. In *Brotherhood Mutual Insurance Co. v. ADT, LLC*, No. 13-1870, 2014 WL 2993728 (D. Minn. July 2, 2014) (unpublished), a sprinkler system malfunctioned and flooded a church's building, so the plaintiff sued the sprinkler system's designer and the security firm that monitored the church's premises. The court held that there was no evidence that the malfunction was caused by a defective design, or that the security firm that monitored the church's premises acted with willful, wanton, or gross negligence. The plaintiff submitted an expert witness report stating that the sprinkler system was defectively designed. The court rejected the plaintiff's expert witness report because the experts were not trained, experienced, or educated in sprinkler head system defect diagnosis, and because the experts' methodology was unsound. Without the expert testimony, the court found that the plaintiff could not establish that the sprinkler system was defectively designed and dismissed the claim against the system designer. Next, the court addressed the plaintiff's claim against the security firm. The court held that the contract between the plaintiff and the security firm contained an exculpatory clause that released the security firm from all liability except for any damages resulting from willful, wanton, or gross negligence. In this case, the security firm had received an alarm signal which had then cleared one minute later. It informed a church trustee and stated no action was required. The next day, the security firm received a "waterflow" alarm signal and immediately alerted the fire department. The court held that, as a matter of law, these actions did not rise to the level of

willful, wanton, or gross negligence, and therefore dismissed the plaintiff's claim against the security firm.

12. In *Geyer Signal Inc. & Kevin Kissner v. Minnesota Department of Transportations*, 2014 WL 1309092, Civ. No. 11-321 (Mar. 31, 2014), the United States District Court for the District of Minnesota held that the Minnesota Department of Transportation's ("MnDOT") implementation of the Disadvantaged Business Enterprise Program is legal and constitutional. Kevin Kissner, the white male owner of Geyer Signal Inc., challenged the legality and constitutionality of the DBE program, which requires that portions of federal highway construction funds be allocated to small businesses owned by socially and economically disadvantaged individuals. Kissner's main argument was that the DBE program has a disproportionate impact on some sub-categories of construction work, where small business entities are most competitive (traffic control, trucking, supply, etc.), creating a disadvantage for white, male-owned businesses working in those areas. After analyzing the DBE program in detail, the District Court rejected Kissner's argument. First, the District Court held that MnDOT's DBE program is not unconstitutional on its face because it provides measures designed to assist DBEs in performing work outside of their specific fields, and therefore provides a mechanism to combat the overconcentration issues raised by Kissner. In addition, the District Court held that MnDOT's DBE program is not unconstitutional as it is applied to Kissner because Kissner failed to prove that the DBE program has a disproportionate impact on his business and because he failed to present affirmative evidence that no discrimination currently exists in Minnesota's public contracting procurement programs. Accordingly, because the District Court found that MnDOT's DBE program is appropriately and narrowly tailored to achieve the legitimate goal of combating discrimination in public contracting, the DBE program was upheld.

13. In *United States v. R.J. Zavoral & Sons, Inc.*, No. 12-668, 2014 WL 5361991 (D. Minn. Oct. 21, 2014) (unpublished), the United States District Court for the District of Minnesota denied summary judgment motions filed by the federal government and a contractor, determining there were sufficient facts in dispute to allow causes of action under the False Claims Act to proceed to trial. The case involved a contract with the Army Corps of Engineers for work on a flood damage reduction project that was set aside for a qualified company under Section 8(a) of the Small Business Act. The Section 8(a) program is administered by the Small Business Association ("SBA") and is intended to promote business development of companies owned and operated by socially and economically disadvantaged individuals, including women and members of minority groups. R.J. Zavoral & Sons, a contractor, formed a joint venture with Ed's Construction, a construction company that was qualified as a small business concern under Section 8(a), in order to bid on the contract. The contract was awarded to the joint venture, and R.J. Zavoral and Ed's Construction each were to perform work and receive profits under the terms of a joint venture agreement that was approved by the SBA. During the course of the project, the federal government became concerned that R.J. Zavoral & Sons, and its officers, were not complying with the terms of the joint venture agreement and the Section 8(a) program in terms of the amount of work that was being performed by Ed's Construction. The government eventually sued R.J. Zavoral & Sons and its officers for claims under the False Claims Act. The District Court denied summary judgment motions filed by R.J. Zavoral & Sons and the federal government. As an initial matter, the Court determined that the statute of limitations for the False Claims Act counts began to run when a government official with the authority to initiate a lawsuit – in this case, an attorney with the Department of Justice – knew or should have known about facts that could form the basis of a claim. Based on the date when the Department of Justice became involved in the case, the Court ruled that the government's claims were not time barred. The Court also concluded that the government presented evidence that could support its claims for fraudulent inducement and fraudulent certification under the False Claims Act. The government argued that R.J. Zavoral & Sons falsely represented that it would comply with the joint venture agreement and the Section 8(a) program

requirements when it was trying to secure the contract. The government also argued that R.J. Zavoral & Sons made false statements in its payment applications and in correspondence with the government. The Court ruled that, in order to prevail on its claims, the government must demonstrate that R.J. Zavoral & Sons made false statements to the government with reckless disregard for whether or not the statements were true. Finally, the Court determined that the government could seek to recover payments made to R.J. Zavoral & Sons under the contract, even though the government suffered no actual damages as a result of the alleged violations of the False Claims Act.

14. In *Tietz v. United Rentals (North America), Inc.*, No. A13-2284, 2014 WL 3558423 (Minn. App. July 21, 2014) (unpublished), the Minnesota Court of Appeals held that an equipment-rental agreement did not qualify as a building-and-construction contract. A general contractor orally contracted with his neighbor to replace the deck in the neighbor's back yard. To perform the work, the general contractor rented a skid steer loader, a bucket, an auger power unit, and an auger bit from an equipment-rental company. The rental agreement contained a broad-form indemnity provision, which included the general contractor's agreement to indemnify the equipment-rental company for the rental company's own negligence. The general contractor was injured while operating the equipment, and he sued the equipment-rental company. The general contractor argued that the rental agreement's indemnification provision was invalid because it was executed in connection with a building and construction contract. (Under Minnesota's anti-indemnity statute, Minn. Stat. § 337.02, an indemnification agreement executed "in connection with" a building and construction contract is generally unenforceable.) The court stated that the general contractor's argument expanded the definition of "building and construction contract too broadly." The court held that a building and construction contract does not "encompass an agreement between a party to a construction contract and a remote nonparty for the rental of equipment," and therefore the rental agreement's indemnification provision was enforceable.

15. In *Zurich American Insurance Co. v. NewMech Companies, Inc.*, Civ. No. 12-1568, 2014 WL 241760 (D. Minn. Jan 22, 2014) (unpublished), the United States District Court of District of Minnesota required a plumber to pay a separate insurance deductible for each unit damaged in a condominium building, after a pipe separation caused building-wide damage, because the policy required a deductible for each "claim" rather than for each "occurrence." A plumber designed and installed a plumbing system at a condominium building in Minneapolis. After a pipe separation, the plumber's insurer paid for all of the repairs and then requested reimbursement from the plumber for the deductible, charging a deductible for each unit damaged, plus one deductible for common areas. The plumber refused to pay, arguing that the separated pipe was one incident, requiring the payment of only one deductible. The insurer sued and the court held that the policy language required a deductible payment for each unit damaged because a deductible was required on a "per claim" basis rather than a "per occurrence" basis. The policy defined the term "claim" as "all damages sustained by one person because of property damage." In contrast, it defined the term "occurrence" as all damages resulting from "one occurrence, regardless of the number of persons or organizations" who sustain damages because of the occurrence. As a result, the policy required the plumber to pay a deductible for each unit damaged.

16. In *Western National Mutual Insurance Co. v. Flag Builders of Minnesota Inc.*, No. A13-1152, 2014 WL 1272126 (Minn. Ct. App. Mar. 31, 2014) (unpublished), the Minnesota Court of Appeals held that an insurer did not have a duty to indemnify or defend a general contractor under a commercial general liability insurance policy for its surveyor's staking errors. An insurer issued the policy to the general contractor hired to construct a Walgreens store. The contractor hired an engineering firm to survey the site. The engineer staked the building corners incorrectly, which required costly repairs. After a lawsuit was filed, the insurer refused to defend or indemnify the contractor, arguing that the insurance policy excluded coverage for

“property damage” stemming from the work performed directly or indirectly by the contractor or “any contractors or subcontractors working directly or indirectly on” the contractor’s behalf. The Minnesota Court of Appeals agreed with the insurer. While the contractor asserted that it did not have a written contract with Moore and did not directly pay Moore, the court held that there was no dispute that the contractor contracted with the engineer, who worked “directly or indirectly” for the contractor on the project.

17. In *Rosso v. Hallmark Homes of Minneapolis, Inc.*, 843 N.W.2d 798 (Minn. Ct. App. 2014), the Minnesota Court of Appeals held that a finding of “substantial completion,” for purposes of Minnesota Statute § 541.051, did not require the filing of a certificate of occupancy. Minnesota Statute § 541.051 provides that an owner may not bring a lawsuit for injury or property damage more than ten years after “substantial completion of the construction.” Homeowners purchased a home in Chaska that was built in the spring of 1995. The developer decorated and furnished the home, using it as a model home until November 14, 1995, when the homeowners entered into the purchase agreement. The certificate of occupancy, however, was not issued until January 19, 1996. On November 20, 2005, the homeowners discovered water damage in the home. This discovery took place more than ten years after the construction of the home was complete, but less than ten years after the certificate of occupancy was issued. The homeowners sued the developer for the water damage. The dispute focused on when “substantial completion” occurred and whether the lawsuit was barred by Minn. Stat. § 541.051. The homeowners argued that substantial completion did not occur until the certificate of occupancy was issued. The Minnesota Court of Appeals disagreed, holding that “substantial completion” refers to the substantial completion of construction, not the issuance of a certificate of occupancy. While the certificate of occupancy demonstrates that the construction is complete, construction may be completed before that time, and in this case, the construction of the home was completed more than ten years before the discovery of the water damage, barring the Rossos’ lawsuit.

18. In *Monson v. Suck*, No. A14-0461, 2014 WL 5123686 (Minn. Ct. App. 2014) (unpublished), Monson was injured when he fell off the top of a set of steps that were connected to the back of a house owned and built by the homeowners thirteen years before the accident. The steps did not have a handrail, and the deck was 6-7 feet off the ground. Monson sued for negligent construction and negligent maintenance of the premises. The District Court dismissed Monson’s claims because they were brought thirteen years after the deck was built, beyond Minnesota’s 10-year statute of repose. The Court of Appeals reversed the District Court’s decision, finding that although the statute of repose barred Monson’s claim for negligent construction of the deck and steps, it did not bar Monson’s claim for negligent maintenance of the premises. Indeed, these claims are specifically preserved because an owner or possessor of real property has a duty to use reasonable care for the safety of entrants on their land, including the duty to inspect their premises for dangerous conditions and to repair them or warn entrants about them. Therefore, the exception to the statute of repose applied to Monson’s claim that the homeowners negligently failed to add a handrail to the deck steps, and Monson’s negligent maintenance claim was not barred by the ten year statute of repose.

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Mississippi

Case law:

1. In *JSI Communications v. Travelers Cas. & Surety Co. of Am.*, 3:13-cv-104 -WHB-RHW, 2014 U.S. Dist. LEXIS 102121 (S.D. March 13, 2014), an unpaid sub-subcontractor sued the surety of the general contractor. The surety denied the claim because, among other things,

the general contractor interplead into the applicable chancery court all monies owed to the subcontractor. In granting summary judgment to the surety, the district court reiterated that liability of the surety is predicated on the underlying liability of its principal. Finding that the surety's principal had no liability because of the interpleader of funds with the chancery court, the surety was dismissed with prejudice.

2. In *Hill v. City of Horn Lake*, 2012-CA-01748-SCT (Miss. Jan. 15, 2015), the Supreme Court of Mississippi held that Section 31-5-51 of the Mississippi Code, which requires contractors for public works projects to furnish proof of general liability insurance, does not create a private cause of action for personal injuries against government entities, like cities, that let contracts without first obtaining proof of insurance.

3. In *Crawford v. Custom Sign Company*, 138 So. 3d 894 (Miss. March 27, 2014), the plaintiff sued a sign installation company for injuries plaintiff allegedly sustained when his vehicle collided with a "Welcome to Clarksdale" sign hanging from a railroad underpass in Clarksdale, MS. The Supreme Court reversed and remanded the case for a factual determination of whether the claims were barred by the statute of repose. The statute of repose precludes claims for deficiencies in construction brought more than six years after the owner's "written acceptance or actual occupancy or use" of the improvements. The Court remanded the case because of insufficient evidence in the record to identify the owner of the sign, and insufficient evidence of whether the sign has been accepted or used by said owner.

4. In *C&I Entertainment, LLC v. Fidelity and Deposit Company of Maryland*, 1:08-cv-16-DMB-DAS; 2014 U.S. Dist. LEXIS 99505 (N.D. Miss. July 22, 2014), a surety company argued that it was "legally impossible" for an owner to declare a contractor to be in default after the contractor reached substantial completion of the project. The district court disagreed and held instead that where a construction contract covers warranty work, an owner can declare a default against the contractor (triggering a claim against the contractor's surety) after the contractor reached substantial completion of the project.

Legislation:

1. S.B. 2622: Mississippi's First Lien Law for Subs and Suppliers. Subcontractors won a huge battle in the 2014 Mississippi Legislative Session by the passage of S.B. 2622, Mississippi's first lien law for first and second tier subs and suppliers. By way of background, until 2013 Mississippi had "Stop Notice" rights for first tier subcontractors and suppliers to lien funds in the hands of the owner owed to the general contractor, but those same subs and suppliers lacked lien rights on the owner's improved property. In *Noatex Corp. v. King Constr. Of Houston, LLC*, 732 F.3d 479 (5th Cir. 2013), the Fifth Circuit upheld a district court's declaration that Mississippi's Stop Notice provision was unconstitutional, thereby leaving subs and suppliers with no remedy against a property owner, and no security against a nonpaying general contractor. Because of the *Noatex* holding, subcontractors, laborers and materialmen that were not in privity of contract with the prime contractor possessed no lien rights under Mississippi law.

That all changed during the 2014 Legislative Session. Senate Bill 2622 was introduced to address the holding. Entitled *An Act To Provide For Contractor Liens and the Enforcement and Notice of Contractor Liens*, S.B. 2622 granted a special lien on the real property or other property for which contractors, subcontractor, and materialmen furnish labor, services or materials for the improvement of real estate, as is provided in the other 49 states. To benefit from the construction lien, a claimant must follow the detailed notice and timing provisions provided within the Bill. Lien claimants will receive a pro rata share of the proceeds from the satisfaction of a construction lien. Through a pre-lien notice sent within 10 days of beginning

work, Owners are entitled to know the identity and existence of all down-stream contractors and materialmen providing work on the construction project.

The Bill was fully endorsed by the American Subcontractors Association. The original Bill was initially opposed by the Associated Builders & Contractors and Association of General Contractors, who desired to “fix” the “Stop Notice” law which provided a lien on their owed funds, rather than having Mississippi join all other states with a subcontractor and supplier lien law on the improved real property. The Bill was also opposed by the Mississippi Bankers Association, a powerful lobby in the Mississippi Legislature.

Prior to its passage in the Senate, the Bill was amended with some limited bank-sponsored amendments in the Senate. A full battle between the subcontractors and the bankers then went to the House side, with the subcontractors fighting against bank-sponsored amendments that would either gut or kill the bill. The subcontractors won with passage of S.B. 2622 after a narrow defeat of further bank-sponsored amendments. However, the Bill was then held on a procedural motion for reconsideration. The next morning, a motion to table the motion for reconsideration failed, and the Bill was passed the House with a bank-sponsored amendment added, which meant that a conference would have to be held between Senate and House members to try to reconcile the two versions. With the prospect of having the Mississippi Bankers Association killing the bill in conference, the subcontractors compromised and made certain concessions to ensure that S.B. 2622 would be accepted in conference.

S.B. 2622 passed both houses of the Legislature, and was signed into law by the Governor, thus ensuring that, for the first time ever, first and second tier subcontractors and suppliers now have lien rights in the State of Mississippi.

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Missouri

Case Law:

1. *Grau Contracting, Inc. v. Captiva Lake Investments, LLC*, 429 S.W.3d 472 (Mo. Ct. App. 2014). This litigation arose from a developer seeking a loan with National City Bank in 2006 to finish work on one condo building and construct another condo building. The loan was for three different portions of construction. The deed was recorded on March 15, 2006. Ultimately the development failed and mechanic’s liens and enforcement actions were filed by Grau Contracting. Captiva then purchased the bank loan and foreclosed the deed of trust and was substituted in place of National City Bank in the mechanic’s lien litigation.

The trial court stated that the mechanic’s liens placed by Grau were superior to those claims by Captiva as they were prior to Captiva’s interest based on the “first spade rule and the waiver doctrine.” When an encumbrance is placed on the land the “first spade rule” allows the mechanic’s lien to relate back to the date when the work was started and “will have priority over any third-party encumbrance attaching after the date the work began.” However, if the mechanic’s lien is placed on the structure or the improvements of the property then the mechanic’s lien will have priority over all other encumbrances. Ultimately the appellate court agreed with the trial court in that Captiva took over the loan after the mechanic’s liens had been filed and therefore the mechanic’s liens would have priority over Captiva’s interest based on the first spade rule.

2. *Hall v. Fox*, 426 S.W.3d 23 (Mo. Ct. App. 2014). This action arose by the contractor (Hall) bringing suit against Fox and Abby Woods Nursing home for breach of contract and quantum meruit. Fox then filed a counterclaim for breach of contract. The trial court found in favor of Fox and on appeal Hall raises one single issue that the circuit court erred in finding that he breached the contract. Hall had given a construction bid to Fox for the renovation of the Alzheimer wing in Abby Woods Nursing Home. Fox had collected an additional six bids and ultimately went with the bid provided by Hall. The bid was for \$50,000 and towards the end of the project, Hall presented a bill for \$15,000 to Fox and after checking her records, Fox realized that she had already paid roughly \$63,000 to Hall and refused to pay the \$15,000 bill and this action ensued.

Hall contends that there was no mutual assent to the contract so therefore he was unable to breach the contract. Hall states that the way that each party interpreted the payment terms was different and hence there was no mutual assent. Hall said that he billed and was ultimately paid on a time and material basis, while Fox believed that the bid was for a fixed sum. However, the court finds that through the parties' actions and words that there was indeed mutual assent to the contract. Hall presented bills to Fox who in turn paid the bills which showed how much labor and materials cost for the period being billed. Fox paid all bills given to her until she realized that she had already paid roughly \$63,000, then she refused to pay the \$15,000 bill presented by Hall. Based on the payment history of Fox to Hall, the court concluded that there was mutual assent to the contract. The appeals court affirmed the circuit court's judgment.

3. *Systemaire, Inc. v. St. Charles County*, 432 S.W.3d 783 (Mo. Ct. App. 2014). Systemaire entered into a contract to complete construction work for St. Charles County. Systemaire completed the construction and some additional add-ons that St. Charles asked for and demanded final payment. St. Charles failed to pay the 60,225.00 remainder and also withheld \$26,500 in retainage. St. Charles stated that Systemaire failed to comply with contract conditions for final payment. Systemaire then filed suit for breach of contract, breach of warranty in addition to interest and attorney fees. Systemaire filed a motion for partial summary judgment on the breach of warranty and contract after St. Charles filed its answer. The trial court granted Systemaire's motion for summary judgment on the breach of contract issue for \$101,185.00 which included the principal, interest and attorney's fees. Systemaire then dismissed its remaining claims. St. Charles then appealed the judgment.

St. Charles appeals on one point, that point is that St. Charles should not have to pay the penalty interest and attorney's fees to Systemaire in accordance with Section 34.057 because sections 34.057.1(4) and (8)(a) gave authorization to St. Charles to not pay Systemaire until all schematics and warranties were given to St. Charles. St. Charles contends that based on the sections above that the contract conditions were not met and therefore St. Charles has thirty days from the time that these conditions are met to issue payment to Systemaire. The court at this point has to determine the contract intentions of the parties. "Where the language of the contract is found to be ambiguous, requiring parol evidence to determine the intent of the parties, the summary judgment should be reversed and the case remanded for further proceedings." The two parties interpret the close out documents differently and as stated above, when parol evidence is needed to determine the intent of the parties then the case will be remanded. Here, the appellate court cannot make that decision and the case is remanded to determine what the closeout documents in this contract actually are.

Legislation:

1. S.B. 529, Modifies the Missouri Public Prompt Payment Act and the law relating to public works projects. Provides that public contracts not only provide prompt payment for the

contractor but also any professional engineer, architect, landscape architect, or land surveyor. This act further incorporates that the public owner will pay the contractor the final payment within 30 days and any professional engineer, architect, landscape architect, or land surveyor within 30 days after receiving invoice. If owner doesn't make full payment then owner will be responsible for 1.5% interest per month. The public owner may now retain up to 10% if the contractor doesn't obtain a bond because the project is less than \$50,000. For highway, road, or bridge projects this act will require that the owner pay 98% of the retainage to the contractor after substantial completion. If an owner determines that a project is not substantially completed then the owner must provide written notice within 14 days to the contractor. This act also changes the retention that a contractor can hold on their subs from 10% to 5% when the contractors receive payment. Finally this act changes when a contractor is required to obtain a bond, from \$25,000 to now \$50,000.

2. S.B. 610, Extends consumer protections against predatory business practices by contractors to owners of commercial properties. Previously the consumer protections against predatory business practices were only for owners of residential properties. This act changes that scope to now include commercial properties.

3. S.B. 809, Modifies provisions of law regarding licensing of architects, professional engineers, professional land surveyors, and professional landscape architects. This act changes the compensation for the board of architects, professional engineers, professional land surveyors, and professional landscape architects from \$50 for each day devoted to board affairs to \$75 a day. Now all licensees listed above will have to affix a personal seal to all final technical submissions. Licensing requirements will not apply when a person is constructing a privately owned structure less than two thousand square feet and not part of a multi building project. This act adds additional scopes to a professional land surveying, it will now include preparation of property descriptions, right of ways and easements along with design surveys.

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Montana

Case law:

1. In *JEM Contracting, Inc. v. Morrison-Maierle, Inc.*, 2014 MT 21, 373 Mont. 391, 318 P.3d 678, the Montana Supreme Court upheld two express contractual provisions regarding claims for additional compensation in rejecting a contractor's request for additional compensation related to a claim for differing subsurface conditions. The project at issue involved a road improvement project for two neighboring counties. The counties had contracted with the contractor, JEM to perform the construction and separately contracted with Morrison-Maierle, Inc. ("MMI") to act as the project engineer and owner's representative.

JEM alleged that it ran into differing subsurface conditions on the first day of the project and throughout the project. JEM alleged that it orally discussed this issue with MMI's on-site representatives over several different conversations. JEM alleged that some of MMI's on-site representatives agreed that the subsurface conditions amounted to a compensable differing site condition while others did not. What was not in dispute was the fact that JEM waited over two weeks to submit its first written notice of a claim under the contract. That claim was rejected for insufficient support.

JEM eventually filed suit against the counties and MMI, seeking additional compensation under the contract for the differing site conditions. The trial court granted MMI summary

judgment on the grounds that JEM failed to follow the explicit claims submission process under the contract.

On appeal, JEM argued that the contract provision requiring JEM to continue working while the parties' negotiated the payment dispute violated Montana's Prompt Payment Act. The Court disagreed, noting that the Prompt Payment Act only applies to monthly progress payments, not change orders. In addition, the Prompt Payment Act allows the owner the right to dispute all or a part of a contractor's invoice. The Court held that if it were to accept JEM's argument, "would turn a statute meant to protect contractors' progress payments for agreed-upon work into a mandate that owners progressively pay contractors for billed amounts regardless of work quality or conformance with the contract."

In addition, the Court held that JEM's claims for additional compensation were barred by the express terms of the contract. The contract required JEM to submit a claim in writing within five days of discovery of differing site conditions. Because it was undisputed that JEM waited 18 days to submit a claim for a differing site condition, the claim was barred.

2. In *Day v. CTA, Inc.*, 2014 MT 119, the Montana Supreme Court upheld the validity of an arbitration provision in an owner-architect contract and dismissed the owner's pending lawsuit for lack of subject matter jurisdiction.

The owners, the Days, sued their general contractor and their architect, CTA, for construction and design deficiencies related to the construction of their personal residence. CTA filed a motion to dismiss the Days' claims against CTA, citing the arbitration provision in the parties' contract. The Days cross-moved for summary judgment, arguing that the arbitration provision was invalid and unenforceable. The district court granted the Days' cross-motion for summary judgment and ruled the arbitration invalid and unenforceable.

On appeal, the Montana Supreme Court reversed and found the arbitration provision enforceable. Consistent with prior precedent, the Court applied an unconscionability analysis to determine the validity of the arbitration provision in question. Under Montana law, a contract is unconscionable if it is a contract of adhesion and if the contractual terms unreasonably favor the drafter.

Applying this two-part test, the Court ruled that even though the subject contract was a standard form contract, it was not a contract of adhesion because the Days had the ability to, and did in fact, make modifications the terms of the contract. In addition, the Court found that even if the contract was a contract of adhesion, the provision would still be within the parties' reasonable expectations given the Days' experience. The Court noted that because Mr. Day was a securities attorney and therefore has more sophistication than most other citizens. Therefore, the arbitration provision was within the Days' reasonable expectations and thus, enforceable. As a result, the Court reversed the trial court and remanded the case for dismissal for lack of subject matter jurisdiction.

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Nebraska

Case law:

1. In *Nyffeler Const., Inc. v. Sec'y of Labor*, 760 F.3d 837 (8th Cir. 2014), the United States Court of Appeals for the Eighth Circuit clarified the time by which a contractor must appeal an adverse ruling. Under the Occupational Safety and Health Act, a contractor may

challenge an administrative law judge's (ALJ) findings by filing an appeal with the Review Commission. If the Review Commission takes no action, the ALJ's order becomes final on the thirtieth day following the date the ALJ's report was docketed with the Review Commission.

2. In *Cizek Homes, Inc. v. Columbia Nat'l Ins. Co.*, 22 Neb. App. 361, 853 N.W.2d 28 (2014), the Court of Appeals of Nebraska further expanded what constitutes faulty workmanship under a CGL insurance policy. Faulty workmanship is not an "occurrence" under a CGL policy and therefore, the insurer is not liable to defend or indemnify the insured. In this case, the court found faulty workmanship despite the fact that the insured denied any negligence or faulty workmanship and instead alleged that the damage was due to the settling of the soil. However, the insured did not present any facts to support this claim. The insurer claimed that the damage was due to faulty construction of the house on soil that later settled and the court agreed. What is important to take from this case is that if you are insured under a CGL policy, it is paramount to your claim for coverage to not only deny negligence or faulty workmanship, but present evidence to support your claim.

3. In *Gaytan v. Wal-Mart*, 289 Neb. 49, 853 N.W.2d 181 (2014), the Supreme Court of Nebraska clarified when an owner and general contractor may be liable for injuries suffered by a subcontractor's employee. The court clarified that before an owner, such as Wal-Mart, could be liable, it must have (1) supervised the work that caused the injury, (2) actual or constructive knowledge of the danger which ultimately caused the injury, and (3) the opportunity to prevent the injury. The court found that Wal-Mart did not exercise sufficient control over the worksite to become liable, despite the fact that the prime contract provided that Wal-Mart would maintain an "Owner Construction Manager" on the jobsite. The court found that this contractual language did not constitute control because it did not imply that Wal-Mart's representative had control over the work done specifically to the roof, where the injury occurred.

The Court also joined the majority of jurisdictions holding that the principle articulated in § 416 of the Restatement (Second) of Torts does not apply to personal injury claims by employees of subcontractors against general contractors or owners. The Court reasoned that an employee of a subcontractor is covered by workers compensation laws for such risks.

Legislation:

1. L.B. 961 amended Neb. Rev. Stat. §§ 45-1201 to 45-1210, known as the Nebraska Construction Prompt Pay Act, as follows: (1) excluding work done by contractors and subcontractors for a political subdivision, federal-aid project, or state-aid project in the State of Nebraska; (2) changing the definition of what constitutes substantially completed work to the stage of the project where the owner can occupy or utilize the project for its intended use; (3) mandating that the owner pay retainage within 45 days after substantial completion of the project; (4) requiring a contractor to pay retainage to a subcontractor who has met the conditions for payment within 10 days of the contractor receiving its retainage; (5) limiting retainage to 10% and if the project is 50% completed, retainage cannot exceed 5%; and (6) authorizing a court to award plaintiffs damages and other costs, including attorney's fees, in a suit for a violation of the Nebraska Construction Prompt Pay Act.

2. L.B. 560 amended Neb. Rev. Stat. §§ 48-1228 to 48-1232, known as the Nebraska Wage Payment and Collection Act. The amended statute now requires an employer to include, or make available, the identity of the employer, the hours for which the employee was paid, the wages earned by the employee, and deductions made for the employee on every regular payday. The amendment also authorizes the Commissioner of Labor to subpoena records and witnesses related to enforcing the Nebraska Wage Payment and Collection Act. The Commissioner of Labor may also notify and issue citations for violations. The penalty of such a

violation is no more than \$500 for a first offense and no more than \$5,000 for subsequent offenses.

3. L.B. 679 amended Neb. Rev. Stat. § 14-420: requires notice relating to zoning and redevelopment projects to neighborhood associations at least 10 working days before a planning board conducts a hearing on a zoning change or a hearing on a redevelopment agreement. Neighborhood associations must register that they wish to receive such notices and the method by which they wish to receive the notice.

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Nevada

Case law:

1. In *Copper Sands Homeowners Ass'n v. Flamingo 94 L.L.C.*, 130 Nev. Adv. Rep. 81, 335 P.3d 203 (2014), the Nevada Supreme Court examined whether a third-party defendant can recover costs under NRS 18.020, which mandates an award of costs for the prevailing party in a case.

Appellant Copper Sands Homeowners Association (“HOA”) brought an action against respondents, developer Flamingo 94, LLC, and general contractor/sales broker Plaster Development Company, Inc. (“Developers”), alleging several claims for various construction defects present in the Copper Sands common-interest community. The Developers filed a third-party complaint against the remaining respondents, subcontractors who had performed work on the project. The district court eventually dismissed all of the HOA’s claims against the developers through numerous summary judgment orders. The district court then awarded the Developers attorneys’ fees and costs. Additionally, the district court awarded the third-party defendants costs against the HOA pursuant to NRS 18.020.

The Nevada Supreme Court’s decision focused primarily on whether the district court has authority to award the third-party defendant costs.

As this was an issue of first impression in Nevada, the Nevada Supreme Court looked to outside jurisdictions for guidance. The Nevada Supreme Court ultimately decided to adopt the Idaho Court of Appeals rationale in *Bonaparte v. Neff*, 773 P.2d 1147 (Idaho Ct. App. 1989). Specifically, the Nevada Supreme Court held that when a third-party defendant prevails in an action and moves for costs pursuant to NRS 18.020, the district court must determine which party (plaintiff or defendant) is adverse to the third-party defendant and allocate the costs award accordingly. In *Bonaparte*, the court held that any award must be proportional “to the third-party defendant’s actual and reasonable participation in litigating the common issues.” *Id.*

Furthermore, the Nevada Supreme Court held that if the court’s judgment on an issue simultaneously favors the third-party defendant and disfavors the adverse party, the third-party defendant should be considered a prevailing party for purposes of NRS 18.020. Applying the *Bonaparte* analysis, the Nevada Supreme Court held that the district court did not abuse its discretion in determining that the third-party defendants were prevailing parties and thus entitled to costs pursuant to NRS 18.020. The Nevada Supreme Court further concluded that the HOA and the third-party defendants were adverse parties because the third-party defendants’ liability was contingent on the HOA’s claims against the Developers.

Lastly, the Nevada Supreme Court addressed the amount of costs at issue. The HOA argued that the third-party defendants were not entitled to all their costs awarded by the district

court because after all of the construction defect related claims were dismissed, the Developers no longer had an indemnity claim against any of the third-party defendants (only claims for fraud and misrepresentation remained). The Nevada Supreme Court remanded this issue for the district court to determine whether the third-party defendants incurred these expenses before or after the dismissal of the last remaining construction defect claims.

2. In *Oxbow Constr., LLC v. Eighth Judicial Dist. Court*, 130 Nev. Adv. Rep. 86, 335 P.3d 1234 (2014) the Nevada Supreme Court considered several issues raised by consolidated writ petitions arising out of a construction-defect action. Specifically, the Nevada Supreme Court addressed whether the district court acted arbitrarily or capriciously by: (1) failing to perform an NRCP 23 class-action analysis, determining that previously occupied units in a common-interest community do not qualify for NRS Chapter 40 remedies and (2) allowing claims seeking NRS Chapter 40 remedies to proceed for alleged construction defects in limited common elements assigned to multiple units in a building containing at least one “new residence.” The Nevada Supreme Court concluded that the district court’s order was not arbitrary and capricious, and denied the writ petitions.

The appeal arose from a construction-defect action initiated by The Regent at Town Centre Homeowners’ Association (“HOA”) against Oxbow Construction, LLC. El Capitan Associates (“El Capitan”), the original developer of The Regent at The Town Centre mixed-use community (“Town Centre”), hired Oxbow as its general contractor. Town Centre contained 274 residential units and 10 commercial units. Following approval from the City of Las Vegas of a condominium plan for the complex, El Capitan entered into an agreement to sell Town Centre to Regent Group II. Over a period of nine months, Regent II sold all of its condominiums to individual purchasers.

The HOA, on behalf of itself and its unit-owners, served Oxbow with notices under NRS Chapter 40 alleging a variety of construction defects. After receiving the notice of defects, Oxbow filed a complaint for declaratory relief in district court seeking a determination that NRS Chapter 40 did not apply to Oxbow because the Town Centre units did not qualify as residences after being rented as apartments. The district court denied Oxbow’s motion, ordering limited discovery to determine which units were occupied before the title transfers from El Capitan to Regent II.

The HOA filed its own motion requesting that all units, irrespective of prior occupancy, be declared “new residence[s]” under NRS 40.615 based on their chronological age and duration of their occupancy. The district court also denied this motion. The HOA then filed a second motion seeking a determination that NRS Chapter 40 remedies are available for all common elements, including those contained within the “building envelopes.” The district court granted the HOA’s motion, in part, determining that the HOA could seek, on behalf of itself or two or more unit-owners, NRS Chapter 40 remedies for construction defects in the common elements of buildings containing a “new residence.”

Following the ruling, both Oxbow and the HOA filed individual writ petitions with the Nevada Supreme Court. Specifically, Oxbow argued that the district court abused its discretion by failing to conduct an NRCP 23 analysis. The HOA requested that the Nevada Supreme Court require the district court to enter an order that NRS Chapter 40 remedies are available for all 274 condominiums.

In denying Oxbow’s writ petition on whether the district court was required to conduct an NRCP 23 analysis, the Nevada Supreme Court relied upon its prior decisions in *D.R. Horton, Inc. v. Eight Judicial District Court (First Light II)*, 125 Nev. 449, 215 P.3d 697 (2009), and *Beazer Homes Holding Corp v. Eighth Judicial District Court (Beazor)*, 128 Nev. ___, 291 P.3d 128 (2012) and clarified that the district court was not required to conduct an NRCP 23 analysis

at this point in the litigation because nothing in the record indicated that the HOA sought to proceed as a class action.

Next, the Nevada Supreme Court addressed whether the HOA was entitled to NRS Chapter 40 remedies for limited common elements assigned to multiple units in a common building containing at least one “new residence.” The Nevada Supreme Court determined that the condominium units were residences for purposes of NRS Chapter 40 under its prior decision in *Westpark Owners’ Ass’n v. Eighth Judicial Dist. Court*, 123 Nev. 356, 167 P.3d 421. However, relying on *ANSE, Inc. v. Eighth Judicial Dist. Court*, 124 Nev. 862, 872, 192 P.3d 738, 745 (2008) and *Westpark*, the Nevada Supreme Court held that units occupied before their original sale cannot be classified as “new” and, therefore, do not independently qualify for NRS Chapter 40 remedies.

In analyzing Oxbow’s contention that construction-defect action cannot be maintained because the assigned limited common elements at issue are appurtenances and must be “new” under NRS 40.615, the Nevada Supreme Court concluded that an appurtenance is not required to be “new” under NRS 40.615 to qualify for NRS Chapter 40 remedies.

Next, the Nevada Supreme Court analyzed whether the assigned limited common elements referred to in the district court’s order are a part of the residences, requiring newness, or are appurtenances with no such requirement. The Nevada Supreme Court ultimately held that to pursue NRS Chapter 40 remedies for construction defects in limited common elements assigned to multiple units in a common building, a plaintiff needs only to establish that the building in question contains at least one unit that is a “new residence.” Relying on *Westpark*, the Court further explained that allowing the existence of one occupied unit to preclude other “new residence[s]” in the same building from recovering for construction defects assigned to that building would undermine NRS Chapter 40’s purpose to “protect the rights of homebuyers by providing a process to hold contractors liable for defective original construction or alterations.”

3. In *Byrd Underground LLC, et al. v. Angaur, LLC et al.*, 130 Nev Adv. Rep. 62, 332 P. 3d 273 (2014), the Nevada Supreme Court addressed three questions asked by the United States Bankruptcy Court for the District of Nevada concerning mechanic’s lien priority over other encumbrances on a property that are recorded after construction of a work of improvement visibly commences.

The first question queried whether the placement of dirt material on a future project site before building permits are issued and the general contractor is hired can constitute commencement of construction. The second question asked the Nevada Supreme Court to clarify its decision in *J.E. Dunn Northwest, Inc. v. Corus Construction Venture, L.L.C.*, 127 Nev.____, 249 P. 3d 501 (2011), where the Court stated that “clearing or grading” does not constitute commencement of construction. Finally, the third question inquired whether the grading that took place in this case constituted visible commencement of construction, such that the mechanic’s lien would receive priority status.

The Nevada Supreme Court initially addressed the second question because it influenced the Court’s analysis of the other questions. The court concluded that its use of the term “clearing or grading” was dictum, and, thus, its holding in *J.E. Dunn* does not preclude a trier of fact from finding that grading property for a work of improvement constitutes a visible commencement of construction. The Nevada Supreme Court further held that contract dates and permit issuance dates are irrelevant to the visible-commencement-of-construction test, but may assist the trier of fact in determining the scope of work of improvement. Lastly, the Nevada Supreme Court declined to decide whether the circumstances surrounding the grading constitute visible commencement of construction of the work of improvement because it required resolution of factual disputes between the parties.

4. In *Gunderson v. D.R. Horton, Inc.*, 130 Nev. Adv. Rep. 9, 319 P.3d 606 (2014), the Nevada Supreme Court considered whether the district court abused its discretion by: (1) denying a motion for new trial based on the allegations of attorney misconduct; (2) not granting sanctions under Nevada's offer of judgment scheme; and/or (3) refusing to consider apportioning sanctions arising from the offer of judgment. The Nevada Supreme Court affirmed the denial of a new trial, but reversed part of the district court's ruling regarding sanctions awarded pursuant to an offer of judgment. Specifically, the Nevada Supreme Court held that (1) the district court was statutorily required to issue sanctions under the offer of judgment rule and statute; (2) when a district court issues sanctions against multiple offerees under the offer of judgment scheme, it must exercise discretion to determine whether to apportion those sanctions among the multiple offerees or to impose those sanctions with joint or several liability; and (3) when offer of judgment sanctions are issued against multiple homeowner offerees in a construction defect action, a district court cannot impose those sanctions jointly and severally against the homeowners.

In the underlying action, homeowners in the High Noon at Boulder Ranch Community ("homeowners") brought claims against D.R. Horton, Inc. ("D.R. Horton") for construction defect related issues. Before trial, D.R. Horton served individual offers of judgment on each of the homeowners based on the extent of their respective property's defects; 39 of the 40 homeowners rejected these offers and proceeded to trial. At the conclusion of trial, the jury awarded verdicts for each homeowner, totaling \$66,300 in damages. No individual homeowner's award exceeded his or her offer of judgment from D.R. Horton.

Following the jury's verdicts, the homeowners and D.R. Horton filed motions for costs and attorney fees. The district court awarded D.R. Horton post-offer costs, but declined to award its attorney fees. Despite awarding D.R. Horton post-offer costs, the district court denied both motions, stating that it was impossible to award apportioned costs and fees under the circumstances.

In assessing whether to award D.R. Horton reasonable attorney fees pursuant to Nevada's offer of judgment statute (NRS 17.115) and rule (NRCP 68), the Supreme Court stated that the district court must evaluate the four factors outlined in *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983) and the additional four factors contained in *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). The Nevada Supreme Court directed the district court to reconsider its order denying D.R. Horton's fees and apply all of the *Beattie* and *Brunzell* factors.

Next, the Nevada Supreme Court discussed whether a district court can apportion sanctions awarded under NRS 17.115 and NRCP 68. This was a question of law not previously addressed in Nevada. Accordingly, the Nevada Supreme Court looked to outside jurisdictions for guidance.

The Nevada Supreme Court decided to follow an Arizona Court of Appeals decision entitled *Flood Control Dist. Of Maricopa Cnty. v. Paloma Inv. Ltd. P'ship.*, 279 P.3d 1191, 1209-10 (Ariz. Ct. App. 2012). Similar to *Maricopa County*, the court held that the decision of whether to apportion sanctions under NRS 17.115 and NRCP 68 among multiple offerees or to impose joint and several liability falls within the purview of the district court's discretion based on the circumstances before it. *Id.* In exercising this discretion, the district court should consider factors, including but not limited to: (1) whether different offerees raise distinct issues justifying segregating the costs and attorney's fees associated with the litigation; and (2) in the case of a prevailing party, whether the party entitled to costs and/or attorney fees would otherwise not likely be able to recover a substantial portion of his or her judgment. *Concord Boat Corp. v.*

Brunswick Corp., 309 F. 3d 494, 497 (8th Cir. 2002). The Nevada Supreme Court reversed the district court's order refusing to apportion the offer of judgment sanctions.

Additionally, the Nevada Supreme Court held that when offer of judgment sanctions under NRS 17.115 and NRCP 68 are issued against multiple homeowner offerees in a construction defect action, a district court cannot impose those sanctions jointly and severally against the homeowners. The Nevada Supreme Court explained that homeowners already face much uncertainty in bringing individual construction defect actions, thereby placing great importance on preserving the reasonableness of bringing a group lawsuit for construction defects. By requiring the apportionment of sanctions under NRS 17.115 and NRCP 68 in this context, the Nevada Supreme Court sought to ensure that group homeowner construction defect actions will not be chilled by the threat of crippling joint and several sanctions. Lastly, the court noted that apportionment is logical and feasible in these circumstances because each home has distinctive defects and juries issue individual homeowner verdicts. Accordingly, the district court must apportion sanctions issued against the homeowners based upon their individual offers of judgment.

5. In *DJT Design, Inc. v. First Republic Bank*, 130 Nev. Adv. Op. 5, 318 P.3d 709 (2014), the Nevada Supreme Court addressed the registration requirements set forth in NRS 623.349(2) in the context of a foreign (non-Nevada) architectural firm's ability to bring or maintain an action in Nevada. The plaintiff was an architectural firm incorporated in Colorado. One of the firm's principals submitted to the Nevada State Board of Architecture ("Board") an application permitting his individual practice of architecture within Nevada and prepared a second application permitting the firm's practice within Nevada. The Board approved the individual's application, but there was no evidence that the Board ever received or approved the firm's practice of architecture in Nevada. Thereafter, the firm contracted with a developer to provide architectural services in Las Vegas, Nevada. After not receiving payment for its work, the firm recorded a mechanic's lien. The defendant bank subsequently moved for summary judgment, arguing that the firm was prohibited from maintaining its lien foreclosure action because the firm was not properly registered as a foreign corporation under NRS 623.349(2) or satisfied Nevada's foreign corporation statutory filing requirements under NRS 80.010(1). The bank also argued that the firm's unjust enrichment was barred for this same reason. The trial court agreed with the bank, and granted the Bank's summary judgment motion. The firm appealed.

The Nevada Supreme Court first observed that, per NRS 623.357, "[n]o person [or] firm . . . may bring or maintain any action . . . for the collection of compensation" for architectural services without first "alleging and proving that such plaintiff was duly registered under [NRS Chapter 623] at all times during the performance of such act or contract." The Court ruled that the firm was required to prove that it was properly registered pursuant to NRS Chapter 623 as part of its prima facie case seeking compensation for its architectural services. The Court rejected the firm's arguments that Nevada's registration requirements do not apply to foreign architectural firms and that because the individual was licensed, the individual could foreclose on the firm's lien as a licensed architect. The Court also did not apply a substantial compliance exception to the registration requirements because of there was no record of the Board ever receiving the firm's corporate registration and, in any event, the firm had performed work on four prior projects. Ultimately, the Court concluded that regardless of whether a non-Nevada firm employs an architect that is registered in Nevada, NRS 623.349(2) and NRS 623.357 mandate that the firm be registered in Nevada in order to maintain an action on the firm's behalf.

6. In *Jun Liu v. Christopher Homes, LLC, et al.*, 130 Nev. Adv. Op. 17, 321 P.3d 875 (2014), the Nevada Supreme Court addressed a third party's right to recover attorney's fees and costs as special damages. In *Liu*, a subcontractor to Christopher Home ("CH") sued Liu, CH and Christopher Homes Ridges ("CHR"), the developer, and others to foreclose on its

mechanic's lien for non-payment. Liu cross-claimed against CH and CHR, alleging that they breached the sales contract by failing to deliver good and marketable title. Under this breach of contract claim, Liu sought to recover from CHR and CH the attorney's fees and costs she incurred in defending herself against the subcontractor's claims as special damages. The trial court held that, as a matter of law based upon the Nevada Supreme Court's ruling in *Horgan v. Feton*, 123 Nev. 577, 170 P.3d 982 (2007), Liu was not entitled to recover fees and costs as special damages under her breach of contract claim because a slander of title claim is required to recover such damages.

The Nevada Supreme Court reversed the trial court, stating:

We conclude that the district court erred in rejecting as a matter of law Liu's claim for attorney fees as special damages, as *Horgan* does not apply to preclude such recovery here. Although *Horgan* held that slander of title must be pleaded as a prerequisite for a party to recover attorney fees as damages in an action to clarify or remove a cloud on title to real property, that opinion did not retreat from the portion of *Sandy Valley* which held that a party, such as Liu, may recover attorney fees incurred in defending against third-party litigation because of CHR's or CH's breach of contract.

7. In *Simmons Self-Storage Partners, LLC, et al. v. Rib Roof, Inc.*, 130 Nev. Adv. Op. 57, 247 P.3d 1107 (2014), the Court addressed whether in order to establish a mechanic's lien on property or improvements thereon under NRS 108.222, a materialman must prove merely that materials were delivered for use on or incorporation into the property for improvements thereon; or, instead, must demonstrate that the materials were actually used for the property or improvements thereon.

Westar Construction, the general contractor, subcontracted with Southwest Steel to furnish and install steel products for six projects in Las Vegas, Nevada. Southwest Steel, in turn, sub-subcontracted with Respondent Rib Roof, Inc. to supply steel for six projects.

Although Rib Roof provided notices of intent to furnish materials that were defective and Rib Roof's bills of lading did not contain the consignee's signature indicating the materials were delivered to the bill of lading's address, appellant Simmons Self-Storage Partners, et al. (collectively, "Simmons") did not contest that the steel for any of the six projects came from another supplier.

Southwest made a partial payment to Weststar for the steel it supplied for five of the six projects, but did not pay Weststar any amount of money with regard to the sixth project. Nevertheless, Southwest sent Rib Roof a request that it sign and return several waivers of payment and lien releases. Thereafter, a Rib Roof representative known by Southwest to lack authority signed an unconditional mechanic's lien release for two of the six properties and returned them to Southwest.

Rib Roof recorded a mechanic's lien against each of the six properties and filed suit to foreclose its liens. Simmons then obtained a mechanic's lien release bond for four of the six properties. Thereafter, the trial court determined that Rib Roof substantially complied with Nevada's Chapter 108 regarding the perfection and execution of mechanic's liens, and calculated the amount of mechanic's lien for each of the properties (including interest) and awarded Rib Roof nearly \$160,000 in attorney's fees and costs. Further, the trial court ruled that, to the extent that the mechanic's lien release bonds were not of a sufficient amount to satisfy Rib Roof's award, all six properties were to be sold without determining the total charge attributable to each property. Simmons appealed.

The Nevada Supreme Court affirmed in part, reversed in part and remanded the case back to the trial court for further proceedings. First, the Court held that a materialman can lien for materials supplied to a project:

We therefore hold that under NRS 108.222, a materialman has a lien upon a property and any improvements thereon for which he supplied materials. A materialman does not need to prove that the material he supplied were used or incorporated in the property or improvements; rather, he must prove that they were supplied for use on or incorporation into the property or improvements thereon.

The Court found that the trial court correctly determined that Rib Roof had placed six valid mechanic's liens, one on each of the six projects, and that the two lien releases signed by the Rib Roof representative were invalid as the representative lacked the authority to sign them.

The Court then found that the trial court erred with regard to its award to Rib Roof in two ways. First, the trial court erred in determining the appropriate amount chargeable to each of the six properties. Second, the trial court erred in ordering the sale of the four properties for which mechanic's lien release bonds had been posted.

On remand, the Court directed the trial court to calculate the appropriate amount chargeable to each of the six properties, including principal, interest and attorney's fees and costs. The trial court can then order the sale of the two non-bonded properties and enter judgment against the lien release bond sureties on the other four. The trial court can take further action against the release bond principal only after a showing that the release bonds are insufficient.

Legislation: N/A

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New Hampshire

Case law:

1. In *In re Moultonborough Hotel Group, LLC*, 726 F.3d 1 (1st Cir. 2013), contractor ROK Builders, LLC sought priority over a mortgage in the property developer's bankruptcy action. Here, ROK initially ceased work on the construction of a Hampton Inn & Suites in Tilton, New Hampshire after the developer, Moultonborough Hotel Group, failed to pay contractor \$1.6M for past work completed. Contractor filed a mechanics' lien against the property for the outstanding amount, but signaled its willingness to resume work if the developer secured adequate financing and paid past due amounts, with interest. Developer then entered into a new financing agreement with Special Finance Group, which resulted in full payment of the contractor and release of the contractor's related mechanics' lien. The financing was secured by a mortgage on the property. Contractor then continued work and was paid over \$6.4M directly by the financing company for work completed. Toward the end of the project, the financing company refused to make final payments to contractor, not because of defects in the work, but instead because of developer's failure to secure additional financing as was required by the loan

agreement. Contractor then filed a mechanics' lien against the property for over \$2.4M and sought priority over the mortgage in this bankruptcy action.

The New Hampshire recording statute, N.H. Rev. Stat. Ann § 477:3-a, acknowledges by negative implication that the first party to record a property interest, without prior notice of another party's claim, has priority. The statute provides that any "instrument which affects title to any interest in real estate" must be recorded and "shall not be effective as against bona fide purchasers for value until so recorded." N.H. Rev. Stat. Ann § 477:3-a. Here, the "race-notice" rule favors the priority of the mortgage, as it was filed prior to and without notice of contractor's \$2.4M mechanic's lien, which did not arise until the project was complete. New Hampshire does create an exception to the race-notice rule for mechanic's liens. The law states mechanic's liens "shall have precedence and priority over any construction mortgage." N.H. Rev. Stat. Ann § 477:12-a. However, the exception is subject to one important qualification: a mechanic's lien "shall not be entitled to precedence . . . to the extent that the mortgagee shows that the proceeds of the mortgage loan were disbursed . . . toward payment of the invoices from or claims due subcontractors and suppliers of materials or labor for work on the mortgaged premises." *Id.* Here, contractor admitted that the mortgage holder had used loan disbursements to make payments of over \$6.4M to contractor for the work on the mortgaged premises. Therefore, the court ruled that the mortgage holder had priority as the first to file, and the mechanic's lien exception was inapplicable as to the \$6.4M because those funds were used to pay contractor as a "supplier[] of materials or labor for work on the mortgaged premises." *Id.*

2. In *Kimball Union Academy v. Genovesi*, 70 A.3d 435 (N.H. 2013), the Court held that New Hampshire has personal jurisdiction over a New Jersey professional engineer who completed work for Kimball Union Academy, a New Hampshire private school, even though Genovesi completed all work out of state. Genovesi completed the work in New Jersey, through a contract with a Florida corporation to provide engineering and design work for the footings and foundation system of a field house to be located in New Hampshire. Kimball Union Academy sued Genovesi for professional negligence related to the footing and foundation design. Genovesi sought dismissal for lack of personal jurisdiction based on the fact that he completed all the work for the foundation drawings from his office in New Jersey and that he has never resided in New Hampshire, owned property in New Hampshire, advertised in New Hampshire, had business interests in New Hampshire, or even visited New Hampshire since a ski vacation more than 30 years ago.

The court found personal jurisdiction over Genovesi based on the New Hampshire long arm statute. Though Genovesi contended he did not commit a tortious act in New Hampshire, "[f]or jurisdictional purposes, the party commits a tortious act within the State when the injury occurs in New Hampshire even if the injury is a result of acts outside the State." *Id.* at 440 (quoting *Thomas v. Telegraph Publ'g Co.*, 859 A.2d 1166, 1169 (N.H. 2004)). Even the fact that his design was to be presented by the Florida corporation to a New Hampshire licensed professional engineer for review, signature, and seal prior to submission to the town for building permit did not negate the allegation that he was negligent to begin with and therefore caused the injury. The Court also noted that Genovesi was aware his work was intended for New Hampshire; he provided a proposal acknowledging that the foundation design was for a field house in New Hampshire, even referencing the project's address. Genovesi also actively engaged in making his work suitable for its location in New Hampshire, being mindful of local restrictions and coordinating with a local specialist. Therefore, that an injury could occur in New Hampshire was entirely foreseeable and his actions indicated his intent to serve the market of New Hampshire, establishing his availment of the protection of New Hampshire's laws.

3. In *Victor Virgin Construction Co. v. N.H. Department of Transportation*, 75 A.3d 1136 (N.H. 2013), the New Hampshire Supreme Court held that a contractor's claim for negligent misrepresentation against the Department was statutorily capped at \$475,000. Contractor

Victor Virgin Construction Co. brought a breach of contract claim and negligent misrepresentation claim against the Department related to its failure to fairly adjust a contract price after changes by the Department increased the scale and scope of work and caused construction delays of almost one year. A jury awarded \$1,520,635 to the contractor on the negligent misrepresentation claim, which was reduced by a trial court ruling that no reasonable jury could have awarded more than \$779,078, as any further award was speculative. The trial court did not enter a finding on the breach of contract claim. Both parties appealed.

On appeal, the New Hampshire Supreme Court ruled in favor of the Department that the negligent misrepresentation claim is governed by N.H. Rev. Stat. Ann § 541-B:14, I, and therefore any recovery under such claim was limited to the statutory cap of \$475,000. Under N.H. Rev. Stat. Ann § 541-B:14, I (Supp. 2012), “[a]ll claims arising out of any single incident against any agency for damages in tort actions shall be limited to an award not to exceed \$475,000 per claimant and \$3,750,000 per any single incident.” The Court remanded the case for determination by the trial court as to liability and damages on the breach of contract claim.

Legislation:

1. S.B. 54, Appeal from the Department of Administrative Services Bureau of Public Works Design and Construction (2013 Session). The bill modifies portions of the New Hampshire Code related to administrative procedures. The law now requires a person aggrieved by a decision of the administrator of public works design and construction to file for an informal review of the director of the division of plant and property management, or the director’s designee, as a prerequisite to appeal to the commissioner. Appeal to the commissioner must be made within 30 days of the director’s determination. Appeals of the commissioner’s decisions shall go before the transportation appeals board, unless related to aeronautical matters, which go before the Aviation Users Advisory Board.

2. S.B. 282, An Act Relative to Disciplinary Proceedings by the Board of Architects (2014 Session). The bill repeals and reenacts law N.H. Rev. Stat. Ann § 310-A:47 to set out the new criteria and procedures for disciplinary actions by the board of architects. It also sets the penalties that the board may impose on architects licensed in the State of New Hampshire.

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New Jersey

Case law:

1. In *Dispenziere v. Kushner Companies*, N.J. Super. LEXIS 157 (N.J. App. Div. November 21, 2014) (“Dispenziere”), the New Jersey Appellate Division found an arbitration clause in a condominium Public Offering Statement unenforceable because it lacked “clear and unambiguous language” that the party was waiving her right to sue. In reaching its decision, the *Dispenziere* court followed the precedent established by the New Jersey Supreme Court in a decision that came down earlier that year in the matter of *Atalese v. United States Legal Services Group, L.P.*, 219 N.J. 430 (2014) (“Atalese”).

Plaintiffs in *Dispenziere* were individual purchasers in a condominium development that brought suit against the defendant developer who they claimed represented that their units would be part of “a large waterfront community, which was to include diverse amenities, including a Community Center, a Health Club, a waterfront esplanade, [three] parks, and other recreational improvements.” After closing on their units, plaintiffs alleged that the defendant

changed the nature of the development and failed to offer the amenities previously represented to be part of the development.

After plaintiff filed suit in New Jersey Superior Court, defendant moved to compel arbitration based on an arbitration clause contained in the Public Offering Statement that was provided to plaintiffs with their purchase agreements, which required any disputes with the developer be brought to arbitration before the American Arbitration Association. The Law Division granted the motion to compel arbitration and plaintiffs appealed. In reaching its decision, the Appellate Division in *Dispenziere* relied heavily on the Supreme Court's reasoning in *Atalese*. Although *Atalese* involved claims under New Jersey's Truth in Consumer Contract, Warranty and Notice Act and the Consumer Fraud Act, while *Dispenziere* implicated New Jersey's Consumer Fraud Act and common law claims, the Appellate Division found the distinction unimportant. The fact that some of the plaintiffs were represented by counsel was also insignificant. Rather, the court looked to whether the arbitration clause clearly stated its purpose and informed that by electing arbitration the parties understood that they were "waiving their time-honored right to sue." Applying this reasoning the *Dispenziere* court struck down the arbitration clause because it was devoid of any language that would inform purchasers such as plaintiffs that they were waiving their right to maintain an action in court. Following *Atalese*, the court found this lack of notice "fatal to defendants' efforts to compel plaintiffs to arbitrate their claims."

2. In the case of *The Palisades at Fort Lee Condominium Assoc. v. 100 Old Palisade*, 2014 N.J. Super. LEXIS 743 (N.J. App. Div. March 31, 2014) ("*Palisades*"), the New Jersey Appellate Division examined when a cause of action accrues for statute of limitations purposes on claims brought by a condominium association for a development that was originally constructed as a rental complex. "Generally, in construction cases a cause of action accrues for statute of limitations purposes at the time of substantial completion of a party's work." The exception to that general rule is found in cases where the equitable principle of the discovery rule is applicable. The court found that the facts present in *Palisades* did not warrant straying from the general rule.

The development in *Palisades* began as a rental apartment building owned and operated by the original developer, Palisades A/V Acquisitions Co., LLC ("A/V"). The development was substantially complete on May 1, 2002. Approximately two years later, A/V sold the development to the sponsor, Crescent Heights. Crescent Heights controlled the Condominium Association until July 2006 when the unit owners assumed control of the Association. The Association engaged an independent engineer to perform an inspection, which revealed various construction and design defects forming the basis of plaintiffs' first Complaint filed on March 12, 2009, approximately seven years after the date of substantial completion. In examining when the cause of action should be found to have accrued - upon substantial completion or when the defects were discovered - the court found dispositive the fact that the defendant contractors were retained to build a rental apartment building and could not have reasonably anticipated having claims filed against them by subsequent buyers. "The statute of repose was drafted to "delimit [the] greatly increased exposure" of potential builder or contractor liability and has been broadly interpreted since its inception in 1967." The numerous changes of ownership at the development from owner, apartment developer, then sponsor, to the Association led the court to apply the six year statute of limitations and find plaintiffs' claims untimely brought.

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New York

Case law:

1. In *Matter of Wallach v. Town of Dryden; Cooperstown Holstein Corp. v. Town of Middlefield*, 23 N.Y.3d 728 (2014), the New York Court of Appeals (New York's highest court) upheld Dryden and Middlefield bans of hydraulic fracturing ("fracking"), under home-rule doctrine, finding that the New York Oil, Gas and Solution Mining Law ("OGSML") does not preempt such home-rule authority. In doing so, the Court ultimately upheld the lower court's decisions and findings that towns may ban oil and gas production activities, including fracking, within municipal boundaries through the adoption of local zoning laws. The Court of Appeals applied the three-factor test in making its determination, finding that: (1) The plain language of the OGSML provides for preemption only of local laws that regulate actual oil and gas operations as distinct from zoning ordinances that restrict or prohibit certain land uses within town boundaries; (2) the statutory scheme of the OGSML likewise justifies invalidating local laws that would intrude on the Department of Environmental Conservation oversight authority; and (3) legislative history supports the contention that local zoning laws that prohibit certain uses of municipal land are superseded by the OGSML. Plaintiff's Motion for Reconsideration was later denied in October of 2014. The decision effectively killed any prospect of fracking in New York since, at the time of the decision, at least 170 local governments had banned the drilling practice.

2. *Beardslee, etc. v. Inflection Energy, LLC*, 23 N.Y.3d 1047 (2014), *decision without published opinion*: certification of questions by the United States Court of Appeals for the Second Circuit ("Second Circuit"), pursuant to Section 500.27 of this Court's Rules of Practice accepted and the issues presented are to be considered after briefing and argument. In connection with New York State's fracking moratorium, the Second Circuit asked the New York Court of Appeals to determine whether the moratorium constitutes a *force majeure* (unforeseeable circumstance that prevents someone from fulfilling a contract) event for purposes vitiating obligations under oil and gas leases. More specifically, the U.S. Court of Appeals for the Second Circuit asked the New York Court of Appeals to consider "whether the moratorium was a *force majeure* event under the leases requiring examination of whether regulatory actions barring 'commercially viable' drilling – but not all drilling – can constitute such an event." If the answer is in the affirmative, the Second Circuit also requested that the New York Court of Appeals determine whether such *force majeure* modifies the primary term of the lease, thereby extending the lease for the amount of time the moratorium is in place.

3. In *Strauss Painting, Inc. v. Mt. Hawley Insurance Co.*, ___ N.E.2d ___, 2014 NY Slip. Op. 08214 (N.Y. Nov. 24, 2014), the New York Court of Appeals underscored the importance of careful attention to contractual insurance requirements during a construction project. Plaintiff had entered into a contract with the Metropolitan Opera Association (the "Met") to repaint certain equipment on the roof of the Met's premises. The contract required Plaintiff to purchase or maintain various types of insurance including owner's and contractor's protective ("OCP") and commercial general liability ("CGL"). Specific requirements for these coverage's were listed on an exhibit attached to the contract. Plaintiff was required to provide the Met with proof of both insurances being retained. Plaintiff ultimately did not purchase the contract. A worker employed by a subcontractor of Plaintiff was injured falling off a ladder during the course of the work and an action was brought against the Met and its landlord. The litigation expanded to include Plaintiff and various insurance companies. The appeal involved Plaintiff's claim for coverage for the accident under its Mt. Hawley CGL policy and the Met's claim under that same policy as an additional insured. The Court upheld the denial of coverage to Plaintiff on the grounds that the notice to Mt. Hawley of the accident was late by approximately four months. Significantly, the Mt. Hawley policy was sold prior to the 2009 effective date of Insurance Law

§ 3420(a)(5), which now requires an insurance company to show it suffered prejudice before coverage can be barred on the grounds of late notice under many types of liability policies. The Court further held that in an insurance coverage dispute, the contractor's notice of a personal injury claim to the insurance broker did not sufficient to satisfy the timely notice requirement under Insurance Law § 3420(d) and the building owner was not considered an additional insured on the contractor's policy with the insurer because the parties did not agree in writing to that requirement. The Court held that the contract's language requiring additional insured status appeared only in the paragraph about OCP coverage and not about the CGL coverage. Accordingly, the finding basically states that if the parties had intended additional insured status under the CGL policy, they should have placed that language so that it more clearly modified the CGL requirement in the contract.

4. In *KeySpan Gas East Corp. v. Munich Reins. Am. Inc.*, ___ N.E.2d ___, 2014 NY Slip Op 4113, 2014 N.Y. LEXIS 1319 (N.Y. Jun. 10, 2014), the Court of Appeals of New York found that three insurers had not, by operation of New York's late disclaimer statute, waived their right to disclaim coverage for environmental contamination where they had allegedly failed to issue their disclaimers "as soon as reasonably possible" after learning of the grounds for disclaimer. The Court overturned an intermediate appellate court decision that had denied summary judgment to the three excess insurers on the basis that issues of fact remained as to whether such a waiver had occurred. The three excess insurers were named as defendants in a declaratory judgment action brought by their insured, a property owner that had incurred losses in connection with the investigation and remediation of environmental damage at manufactured gas plant sites. In defending the suit, the insurers raised late notice as a defense. Following summary judgment proceedings, the intermediate appellate court decided that a jury should consider whether the insurers waived their right to disclaim coverage by failing to meet their "obligation to issue a written notice of disclaimer on the ground of late notice as soon as reasonably possible after first learning of the accident or of grounds for disclaimer of liability." The Court of Appeals reversed the decision, finding that the appellate court had improperly applied New York Insurance Law § 3420(d)(2), New York's late disclaimer statute, to an environmental damages claim. While the appellate court had not cited the statute directly, the Court of Appeals noted that the appellate court had essentially applied the statute's strict timeliness requirements. However, the statute that requires notice of a disclaimer "as soon as is reasonably possible," only applies to death and bodily injury claims because, as the Court of Appeals explained, the statute was enacted to aid injured parties by encouraging the expeditious resolution of such claims. In other contexts, including environmental remediation claims, the statute does not apply, and the mere passage of time will not deprive an insurer of its policy defenses without "the insurer's manifested intention to release a right as in waiver, or on prejudice to the insured as in estoppel." Accordingly, the Court of Appeals reversed the decision and remanded the case for further proceedings.

5. In *Morris v Pavarini Constr.*, ___ N.E.2d ___, 2014 NY Slip Op. 01210 (N.Y. Feb. 20, 2014), the Court of Appeals ruled for an injured worker on a summary judgment motion based on Labor Law § 241(6). Cases brought under the New York Labor Law give the injured worker a claim against a construction site owner and general contractor that the injured worker would not have under the common law. The Labor Law creates a statutory non-delegable duty for the owners and general contractors of construction sites to be responsible for worker safety. Cases brought under Labor Law § 240(1) deal with elevated risks. Cases brought under Labor Law § 241(6) are predicated on violations of the Labor Code of New York. If an injured worker can prove (1) a violation of a specific section of the Labor Code, (2) the violation of that specific section of the Labor Code was a substantial factor in causing the injury, and (3) the violation of that specific section of the Labor Code was a failure to use reasonable care, then the owner and general contractor are liable for the plaintiff's injuries under Labor Law § 241(6). In the facts under *Morris*, the plaintiff was a carpenter struck by part of a concrete form that was being

constructed. (This was actually the second time this case was before the court of appeals). After a hearing in which expert witnesses testified for both sides, the Court found that the defendants violated the Labor Code (12 NYCRR 23-2.2(a)), that violation was a substantial factor causing the plaintiff's injury, and that violation was a failure to use reasonable care. The plaintiff was awarded summary judgment on liability and the plaintiff would be awarded damages for his injuries at a trial.

Legislation:

1. 2014 Supplement to the New York State Energy Conservation Construction Code: Effective January 1, 2015, The New York Energy Code is contained in Title 19 of the New York Codes, Rules and Regulations ("NYCRR"), part 1240, and in the publications incorporated by reference in 19 NYCRR part 1240, which include the 2010 edition of the Energy Conservation Construction Code of New York State (the "2010 ECCCNY"), the 2012 edition of the International Energy Conservation Code (the "2012 IECC"), the 2010 edition of the ANSI/ASHRAE/IES Standard 90.1, Energy Standard for Buildings except Low-Rise Residential Buildings ("ASHRAE 90.1-2010"), as well as the 2014 Supplement to the New York State Energy Conservation Construction Code (the "2014 Supplement"). NYS Code Council voted to amend the Energy Conservation Construction Code of New York State (for Commercial buildings only), adopting the IECC-2012 and ASHRAE 90.1-2010, as amended by the 2014 Supplement to the New York State Energy Conservation Construction Code. A copy of the 2014 Supplement can be located at http://www.dos.ny.gov/dcea/pdf/2014EnergySUPP_041114.pdf.

2. 2014 New York City Construction Codes, effective December 31, 2014. Significant changes made to the NYC Construction Codes as part of the NYC Department of Buildings Code Revision process and by other local laws passed by City council in the wake of Hurricane Sandy, collectively known as the 2014 NYC Construction Codes. New effective date December 31, 2014. Benefits of the changes include, updating Codes to national standards, incorporate latest technologies, allow new materials and methods of construction, and maintain consistency with other jurisdictions. A detailed list of the changes can be located at www.nyc.gov/html/dob/downloads/pdf/2014_code_changes_chapter_33.pdf.

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North Dakota

Case law:

1. In *C & C Plumbing & Heating, Inc. v. Williams County*, 2014 ND 128, the North Dakota Supreme Court upheld the validity of a "no damages for delay" provision in a public contract against the prime contractor but also found the county liable for some delay damages to a project subcontractor due to active interference on the county's behalf.

The lawsuit arose out of the construction for a new county law enforcement center. Williams County ("County") contracted with a construction management firm, Parsons Commercial Technology Group, Inc. ("Parsons") to act as the County's representative during construction. The project was let under 28 separate contracts. American General Contractors ("ACG") obtained five of the contracts and acted as the de facto general contractor on the project. Although the County and Parsons outlined a strict project schedule that needed to be followed, the project suffered a series of delays, resulting in over seven months of delay to reach substantial completion.

Several project contractors sued to recover costs associated with the various delays. The district court denied ACG's claims for additional costs, citing the presence of a "no damages for delay" clause contained in ACG's contract with the County. The district court did, however, grant the masonry contract a recovery for additional costs associated with temporary heating costs to perform its work on the theory that the County, through Parsons, actively interfered with the contractor's means and methods and thus directly contributed to the delays.

On appeal, ACG challenged the district court's ruling that it was precluded from recovering delay damages. The North Dakota Supreme Court upheld the district court's decision, citing earlier precedent in which the Court had already upheld a "no damages for delay" clause. The Court also upheld the verdict in favor of the masonry contractor despite the

presence of a "no damages for delay" clause in its contract with the County, citing the recognized "active interference" exception to a "no damages for delay" clause.

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Ohio

Case law:

1. In *Transtar Electric, Inc. v. A.E.M. Electric Services Corporation*, No. 2013-0148, 2014-Ohio-3095 (Ohio Sup. Ct. July 17, 2014), the Court held that when a contract provides that payment by a project owner to a general contractor for work performed by a subcontractor is a condition precedent to payment by the general contractor to the subcontractor, the provision is a paid-if-paid provision.

A.E.M. Electric Services Corporation ("AEM"), as general contractor entered into a subcontract with Transtar Electric, Inc. ("Transtar") for electrical services related to a pool at a Holiday Inn. AEM did not pay Transtar's final three (3) invoices because the project owner did not pay AEM. The subcontract contained the following clause:

RECEIPT OF PAYMENT BY CONTRACTOR FROM OWNER
FOR WORK PERFORMED BY SUBCONTRACTOR IS A
CONDITION PRECEDENT TO PAYMENT BY CONTRACTOR
TO SUBCONTRACTOR FOR THAT WORK.

Transtar filed suit seeking payment, but the trial court granted AEM summary judgment based upon the clause above. The Court of Appeals reversed holding that the clause was not specific enough to show that both parties to the contract agreed that that the risk of nonpayment by the project owner would be borne by the subcontractor.

The Supreme Court reviewed Ohio case on payment of subcontractors by general contractors. First, the Court noted that a general contractor may enter into a "pay-when-paid" clause, i.e., the contractor may make an unconditional promise to pay, usually within a reasonable time. Although the "reasonable time" typically allows the general contractor to be paid before it must pay the subcontractor, "[s]uch a promise is not dependent on or modified the owner's nonpayment."

Second, the Supreme Court stated that a general contractor may enter into a "pay-if-paid" clause, i.e., the contractor may make a conditional promise to pay, enforceable only if the condition precedent of payment from the owner occurs. The effect of a "pay-if-paid" clause is to

shift the risk of nonpayment by the owner to the subcontractor. Third, the Court stated that a contract cannot contain both a “pay-when-paid” clause and a “pay-if-paid” clause.

Finally, the Supreme Court determined that that various formulations of language had resulted in holdings about whether a particular clause was one or the other, but that a contract provision is a “pay-if-paid” clause when payment by the project owner is a condition precedent to payment of the subcontract. The Court held that a condition precedent is “a condition that must be performed before obligations in the contract become effective,” i.e., “[i]f the condition is not fulfilled, the parties are excused from performing.”

Applying these principles to the clause at issue the Supreme Court reversed the Court of Appeals and held that it was a “pay-if-paid” clause. The Court also stated that “the use of the term condition precedent negates the need for additional language to demonstrate the intent to transfer risk.” In short, no additional language is necessary to clearly describe the intent of the parties.

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Oregon

Case law:

1. *Avenue Lofts Condominiums Owners’ Ass’n v. Victaulic Co.*, 3:13-CV-01066-BR, 2014 U.S. Dist. LEXIS 77189 (D. Or. Jun. 6, 2014): In 2004, a condominium was constructed pursuant to an agreement between a developer and a general contractor. The general contractor entered into an agreement with a subcontractor to install plumbing systems, which used many components manufactured by defendant Victaulic Co. Subsequently, defendant’s products began to deteriorate, thereby resulting in extensive water damage. The plaintiff condominium association filed suit against defendant alleging, *inter alia*, violations of Oregon’s Unlawful Trade Practices Act (“UTPA”). The Court held the UTPA applied to consumer transactions, but not commercial transactions. Here, because the purchase of defendant’s components were made by the general contractor and/or other subcontractors, rather than the plaintiff, it was deemed a commercial transaction, rather than a consumer transaction, and thus the plaintiff’s UTPA claim failed.

2. *Shell v. Schollander Cos., Inc.*, 336 P.3d 569 (Or. Ct. App. 2014): Plaintiff was the owner and purchaser of a “spec home” (a home built on speculation that an individual would purchase upon completion, rather than a home specifically built for an individual) who bought the home midway through construction using a real estate sales agreement, rather than a construction contract. When defects were noticed subsequently, plaintiff filed negligence suit against the developer. The trial court granted defendant’s motion for summary judgment on the ground that plaintiff did not initiate this action within the 10-year statute of repose required by ORS 12.115, which begins to run from the time of “the act or omissions complained of.” The Court of Appeals of Oregon determined that the ten-year statute of repose set forth in ORS 12.135 for claims arising out of the construction, alteration, repair or improvement of real property did not apply. Instead, the ten-year statute of repose set forth in ORS 12.115 applied, which begins running from the time of the act or omission complained of. The court recognized the alleged defect was the construction of the home’s outer shell, and held that because the shell was completed more than ten years before the complaint was filed, the plaintiff’s claims were time-barred.

3. *Tavtigian-Coburn v. All Star Custom Homes, LLC*, 337 P.3d 925, (Or. Ct. App. 2014): Plaintiff homeowner sued defendant contractor for negligent construction of a home, and

defendant was granted summary judgment on grounds that plaintiff's claim was untimely under the six year statute of limitations set forth in ORS 12.080(3). On appeal, the appellate court adopted the recent Oregon Supreme Court's decision in *Rice v. Rabb*, 320 P.3d 554 (2014), in which it held that the six-year statute of limitation in ORS 12.080(4) for conversion and replevin claims incorporates a discovery rule. Plaintiffs' argued in their appeal that accordingly, their claims did not accrue until they knew or should have known of each of the elements of their negligence and nuisance claims. The Court agreed and since defendant did not present any evidence that plaintiff knew or should have discovered the claims more than six years before filing, the trial court erred in granting summary judgment in favor of defendant was reversed.

4. *PIH Beaverton, LLC v. Super One, Inc.*, 323 P.3d 961 (Or. 2014): Plaintiff purchased a hotel from a third party in 2006. Plaintiff discovered construction defects and sued defendant contractor more than ten years after a notice of completion was recorded under ORS 87.045, but less than ten years after the county issued a notice of final completion, and sued. Defendant argued the statute of ultimate repose under ORS 12.135 barred the claims. The court held that recording and posting a completion notice under ORS 87.045 does not establish the date on which the statute of ultimate repose began to run, and that absent a written acceptance, construction must be fully complete for the ORS 12.135 limitations period to accrue, rather than substantially complete.

Legislation:

1. S.B. 254 Model Rules: An Act relating to requirements for alternative contracting methods, creating new provisions, and amending ORS 279A.065, 279A.070, 279C.307, 279C.330, 279C.335, and 279C.380. Passed in 2013 and effective July 1, 2014. S.B. 254 set forth new requirements for all public agencies and contractors for public contracting that is not subject to competitive bidding. S.B. 254 specifies conditions under which a contracting agency may use alternative contracting methods to award public improvement contracts for construction manager/general contractor services. In addition, S.B. 254 requires the adoption of model rules to specify procedures for procuring these services and also requires contracting agencies to procure such services in accordance with the model rules.

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Rhode Island

Case law:

1. In *Process Engineers & Constructors, Inc. v. DiGregorio, Inc.*, 93 A.3d 1047 (R.I. 2014), a pipe installation sub-subcontractor brought an action against subcontractor, alleging breach of contract and quantum meruit after the sub-subcontractor installed, and then was required to replace, pipe due to water-damaged insulation. The trial court entered judgment in favor of the sub-subcontractor for quantum meruit and the subcontractor appealed.

Per the facts of the case, the owner selected the exact pre-insulated pipe that it wanted used on the project. The sub-subcontractor installed the requested pipe. The parties later determined that the insulation surrounding the pipe had become wet. The sub-subcontractor replaced the pipe and demanded payment for that work pursuant to breach of contract and quantum meruit. The subcontractor withheld the payment because "it believed that [sub-subcontractor] was at fault for the water damage to the pipe[.]" The trial court held that because the sub-subcontractor had failed to submit a change order for the extra work, it did not satisfy the conditions precedent under the contract and therefore could not recover under the contract.

The trial justice next considered quantum meruit. Because the sub-subcontractor was not responsible for dewatering the trench, it was entitled to rely on the responsible entity, the subcontractor, to keep the trenches dry. As such, the trial justice was satisfied that the sub-subcontractor's costs for having to replace the wet pipe insulation were due to "something [other] than its own actions" and therefore the "additional costs to replac[e] the damaged pipe were not attributed to [p]laintiff's own inefficiencies or job preparation." The trial court therefore awarded the sub-subcontractor the cost for the replacement of the damaged wet pipe.

On appeal, the Supreme Court explained that "the question is whether [the sub-subcontractor making a claim in quantum meruit] only had to prove that it was not responsible for the loss, or whether [it] also had to prove what caused the loss." The Court held that "[the sub-subcontractor] was required to prove only that it was not at fault for the loss; it did not need to prove who was at fault." The Court assessed that there was competent evidence supporting the trial court's finding that the additional costs for replacing the damaged pipe were not attributable to the sub-contractor's own inefficiencies or poor job preparation. In essence, there was nothing more that the sub-subcontractor could have done to "protect" the pipe, as was its responsibility. Accordingly the sub-subcontractor had met its burden and could recover under quantum meruit. The case begs the question of how the sub-subcontractor satisfactorily proved that it was not responsible for the loss, without proving what caused the loss.

2. In *Emond Plumbing and Heating, Inc. et al. v. BankNewport*, No. 2013-212-Appeal, 2014 WL 6724339 (R.I. November 28, 2014), the Supreme Court affirmed the trial court's decision to grant summary judgment against two subcontractors and in favor of the bank. The appellants, two subcontractors, had brought unjust enrichment claims against a bank that had issued a construction loan to the building owner. The subcontractors had contracted with the general contractor, not the bank or the owner. As work on the project was completed and inspected, the bank released loan funds to the owner earmarked for the general contractor and subcontractors. The two plaintiff subcontractors received payment for some of their completed work. Then the owner was arrested for bribery. The bank declared the owner in default, cancelled payment on all pay applications, and instituted foreclosure proceedings on the building. Through foreclosure, the bank obtained title to the building, but still refused to pay the subcontractors for the completed work from the undistributed loan proceeds. The bank also prevented the subcontractors from removing installed equipment that was never paid for. After filing the complaint for unjust enrichment, the two subcontractors and the bank cross-moved for summary judgment. The trial court agreed that as a matter of law the bank rightfully obtained the improved building by way of its status as the secured creditor and that the plaintiffs sat on their rights by failing to oppose the bank's foreclosure and asserting mechanics' liens. The trial court therefore granted summary judgment in the bank's favor. It held that any benefit that the bank received as a result of the unsecured subcontractors' work to the collateral was not unjust and that the bank had perfected its security interest.

On appeal, the Supreme Court declined to adopt the trial court's decision that the bank was entitled to the improved property by way of its status as a secured creditor. Rather, the Supreme Court reasoned that the lender's retention of the property, including the improvements thereon, was not inequitable under a theory of unjust enrichment. The Court first recounted that "to recover for unjust enrichment, a claimant must prove: (1) that he or she conferred a benefit upon the party from whom relief is sought; (2) that the recipient appreciated the benefit; and (3) that the recipient accepted the benefit under such circumstances 'that it would be inequitable for [the recipient] to retain the benefit without paying the value thereof.'" The Court explained that the third prong is "the most important" and turns on the "facts of the particular case and balanc[ing] [of] the equities." The Court held that it would not be unjust for the instant bank to retain the property and improvements without paying the subcontractors for them. The Court took particular note that there was no bad faith or misconduct on the part of the bank and that the bank was never responsible for making payments to these subcontractors.

3. In *Berkshire Wilton Partners, LLC v. Bilray Demolition Co.*, 91 A.3d 830, 834 (R.I. 2014), a general contractor moved to vacate an arbitrator's award to a subcontractor. The general contractor prevailed on its motion and the subcontractor appealed.

In the underlying action, the general contractor terminated the subcontractor in April 2010. Per the agreement, the parties submitted the termination to arbitration and the subcontractor sought the balance on its contract price or the value of additional work completed but not paid for. The general contractor objected to the subcontractor's claims on account of a signed lien waiver that extinguished claims through March 16, 2010. The arbitrator disagreed that the waiver had this effect. The arbitrator concluded that the waiver inured to the benefit of the owner not the general contractor and therefore issued an award to the subcontractor against the general.

On the motion to vacate the arbitrator's award, the trial court reversed the award based on the arbitrator's misapprehension of the law in that the release did in fact unambiguously waive all claims with no exceptions.

The subcontractor appealed and the Supreme Court reversed the trial court and reinstated the award. The Supreme Court began its analysis by noting that arbitration's "policy of finality is reflected in the limited grounds that the Legislature has delineated for vacating an arbitration award" and that an arbitrator's decision is "insulated from the normal appellate review for errors of law." The Supreme Court noted that unlike the decision, *Gustafson v. Max Fish Plumbing & Heating Co.*, 622 A.2d 450 (R.I.1993), relied upon by the instant trial justice, here the analysis as to the release's ambiguity came after the arbitrator issued its award. In *Max Fish*, the question on the language of a release was determined before the arbitral award was issued. The Court also recounted that "to vacate an arbitrator's decision, we must conclude that the arbitrator has manifestly disregarded the law." Then the Court explained that "a manifest disregard of the law occurs when an arbitrator 'understands and correctly articulates the law, but then proceeds to disregard it.'" Rather, here, the arbitrator in the Court's assessment had made an analysis of the release language and "an earnest attempt" to reconcile it with the release language in *Max Fish*. The Court concluded that "that the arbitrator's decision neither is irrational nor manifestly disregards the law." The Supreme Court declined to disturb the decision of the arbitrator and subcontractor's award therefore was reinstated.

This case is significant because it is consistent with the extreme reticence of the Rhode Island Supreme Court to disturb arbitration awards in construction contracting cases; indeed, it has never upheld the vacation of an arbitrator's award.

4. In *Nat'l Refrigeration, Inc. v. Capital Properties, Inc.*, 88 A.3d 1150 (R.I. 2014), a subcontractor brought action to enforce a mechanics' lien. The property owner and lessee bonded the lien and the plaintiff subcontractor amended its complaint to add the surety. The subcontractor moved for summary judgment on the mechanics' lien complaint and the owner and lessee requested judgment in their favor, arguing that the posting of the bond released them from any claims in the lawsuit, which the trial court granted. The subcontractor appealed.

The Supreme Court affirmed the trial court decision. The Court explained that once the bond is secured, it substitutes for the lien and the property owner is dismissed. Otherwise, the Court noted, "permitting the inclusion of the owner and lessee as defendants after a bond is deposited would nullify § 34-28-17(a)."

5. In *Cardi Corp. v. State of Rhode Island and Providence Plantations, et al.*, 2014 WL 3819537 (R.I.Super. July 30, 2014), a general contractor brought a declaratory judgment action against the AIA A312 performance-bond surety for the steel subcontractor. After payment had been made to the general contractor and the subcontractor, the owner of the highway project

determined that the subcontractor had not properly applied zinc coating to at least 50% of the steel. The Owner immediately deducted the payment from the general contractor. The general contractor proceeded to sue the steel-subcontractor's surety. The surety moved for summary judgment because it claimed that (i) the work was completed over 2 years ago, the limitations period on the bond, (ii) because the general contractor was not a claimant on the bond, and also (iii) because the general contractor failed to meet the conditions precedent on the bond before seeking recovery. The Superior Court denied the summary judgment motion and allowed the general contractor to proceed under the bond against the surety. With respect to the statute of limitations on the bond, the Court recounted that the statute of limitations does not begin to accrue until the full performance of the contract, which is the date when the last of the labor was performed or the material was supplied. Because the subcontractor continued to provide work on access hatches for the project after completing the zinc coating work, the Court assessed that there was a question of fact whether this hatch work was part of the contract and therefore whether the limitation in the bond was tolled. Next the court held that the question of "who was a claimant" concerned the terms of the payment bond, not the performance bond which was at issue here. The performance bond gave no express definition of "claimant" and stated that the surety has its obligations under the construction contract provided that the owner performs its obligations. The owner performed, so there was no preclusion against the general contractor making a claim on the performance bond. Finally, with respect to the conditions precedent in the performance bond, which required that the claimant declare default and arrange for a surety conference within a reasonable time, the court determined that taking those steps three years after the zinc coating was complete did not affect its obligations under bond. Because the claims here concerned latent defects, it was not possible to give a default notice because the defective work was only discovered after it was performed, completed, and inspected. As such, the trial court held that the surety remained liable on the bonds even after the completion of the subcontractor's work.

Legislation:

1. R.I. Gen. Laws § 37-2-27.1, -27.2, -27.3, -27.4, concerning state purchases of construction manager at-risk services, were amended to address the chief purchasing officer's determination to procure such services. The amendments do not apply to highway or heavy construction project procurements. The amendments require that the purchasing officer appoint a technical review committee that now includes the public agency's program manager. The committee and the chief purchasing officer assesses whether using construction manager at-risk is the best value for the state and more practicable than using the general contractor method of management. The amendments requires the chief purchasing officer to provide a written determination that the following factors support the decision for a construction manager at-risk management including, but not limited to: 1) Whether specifications can be prepared that permit award on the basis of either the lowest bid or the lowest-evaluated bid price; (2) Whether the available sources, the time and place of performance, and other relevant circumstances exist as are appropriate for the use of competitive sealed bidding; (3) The complexity of the project, including the existing or proposed infrastructure or structures, required demolition or abatement, adjacency to other structures or abutters, site constraints, building systems, uniqueness of design elements, or environmental implications; (4) The size, scope, and estimated cost of the project; (5) Potential to achieve optimal minority or woman business enterprise or other subcontractor or vendor participation required in accordance with any applicable state or federal laws; (6) The amount and type of financing available for the project, including whether the budget is fixed and the source of funding, for example, general or special appropriation, federal assistance monies, general obligation bonds or revenue bonds. Through these amendments, the chief procurement officer, not the technical review committee, now negotiates the guaranteed, maximum-price with the construction manager at-risk. The construction manager at-risk now has access to the Rhode

Island Vendor Information Program ("RIVIP") to solicit all bids for the subcontracts and shall receive approval by the public agency before entering into these contracts.

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South Carolina

Case law:

1. In *Teseniar v. Prof. Plastering & Stucco, Inc.*, 407 S.C. 83, 754 S.E.2d 267 (Ct. App. 2014), individual Homeowners ("Plaintiffs") filed an action against general contractor and numerous defendants alleging negligence and breach of warranty of workmanlike service resulting from construction defects caused by water intrusion at an apartment complex on John's Island. The property owner's association filed a separate suit but the two actions were later consolidated. All defendants except the Stucco Applicator settled with the Plaintiffs. During the trial, Plaintiffs' presented the testimony of various experts including the testimony of a repair expert regarding the repair cost to replace the defective stucco. The repair expert originally created an estimate to repair the entire project but presented a "stucco-only" estimate at trial. Plaintiffs also presented the testimony of experts regarding the construction defects and the improper application of the stucco. Stucco Applicator attempted to present an expert witness ("Causation Expert") to offer testimony in construction and engineering. Plaintiffs objected on his qualifications as an expert and also argued that his testimony should be excluded based on a prior discovery violation due to his failure to produce his entire file. The trial court failed to qualify the Causation Expert and ruled that he was only allowed to testify as to his personal observations during his investigation at the project. The jury awarded damages in excess of \$7M to Plaintiffs. After the verdict Stucco Applicator filed motions for new trial absolute, set-off, JNOV and new trial nisi remittitur which the trial court denied. Stucco Applicator also filed a motion to alter or amend the judgment which was denied as well.

After the jury had returned its verdict, Stucco Applicator proffered its Causation Expert's testimony. The Causation Expert offered testimony that the water intrusion at the project was caused by the incorrect installation of items surrounding the windows which was outside of the Stucco Applicator's scope of work and "definitive testimony in which he said the water intrusion was not proximately caused by the [Stucco Applicator's] work."

During the ongoing action between Plaintiffs and Stucco Applicator, Stucco Applicator filed a cross-claim against its Subcontractor that had performed stucco repairs at the project. Subcontractor was also a defendant in Plaintiff's suit and settled. Subcontractor filed a motion for summary judgment arguing that because Stucco Applicator wasn't licensed its claims were barred pursuant to statute. The trial court granted Subcontractor's motion. Stucco Applicator then filed a Rule 59(e) motion to alter or amend the judgment which was also denied by the trial court.

On appeal, the Stucco Applicator argued that the trial court erred in failing to qualify its Causation Expert. The Court of Appeals reversed the trial court holding that because the trial court "did not delineate any particular reason for its decision not to qualify [him] ... we believe he held the prerequisite experience needed to testify as an expert under Rule 702, SCRE." The Court focused on the Causation Expert's 30 years in the construction industry, the fact that he had a bachelor's and master's degree in civil engineering, knowledge of the International Building Code and work in the coastal region of Georgia holding that these elements constituted sufficient specialized knowledge to qualify him as an expert at trial. Plaintiffs argued that any testimony presented by the Causation Expert would have been cumulative making the trial

court's exclusion of his testimony harmless. In addition, Plaintiffs also argued that another one of Stucco Applicator's experts offered testimony at trial which "mirrored [the Causation Expert's] testimony in many ways, and thus [his] testimony would have been cumulative." The Court rejected this argument, holding that because the expert was prevented from critiquing any of the architect's work and because he failed to do a forensic analysis of all the buildings his testimony would not have been cumulative. The Court stated that the "trial court's decision to qualify [Plaintiffs'] expert witness who testified to the proximate cause of the water intrusion while declining to qualify [the Stucco Applicator's Causation Expert] created a situation where [the Stucco Applicator] had not expert witness to rebut [Plaintiffs'] expert witness's testimony."

Plaintiffs also argued that the trial court's exclusion of the Causation Expert's testimony was an appropriate discovery sanction due to the Stucco Applicator's refusal to produce part of its Causation Expert's files. The Court of Appeals rejected this argument, holding that because (1) the Stucco Applicator agreed it would avoid using the materials which were not produced, (2) the Causation Expert was made available for depositions the day before testifying at trial, (3) the trial court didn't specify that its refusal to qualify him as an expert was a discovery violation and (4) only one of the Plaintiff's deposed the Causation Expert, the exclusion of his testimony did not warrant the sanction of excluding his testimony.

Finally, the Stucco Applicator argued that the trial court erred in granting its Subcontractor's motion for summary judgment due to the Stucco Applicator's operation as an unlicensed subcontractor under S.C. Code § 40-11-270(C). This provision of the statute states that "[a]n entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract ..." The Court also reversed the trial court's award of summary judgment holding that (1) a general contractor is permitted to use the services of an unlicensed subcontractor pursuant to S.C. Code § 40-11-270(C), (2) the Stucco Applicator was a subcontractor of the general contractor, and (3) "the pertinent licensing statutes are designed to protect the public interest ... [which] does not exist when dealing with claims between contractors."

Legislation:

1. The SC Abandoned Buildings Revitalization Act of 2013, H.3093. This bill established provisions allowing a taxpayer making qualifying investments in the rehabilitation of an abandoned building to receive income tax credits or credits against property tax liability in an amount comprising up to twenty-five percent of the rehabilitation costs. These tax credits are available through 2019.

2. S.C. Code § 8-15-70 (S.438), also known as the PLA bill. This bill provided for fair and open competition in governmental contracts by stipulating that state or local entities, officials and employees, in regard to a public building, may not require or prohibit a bidder, offeror, contractor or subcontractor from entering into or adhering to an agreement with one or more labor organizations in regard to the project; and may not discriminate against a bidder for becoming or refusing to become a signatory to an agreement with one or more labor organizations. The bill also provided that state and local entities shall not award a grant, tax abatement or tax credit based on the inclusion of such agreements.

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South Dakota

Case law:

1. In *East Side Lutheran Church of Sioux Falls v. NEXT, Inc.*, the Supreme Court held the accrual of a cause of action for design and construction errors and omissions was a question of fact sufficient to defeat a Motion for Summary Judgment, because what a reasonably prudent person should inquire into when learning of an initial defect can differ depending on the circumstances.

The church filed its Complaint against the Contractor in July 2010. The Contractor then filed a motion for summary judgment, arguing that the six year statute of limitations had expired. There was no question the church had actual notice of water infiltration well before July 2004, which would have been the statute of limitations cutoff date based on the filing of the Complaint. However, the question was whether that notice of water infiltration was sufficient, as a matter of law, to put the church on notice of all of the alleged design and construction errors. The lower court agreed that it did.

The Supreme Court, however, disagreed arguing that it is up to the trier of fact to determine whether the church's notice of water infiltration constituted sufficient facts to put a reasonably prudent person on notice of each one of the alleged construction and design errors, as well as to answer the question as to how obvious a defect must be to encompass accrual of all potential claims. The case was remanded for further proceedings.

2. In *Kreislers Inc. v. First Dakota Title Ltd. Partnership*, the Supreme Court declined to extend the economic loss rule to professional services. Instead, the Supreme Court explained that other jurisdictions have limited the application of the Rule to commercial transactions, and for this particular instance it was following that line of jurisprudence.

While the services and contract at issue in the *Kreislers Inc.* matter, are not necessarily construction related in the traditional sense (although it did involve the 26 U.S.C.A. §1031 exchange of property for construction), it is useful to note that this holding should have significance for claims against architects or engineers and may open the door to tort claims being brought, in addition to those for breach of contract.

Legislation:

1. House Bill No. 1073: On March 10, 2014, the Governor signed House Bill No. 1073, which amended Section 44-9-24 to prohibit the enforcement of a lien more than six years after the date of the last item in the lien holder's claim. If no action is commenced within six years of filing the claim, the owner of the property may file an affidavit with the register of deeds stating that an action has not been instigated and the lien shall be cancelled within thirty days of the filing of the affidavit.

2. House Bill No. 1212: A second legislative update involves House Bill No. 1212, which was signed by the Governor on March 14, 2014, and amended Chapter 5-18A. The law was an attempt to neutralize the involvement, or lack of involvement with labor organizations. Specifically, a new section was included to provide for more "economical, nondiscriminatory, neutral and efficient procurement of construction-related goods and services" by the State and its political subdivisions. To effectuate that mission, the State, or its agent, is now prohibited from including either requirements for, or prohibitions, against a contractor adhering to an agreement with a labor organization. The amendment also prohibits discrimination against a contractor for either choosing to participate with a labor organization, or refusing to so participate.

Tennessee

Case law:

1. In *TWB Architects, Inc. v. The Braxton, LLC*, 2014 Tenn. App. LEXIS 703 (Tenn. Ct. App. Oct. 30, 2014), TWB Architects, Inc. (“TWB”) entered into an AIA B151-1997 architect agreement with Progress Capital Partners, LLC for the design of a mid-rise condominium project known. Under the agreement, TWB would be paid a fee of two percent of construction costs or, if the project was not constructed, time and expenses.

Later, The Braxton, LLC (“Braxton”) was formed and entered into a purchase agreement with the principal of TWB for the sale of a penthouse in the project. The purchase agreement was for “\$0 in consideration of design fees owed” under the architect agreement. Construction began and the condominiums were completed in accordance with TWB’s plans. Thereafter, the principal of TWB requested that the penthouse be conveyed to him, but learned that it was encumbered by a security interest and that Braxton would be unable to transfer it to him.

Braxton filed a notice of completion of the project on December 5, 2008, stating that the “[d]ate of completion of the improvement” was October 21, 2008. On February 26, 2009, 83 days after filing the notice of completion, TWB recorded a mechanic’s lien. Then, on March 11, 2009, TWB filed a complaint to foreclose on the mechanic’s lien. It was undisputed that TWB’s architectural services had been completed in 2006.

Braxton filed a motion for summary judgment asserting, among other things, that TWB’s mechanic’s lien was time barred. The basis for Braxton’s argument was a provision in Section 9.3 of the B151, which stated: “In no event shall ... statutes of limitations commence to run any later than the date when the Architect’s services are substantially completed.” Under this provision, Braxton argued that the statute of limitations commenced to run in 2006, when TWB’s services were completed. The relevant statute of limitations was Tenn. Code Ann. § 66-11-106, which states that “[a] prime contractor’s lien shall continue for one (1) year after the date the improvement is complete or is abandoned.

In response, TWB argued that the relevant provision of the agreement was Section 7.1.1, which states as follows:

Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party. If such matter relates to or is the subject of a lien arising out the Architect’s services, the Architect may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to resolution of the matter by mediation or by arbitration.

TWB agreed that Tenn. Code Ann. § 66-11-106 was the relevant statute of limitations and that it had one year from the date of completion (October 21, 2008), as stated in the notice of completion, to file suit.

The court agreed with TWB that Section 7.1.1 was the relevant contract provision because it specifically related to “a lien arising out of the Architect’s services.” Under that

section, TWB was permitted to “proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to resolution of the matter by mediation or by arbitration.” The applicable law allowed TWB to bring a lien enforcement action up to one year after the improvement was complete, which, according to the notice of completion, was October 21, 2008. Because TWB filed suit to enforce its mechanic’s lien on March 11, 2009, its suit was timely and not time-barred.

2. In *Raines Bros. v. Chitwood*, 2014 Tenn. App. LEXIS 393 (Tenn. Ct. App. July 3, 2014), Michael Chitwood (“Chitwood”) entered into a written agreement with Raines Brothers, Inc. (“Raines”) to have construction work performed on his home. The contract was a cost-plus agreement, under which Chitwood would pay the cost of the work plus a fee of 10%.

Work progressed on the home for just over two years. Near the end of the project, Chitwood stopped paying Raines because some of the work was not completed to his satisfaction. This led to a series of meetings between the parties, as well as two other contracts under which Raines performed additional work on the home. Although Chitwood paid all amounts due under the other contracts, he still failed to pay approximately \$67,000 due under the original contract. Raines filed suit to recover the amounts owed by Chitwood.

The trial court found that ample evidence was presented at trial that detailed the expenses incurred on the job. Chitwood’s former accountant testified that he had significant enough information to break down the labor and materials and other costs onto his spreadsheets, which he prepared for Chitwood. Accordingly, the court awarded Raines a judgment of \$66,762.71.

Defendants appealed, raising, among other issues, the sufficiency of proof as to damages. Defendants also asserted that, because this was cost-plus agreement, Raines had to establish the actual cost of work performed. Defendants argued that Raines failed to do so and instead merely introduced a “representative sample” of cost invoices.

Citing *Forrest Constr. Co., LLC v. Laughlin*, 337 S.W.3d 211 (Tenn. Ct. App. 2009), the court stated that, in any cost-plus contract there is an implicit understanding that the costs must be reasonable and proper. The contractor is under a duty to itemize every expenditure on the job and, where the owner denies being indebted to the contractor, has the burden of proving every item of expense in connection with the job. In *Forrest*, the contractor’s proof was found to be insufficient where it consisted of a simple spreadsheet of expenses and a so-called “representative sample” of invoices and receipts.

The court in this case conducted a thorough review of the exhibits submitted at trial and found that Raines maintained daily records itemizing project costs for subcontractors, materials, and equipment, and even provided detailed labor cost records that reflected individual hours charged for each date and worker involved. Chitwood’s accountant also testified that the invoices were complete and allowed him to fully separate and itemize the costs of the project on his own spreadsheets. Thus, the court found that the proof provided by Raines was sufficient to demonstrate its costs, and the evidence supported the trial court’s judgment against Chitwood.

Legislation:

1. H.B. 1243, Mechanic’s Liens: As enacted, revises the provisions regarding who is to be served in regard to mechanics’ and materialmen’s liens.

2. S.B. 1435, Contractor Licensing: As enacted, requires state board for licensing contractors to deny an application for a license to engage in contracting if the board finds the applicant's name to be identical with or similar to that of an existing licensed contractor; provision not applicable if the applicant's name has been trademarked.

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Texas

Case law:

1. In *Zachry Const. Corp. v. Port of Houston Authority of Harris Cty.*, No. 12-0772, 2014 WL 44726216 (Tex. August 29, 2014)(not released for publication), the Texas Supreme Court reversed and remanded the Houston Court of Appeals (14th Dist.), holding that a no damage delay provision was unenforceable. The no damage for delay clause at issue expressly excluded delay damages that arose from "the negligence, breach of contract or other fault of the Port Authority." The Court held that it was against public policy to allow a party to insulate itself from its own deliberate conduct.

The Court also found that the Local Government Contract Claims Act waived sovereign immunity for a contract claim for delay damages not expressly provided for in the contract.

Finally, the Court held that the general contractor did not waive its claim for liquidated damages by executing lien releases where the liquidated damages were disputed before the waiver was signed, the releases were intended to cover progress payments only, and the liquidated damages were not unambiguously released.

2. In *Ewing Const. Co., Inc. v. Amerisure Ins. Co.*, 420 S.W.3d 30 (Tex. 2014), the Texas Supreme Court, responding to a certified question from the Fifth Circuit, stated that the common law duty to perform work in a good and workmanlike manner does not "assume liability" so as to trigger the contractual liability exclusion in a general contractor's commercial general liability policy. *See also Crownover v. Mid-Continent Casualty Co.*, 772 F.3d 197 (5th Cir 2014.)

3. In *Jaster v. Comet II Construction, Inc.*, 438 S.W.3d 556 (Tex. 2014) the Texas Supreme Court affirmed the Austin Court of Appeals holding that the 2005 version of Tex. Civ. Prac. & Rem. Code § 150.002 (the certificate of merit statute) required only a plaintiff to file a certificate of merit and that the statute does not apply to defendants or third-party defendants who assert such claims.

4. In *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384 (Tex. 2014) the Texas Supreme Court held that the "good cause" exception to the mandatory requirement of filing a certificate of merit with the original petition applies only when the original filing is within 10 days of the expiration of the limitations period and when the plaintiff alleges that such time constraints prevented the preparation of a certificate of merit affidavit. Additionally, the Court held that the certificate of merit requirement is not jurisdictional and a party may waive its right to seek dismissal under the certificate of merit statute.

5. In *TIC N. Cent. Dallas 3, L.L.C. v. Envirobusiness, Inc.*, No. 05-13-01021, 2014 WL 4724706 (Tex. App.—Dallas September 24, 2014)(not released for publication), the Dallas Court of Appeals held that the certificate of merit statute did not prohibit the filing of an original petition with a certificate of merit in a new lawsuit after the plaintiff's original petition in an earlier lawsuit was dismissed without prejudice for failing to contemporaneously file a certificate of merit, reasoning that it was "the legislature's intent to allow trial courts to determine when a

plaintiff should be given a second opportunity to comply with the statute.” *But see Bruington Eng’g, Ltd. V. Pedernal Energy, L.L.C.*, No. 04-13-00558-CV, 2014 WL 4211024 (Tex. App.— San Antonio Aug. 27, 2014), holding that a court must dismiss an original petition with prejudice if the petition does not properly include a certificate of merit and that does not meet the statutory exception to the contemporaneous filing requirement.

*A petition for review has been filed in the Texas Supreme Court, Docket No. 14-0916.

6. In *Crawford Servc, Inc. v. Skillman Intern. Firm, L.L.C.*, 444 S.W.3d 265 (Tex. App.— Dallas 2014), the Dallas Court of Appeals reversed and remanded a trial court’s ruling, holding that the trial court did not have discretion under Tex. Prop. Code 53.154 to deny a lien claimant a judgment of foreclosure once the trial court determined that the lienholder had a valid debt and had properly perfected its mechanic’s lien.

*A petition for review has been filed in the Texas Supreme Court, Docket No. 14-0910.

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Utah

Case law:

1. In *Townhomes at Pointe Meadows Owners Association v. Pointe Meadows Townhomes, LLC*, 329 P.3d 815 (Utah Ct. App. 2014), the Utah Court of Appeals recently emphasized the discretion a trial court has in managing its cases. This also reinforced the importance of timeliness in filing, and the necessity of expert testimony in construction related claims.

Plaintiff Townhomes at Pointe Meadows Owners Association (“Association”) filed suit against multiple parties who developed Townhomes at Point Meadows, a multi-unit townhome development in Lehi, Utah. The Association claimed that there were various defects in the construction of the common areas, and that the developer breached different warranties, covenants, and duties it owed to the Association.

After multiple delays and extensions of time during the discovery period, multiple parties filed motions for summary judgment arguing that the Association had not produced sufficient evidence to support its claims. In response, the Association filed a motion to extend discovery, and a motion in opposition to summary judgment. The Association did not disclose its expert testimony until it filed its motion in opposition. The trial court denied the Association’s motion to extend and granted the summary judgment against the Association.

The Association appealed this decision, and the court of appeals affirmed the district court’s ruling. The court explained that “[t]rial courts have broad discretion in managing the cases before them” and reversal is appropriate only “if there is no reasonable basis for the district court’s decision,” or in other words if there was an abuse of discretion.

The court of appeals held that the district court did not abuse its discretion when it denied the Association’s motion to extend discovery. The district court examined the Association’s “pattern of delay and inaction” in the case. The Association had come to an agreement with some of the defendants to extend the discovery deadline, but the parties didn’t involve certain third-party defendants in those discussions until two months after the deadline had passed. Reliance on this agreement was unreasonable because not all of the relevant

parties were included in the initial discussions.

The Association argued that its expert testimony should not have been excluded because an expert report that is not disclosed within the established deadlines can still be allowed if it is shown that “good cause excuses tardiness or that the failure to disclose was harmless.” The district court found that the tardiness did not have good cause and that it was not harmless. This was justified in that the Association unreasonably relied on its agreement to extend. Additionally, some of the defendants had already retained and disclosed their own experts and such tardiness would require the defendants to have their experts revise their reports to respond to this new expert testimony. The court of appeals found no abuse of discretion in the trial court’s decision to exclude the Association’s expert testimony.

The court of appeals was not convinced by the Association’s argument that the claims did not require expert testimony. “Expert testimony is generally necessary in cases that involve trades or professions that require specialized knowledge, such as medicine, architecture, and engineering.” Since the district court’s dismissal of the Association’s expert testimony was affirmed, the Association did not have adequate evidence to support its claims, so the district court’s grant of summary judgment was affirmed.

So what does this all mean? It is best to not be late. Don’t miss deadlines in preparation for trial, and make sure you have an expert to support your claims. Trial courts are given great deference in respect to these issues on appeal, so it is best to do it right the first time.

2. In *Lane Myers Const., LLC v. Nat’l City Bank*, 2014 UT 58, the Utah Supreme Court addressed, among other things, the form and substance of lien waivers and the requirements of a valid lien waiver. The case arose out of an agreement between a residential home buyer and Lane Myers Construction, LLC (“Lane Myers”). The home buyers obtained construction financing from National City Bank of Indiana. But the loan did not cover the full amount of construction costs for the home. When the home buyers failed to pay the remaining amounts owed, Lane Myers filed a mechanic’s lien and sought to foreclose its lien and to have its lien declared prior in right to the trust deed recorded by National City.

In response to the suit National City filed a motion for summary judgment claiming that Lane Myers had waived its lien rights when it submitted numerous requests for disbursement forms throughout the construction of the home. Lane Myers did this in order to draw funds from the construction loan. National City claimed the language in those draw requests effectively waived the contractors right to claim a lien. Importantly, the draw requests and the waiver language contained in them was not in the form suggested by Utah’s lien waiver statute. Nevertheless, the trial court granted summary judgment in favor of National City because it determined the draw requests contained sufficient information to substantially comply with the lien waiver statute. Lane Myers appealed the decision on the ground that the lien waivers were invalid.

The appellate court overturned the trial court’s grant of summary judgment and held that although the draw requests contained language purporting to waive Lane Myers’ lien rights, the requests did not contain all the required components of a valid lien waiver. The court relied on the lien waiver form found in §38-1-39(2) and stated that although the suggested lien waiver form found in §38-1-39(2) is not required to validly waive lien rights, the substance and effect of the suggested form is required.

The Utah Supreme Court overturned the Court of Appeals’ earlier decision that all requirements of §38-1-39(2) are required components of a valid lien waiver. The Court held that these components are relative “safe harbors,” but that the only true requirement of a general waiver is that the “lien claimant . . . executes a waiver and release that is signed by the lien

claimant or the lien claimant's authorized agent." An exception to this general rule is found in the statute itself and requires strict adherence to the forms of Subsection 4(d) if the waiver is effected by a "restrictive endorsement on a check."

The Court did not, however, follow the trial court's broad interpretation of the statute, and held that "the enforceability of the waiver in question cannot be resolved on the basis of the 'face' of the draw requests." Lien waivers are to be interpreted according to settled caselaw; specifically, that "[t]o constitute waiver, there must be an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it."

Ultimately, the strict adherence required by the appellate court is no longer required, but in light of this case it seems best practice for attorneys or lenders drafting lien waiver language to start with the form provided in the statute and make any modifications from there, being careful not to materially or substantially change the language and effect of the form.

3. In *Cromwell v. A & S Const., Inc.*, 2013 UT App 240, 314 P.3d 1008, the Court of Appeals of Utah discussed the duty subcontractors owe to the employees of other subcontractors. This case arose when plaintiff Cromwell, an employee of the painting subcontractor, suffered serious injuries after falling thirty-six feet down an empty elevator shaft. Defendant A & S Construction Inc. was the general contractor on the project, and co-defendant Guns & Hoses framed and installed doors throughout the project, including the access to the empty elevator shaft. Cromwell sued both parties for negligence, and Guns & Hoses was granted summary judgment. The district court determined that Guns & Hoses owed no duty to Cromwell and even if a duty was owed, Guns & Hoses did not breach that duty. Cromwell appealed this decision, and the court of appeals evaluated whether Guns & Hoses had a duty to protect Cromwell from the risk of falling into the elevator shaft at the time of the injury. The court of appeals ultimately agreed with the district court and found no duty.

The court noted that a key element of whether a duty is owed on a construction project is control. The court simply stated that "so long as the work remains in his control, a contractor is subject to liability as though he were the possessor of the land. Accordingly, a subcontractor is liable "for only such harm as is done by the particular work entrusted to him." The court held that a subcontractor "owes the same duty to employees of another subcontractor as it owes to any other person" but that liability is "limited to only such harm as is done by the particular work entrusted to him."

The court held that Guns & Hoses did not owe Cromwell any liability at the time of his accident. Because Guns & Hoses contracted to perform framing and installation of doors throughout the project, it neither created the "dangerous condition of the empty elevator shaft, nor did it exercise any control over the condition of the shaft." Thus, a contractor is only liable to others for negligence caused by his work, or for conditions that arose under his control.

4. In *Total Restoration, Inc. v. Merritt*, 2014 UT App 258, *reh'g denied* (Dec. 3, 2014), the Court of Appeals of Utah reviewed whether certain remedial work was lienable under Utah's mechanics' lien statute. The Merritts hired Total Restoration, Inc. to perform remediation work after their home was damaged by a broken fire-sprinkler that had frozen and cracked. Total Restoration's work included removing water-damaged baseboards, carpet pad, drywall, and insulation, drying the affected areas, cleaning the carpets, applying an anti-microbial agent to prevent mold growth, and hiring a subcontractor to repair the fire-sprinkler system. When the Merritts refused to pay Total Restoration for its work, Total Restoration recorded a lien and filed suit for breach of contract, unjust enrichment, and foreclosure of its mechanics' lien. The trial court determined that the work performed was lienable under the mechanics' lien statute, as having performed "extensive repairs." The court of appeals disagreed and reversed.

In making its determination, the court of appeals looked to the mechanics' lien statute which only applies to work that constitutes an improvement. The court noted that improvement "is a legal term that has been construed to connote physical affixation and enduring change to premises in a manner that adds value." Additionally, "mitigation work that merely involves cleanup or remediation to return the property to its precasualty condition and that does not implicate any physical affixation to or alteration of the structure of the building or the premises is not lienable under the statute." The court looked to previous cases where remediation work such as flood remediation and inspection and repair of frozen water pipes were held to not be lienable under the mechanics' lien statute.

The court held that the repairs performed by Total Restoration were not lienable under the statute. Accordingly, the court reversed the trial court's determination that Total Restoration's lien against the Merritts' home was valid and enforceable. In this decision, the court reinforced the notion that certain remediation work is nonlienable.

5. In *CCAM Enterprises, LLC v. Dep't of Commerce, Div. of Occupational & Prof'l Licensing*, 2014 UT App 79, the Court of Appeals of Utah discussed the assignability of claims made on the Residence Lien Recovery Fund ("the Fund") under the Lien Recovery Fund Act ("LRFA"). The court held that because the statute does not specifically bar assignment, qualified beneficiaries are free to assign their claims. The claims on the Fund arose when a general contractor, Rockin R, failed to pay Classic Cabinets ("Classic") for work it performed. According to LRFA, Classic was a qualified beneficiary, but the claims were not brought by Classic. Classic had merged with CCAM Enterprises, LLC ("CCAM") and assigned all of its claims on the Fund. The Division of Occupational and Professional Licensing ("DOPL") administers the Fund, and concluded that CCAM could not recover on the assigned claims, because "CCAM was not a qualified beneficiary under LRFA but merely the assignee of a qualified beneficiary." This decision was upheld on review by the Utah Department of Commerce, and then the district court granted summary judgment in DOPL's favor when CCAM filed a complaint.

In reviewing the district court's decision, the court of appeals looked to the general assignability of claims under the common law and that "statutory claims are assignable unless the statute dictates otherwise." The court looked to LRFA, which does not mention assignment. LRFA "states that a claimant may receive payments from the Fund only if 'the claimant was a qualified beneficiary during the construction of a residence' . . . But it does not contain a statutory instruction barring assignment." Because LRFA does not bar assignment, Classic's assignment to CCAM was held valid and the court of appeals reversed the district court's summary judgment in favor of DOPL. The court noted that its decision preserved the purpose of LRFA by protecting both homeowners and subcontractors. "Subcontractors are protected because they may assign their claims if they change their form of business, close their doors, or for some other reason need to assign their claims. And homeowners are protected because LRFA still provides them protection from subcontractor liens."

6. In *Hughes Gen. Contractors, Inc. v. Utah Labor Comm'n*, 2014 UT 3, the Utah Supreme Court reviewed and rejected the multi-employer worksite doctrine under the Utah Occupational Safety and Health Act ("UOSHA"). This doctrine has been followed by the federal courts and "makes a general contractor responsible for the occupational safety of all workers on a worksite—even those who are not the contractor's employees." This was a case of first impression in determining the viability of multi-employer worksite doctrine.

This case arose as Hughes General Contractors ("Hughes") and subcontractor B.A. Robinson were cited for violation of UOSHA in relation to the improper use and erection of scaffolding connected to B.A. Robinson's masonry work. The Utah Occupational Safety and Health Division ("UOSH") cited Hughes for its failure to inspect and take corrective action. In its determination, UOSH invoked the multi-employer worksite doctrine to conclude that Hughes

was a controlling employer because it had general supervisory authority over the worksite. Hughes contested the citation, which was upheld by and Administrative Law Judge, and then the Appeals Board. Hughes brought its case before the Utah Court of Appeals, which certified the case to the Utah Supreme Court.

The Appeals Board affirmed Hughes' citation because the governing Utah statute "mirrors its federal counterpart," which was interpreted to impose liability on a general contractor under the multi-employer worksite doctrine. Despite its similarity, the Court held that the governing Utah statute "is not a mirror-image of its federal counterpart." The Utah statute imposes liability on an employer and "the text and structure of this provision are singularly focused on the employment relationship." An employment relationship "focuses on the employer's right to control the employee" and "the relevant control is not over the premises of a worksite, but regarding the terms and conditions of employment." Such employment is determined by factors such as the right to hire and fire, the method of payment, and the furnishing of equipment. Accordingly, the Court rejected the multi-employer worksite doctrine as "a general contractor is [typically] not an employer vis-à-vis the workers of its subcontractors. And typically there is only one employer as to any one group of workers."

Having rejected the multi-employer worksite doctrine, the Court reversed the citation against Hughes. The Court reversed because "[t]he scaffolding problems in question involved workers engaged under the control of B.A. Robinson, not Hughes," and therefore B.A. Robinson was solely responsible for the violation. This decision removes a general contractor's burden in regard to UOSH citations on a large project with many subcontractors, but it should not lessen a contractor's commitment to safety on the job site.

7. In *Nolin v. S & S Const., Inc.*, 2013 UT App 94 *cert. denied sub nom. Nolin v. S & S Const.*, 312 P.3d 619 (Utah 2013), the Court of Appeals of Utah evaluated Real Estate Purchase Contracts ("REPC") to determine whether the litigation before it was "to enforce" the REPCs and therefore subject to the attorney fees provision. The litigation stemmed from two REPCs S&S Construction, Inc. made with two different homeowners. S&S built a retaining wall in a common area between the two residences. After a rain storm, this retaining wall failed and caused dirt and rocks to slough onto one of the lots. When the retaining wall was rebuilt, the homeowners filed suit against S&S alleging defective construction of the wall. The parties ultimately entered into a settlement agreement, but preserved the issue of attorney fees under the REPC for resolution by the district court with the settled assumption that the homeowners were the prevailing party. The district court awarded attorney fees because it determined the litigation was to enforce the REPCs as S&S "breached the warranties of construction in a workmanlike manner and habitability".

In Utah, attorney fees are only awarded if allowed by statute or contract. Because no statute authorized attorney fees in this situation, the court had to rely on the REPCs. The attorney fees provision of the REPCs provided for attorney fees in litigation "to enforce" the agreement. The homeowners argued that the construction of the retaining wall fell within the REPCs because the wall was a "structural element" of the residences under the agreements. The court noted that the retaining wall was undisputedly in the common area between the homeowners' lots, and the "plain language of the REPCs clearly limits the warranty to structural elements 'of the Residence.'" The examples that the REPCs gave of structural elements (roof, walls, and foundation) are "elements of the residence itself and are critical to its structural integrity, stability and soundness." The REPCs also differentiated between the terms "Lot" and "Residence," and this distinction helped the court determine that the warranty over structural elements did not extend to elements of the lots. Because the retaining wall was a structural element of the lots, and not the residences, the litigation was not to enforce the REPCs and the award of attorney fees was improper. The court therefore reversed.

Moving forward, an award for attorney fees will be allowed so long as it is clear that the underlying litigation was to enforce the contract. This means that an attorney must take care to understand the basis of his claims and the limitations a contract sets.

8. In *Ross v. Epic Eng'g, PC*, 2013 UT App 136 *cert. denied sub nom. Ross v. Epic*, 312 P.3d 619 (Utah 2013) the Court of Appeals of Utah reinforced the requirement that an expert witness testifying on the applicable standard of care must have expert knowledge of that standard. As such, a geotechnical engineer does is not automatically qualified to testify on the standard of care for a structural engineer. The dispute arose when Ross hired Epic Engineering ("Epic") for the structural engineering and drafting of a small commercial building. The plans indicated that the footings were to be placed at least 12" into original undisturbed earth or engineered fill. Some months after construction, the building began to settle as a result of unconsolidated fill material under the soil. Ross sued Epic for failing to prepare a soils report as part of the engineering plans. Both Ross and Epic retained engineers to provide expert testimony. Ross' expert was a geotechnical engineer, who admitted in his testimony that "geotechnical engineers do not actually design buildings and that he did not have an opinion on the standard of care applicable to Epic." The district court excluded Ross' expert testimony and granted summary judgment in favor of Epic as Ross failed to provide sufficient evidence to establish an issue of material fact. Upon review, the court of appeals affirmed.

The court affirmed the district court, as it held the district court did not abuse its discretion in excluding the expert testimony of Ross' expert. Due to the technical nature of the dispute, expert testimony was required to provide on the appropriate standard of care for a structural engineer. This is required "[w]here the average person has little understanding of the duties owed by particular trades or professions" such as "the standard of care for medical doctors, architects, *engineers*, insurance brokers and professional estate executors." Ross argued that its expert was a licensed engineer and was therefore qualified to provide testimony about the standard practices of structural engineers. The court explained that "not every engineer is qualified to opine about the standard of care or the standard practices applicable to all other engineers." This does not mean that experts must be from the same field, but it does require that the expert's field follows the same methods or that the expert is knowledgeable about the standard of care of the other. Ross' expert admitted in its testimony that it was not knowledgeable about the standard of care for a structural engineer. Upon this basis, the court of appeals affirmed the district courts exclusion.

This case is important for cases of a technical nature requiring expert testimony. An expert must be able to testify to the applicable standard of care, and if the expert is not within the same field as the dispute, then it must be shown that the expert is still knowledgeable of the applicable standard.

9. In *Am. First Credit Union v. Kier Const. Corp.*, 2013 UT App 256 *cert. denied sub nom. Am. First v. Kier*, 324 P.3d 640 (Utah 2014) the Court of Appeals of Utah determined that the definition of "you" for purposes of an insurance contract was limited to the Named Insured and not an Additional Insured. Plaintiff American First Credit Union ("AFCU") contracted with Kier Construction Corporation to act as the general contractor in constructing an AFCU branch office. Kier subcontracted with Broberg Masonry, Inc. ("Broberg") to supply and install a stone veneer for the building exterior. Kier required Broberg, as part of the contract, to obtain commercial general liability insurance ("CGL policy"), to which Kier was listed as an "Additional Insured." AFCU sued Kier for breach of contract when issues with the stone veneer arose. Kier in turn filed a third party complaint against Broberg and Broberg's insurance company Owners Insurance Company ("Owners"). Owners filed for summary motion, arguing that Kier was not covered by the insurance policy. The district court denied Owners' motion, but the court of appeals reversed.

In evaluating whether or not Kier was covered by the CGL policy, the court of appeals looked to the definition and usage of the words “you” and “your.” The court explained that “in the absence of ambiguity, we interpret the terms of an insurance policy according to their plain meaning.” The policy defined the words “you” and “your” to mean the Named Insured, and the only Named Insured identified in the policy was Broberg. The CGL policy provided for certain circumstances where an entity acquired or formed by the Named Insured would qualify as a Named Insured, but “[a]ny other person qualified under the CGL policy is merely an ‘insured,’ and not a Named Insured.” Because Kier did not qualify as a Named Insured, the court held that the CGL policy exclusions and exceptions that district court relied on to determine coverage, referred to Broberg and not Kier. Therefore, the policy included coverage for Broberg and not Kier, despite Kier being an Additional Insured.

This case reinforces the understanding that it is important to carefully read insurance policies. The definition of simple words like “you” or “your” could be the difference between policy coverage, and policy exclusion.

Legislation:

1. Utah Code §§ 38-1a-102, 38-1a-501, 38-1a-503, Construction Lien Amendments. In 2014, the Utah Legislature amended the construction lien statutes. The most notable change occurred with regards to preliminary notices. Prior to this change, Utah Code Ann. §38-1a-503 allowed a construction lender to acquire priority over a construction lien or claimant who had filed a preliminary notice before the recording of the mortgage or trust deed only if: (1) the lender paid the claimant in full for all construction work performed until the date the mortgage or trust deed is file and (2) the claimant filed a notice of withdrawal. This placed an obligation on the lenders to make sure that the claimants withdrew their prior preliminary notices. If claimants did not withdraw their preliminary notices, it was up to the lender to enforce the statute, thereby obtaining priority.

With the 2014 amendments, the Legislature removed the withdrawal requirement, and now lenders automatically obtain priority when they record and fully pay off all claimants with prior recorded preliminary notices. This change removed all references to withdrawal and refiling from §§ 38-1a-102, 38-1a-501 and 38-1a-503. Although this change removes the burden lenders previously faced in monitoring and ensuring the withdrawal of prior preliminary notices, this change creates uncertainty as to the priority of claims on a project. According to this change, the registry no longer clearly sets forth the priority on a project, as a lender could have filed a preliminary notice without having fully paid all prior claimants. It seems that the best way to know the priority on a project with a filed mortgage or trust deed is to contact the lender and obtain an affidavit that the prior claimants had been paid in full.

In addition to the change regarding withdrawal and refiling of preliminary notices, the Legislature created a safe harbor for filing preliminary notices. According to revised § 38-1a-501(i)(ii)(2)(b), a preliminary notice substantially complies with the statutory filing requirements and falls within the new safe harbor if it links to a preliminary notice filed by an original contractor for the same project.

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Vermont

Case law:

1. In *Luck Brothers, Inc. v. Agency of Transportation*, 2014 VT 59, --- A.3d ---, contractor Luck Brothers, Inc. filed a complaint related to its claim against the Agency for additional compensation on a road construction contract. The contractor sought a declaratory ruling that it need not exhaust the administrative remedies before the Transportation Board prior to bringing the judicial action because it alleged such procedures were not promulgated by rule and do not provide due process protections required by law. The Vermont Supreme Court disagreed, holding that the legislature has explicitly empowered the Transportation Board to adjudicate legal disputes concerning state contracts and the Vermont Supreme Court has “consistently held that when administrative remedies are established by statute or regulation, a party must pursue or ‘exhaust’ all such remedies before turning to the courts for relief.” *Id.* ¶ 19 (quoting *Jordan v. State Agency of Transp.*, 702 A.2d 58, 60 (Vt. 1997)). The Court clarified that the Board is empowered to require development of the record beyond the Agency record and that it must apply a de novo, non-deferential review standard to the Agency dispute-resolution decisions under the administrative claims process. These due process protections were enough to satisfy the Court.

2. In *Klinker v. Furdiga*, --- F. Supp. 2d ---, No. 5:12-CV-254, 2014 WL 2198823, (D. Vt. May 27, 2014), the federal court held that a homeowner serving as “general contractor” for the construction of his own personal home is not by statute an “employer,” and therefore is not statutorily immune from a claim by the employee of a subcontractor injured while working on the home. Under Vermont law, for an employee to recover compensation from a third party for a work-related injury, the defendant must be “some person other than an employer.” 21 V.S.A. § 624(a). Here, the homeowner claimed to be an “employer,” as defined by statute, due to his position as general contractor for the construction of his personal home. The critical inquiry to determine whether a person is an “employer” under the statute is whether the work being carried out could have been carried out by the employer’s own employees as part of the regular course of business. This definition is to avoid general contractors hiring independent contractors in an effort to avoid workers compensation requirements. Here, though the homeowner was serving as general contractor for his own personal home, the homeowner did not have employees “who could have carried out” the work completed by the injured worker and such work was not “part of the regular course of business” for the homeowner, who was just building his own home. Therefore, the homeowner was not an “employer” and not immune to the personal-injury claim of the subcontractor’s employee.

Legislation: N/A

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Virginia

Case law:

1. In *Synchronized Construction Services, Inc. v. Prav Lodging, LLC*, 764 S.E.2d 61 (Va. 2014), the Virginia Supreme Court held, in a 4-3 decision, that in the case of a “bonded off” lien, the general contractor is not a necessary party to a mechanic’s lien suit. The court reasoned that once the bond was posted and the real estate no longer “viable,” the construction manager and *de facto* general contractor did not have a pecuniary interest in the bond itself. Therefore, the general contractor’s relation to the litigation no longer made it a necessary party.

2. In *Dept. of Professional and Occupational Regulation, Board for Contractors v. Best Buy Stores, LP*, 2014 WL 457745 (Feb. 4, 2014), the court of appeals affirmed that the operator of an appliance store chain was not a “contractor” required to hold a contractor’s license with a gas fitting specialty. The court found that the operator contracted with a third party to install the dryer and was never present on the job site. Additionally, the installation was limited to the direct replacement of the appliance, did not include piping or fittings, and any additional work had to be completed by another party outside of the agreement with the operator. The court found that the replacement was not an “improvement of any building or structure permanently annexed to real property.”

3. In *Atlantic Environmental Construction Company v. M. Malveaux*, 63 Va. App. 656 (2014), the court of appeals held that a worker’s supervisor’s knowledge of Virginia Occupational Safety and Health Act (VOSHA) violations was imputed to its employer as a basis for imposing civil penalties upon the employer. The supervisor was present at the job site and aware that workers were on the roof of the project, sitting at the edge of a skylight without proper fall-protection equipment in violation of VOSHA, but he did not intervene or take any action to correct the violations. The court of appeals found that the circuit court had correctly applied the principles of *respondat superior*, affirming the citations for VOSHA violations against the employer.

4. In *Specialty Products, Inc. v. Demolition Services, Inc.*, 87 Va. Cir. 325 (2013), the circuit court (Norfolk) found that venue was proper as to a fraudulent inducement claim despite the fact that the construction project and subsequent alleged breach and unjust enrichment occurred elsewhere. The court overruled the defendant’s objection to venue and denied a motion to transfer as to the fraud, since the alleged misrepresentations to the subcontractor regarding forthcoming change orders and payment were spoken or typed and then transmitted via telephone or email to Norfolk.

5. In *Rodriguez ex. rel. estate of Rodriguez v. Leesburg Business Park, LLC*, 287 Va. 187 (2014), the administrator of the estate of a general contractor’s employee brought an action against a landowner for wrongful death after the employee died during a construction accident involving power lines. The Supreme Court of Virginia held that the landowner was not a statutory employer so the action was not barred by the exclusivity provision of workers’ compensation law. Upholding VA Code § 65.2-302, the Court stated that if the work performed by an employee of the contractor or subcontractor is part of the employer’s trade, business, or occupation, the business owner is the statutory employer of the employee and is liable for compensation as though the worker were his own employee. In the alternative, if the work is not part of the trade, business or occupation of the owner, and the owner hires an independent contractor to perform the work, the contractor, not the owner, is liable to the employee under the Worker’s Compensation Act.

6. In *Robertson v. Western Virginia Water Authority*, 287 Va. 158 (2014), the Virginia Supreme Court held that the Water Authority was not entitled to sovereign immunity from a lawsuit brought by a property owner for negligence following a burst sewer line and resulting collapse of a retaining wall. The court addressed the two functions of municipal corporations: governmental and proprietary. While sovereign immunity exists in the operation of the Water Authority’s governmental functions, the court stated that this was not the case with respect to its proprietary functions. A “function is proprietary in nature if it involves a privilege and power performed primarily for the benefit of the municipality.” Since routine maintenance of the sewer system is proprietary, the court found that the Water Authority was not immune from liability for injuries caused by the negligent performance of such maintenance.

7. In *Carnell Construction Corp. v. Danville Redevelopment & Housing Authority*, 745 F.3d 703 (4th Cir.) (cert. denied), 135 S. Ct. 357 (2014) (cert. denied), and 135 S. Ct. 361

(2014), the Fourth Circuit Court of Appeals addressed a minority-owned contractor's claims of racial discrimination and breach of contract against the housing authority and lessee of the project site. Among other things, the Court found that: The contractor was limited to recovery under only those contract claims specifically mentioned in its letter to the public housing authority pursuant to the Virginia Public Procurement's Act's (VPPA) written notice requirement (Va. Code Ann. § 2.2-4363(A)); the VPPA's cap on change orders at \$50,000 or 25% of the original contract amount applies to all fixed-price public contracts (Va. Code Ann. § 2.2-4309); although the contract provided for some modification to the final price, it was a fixed-price contract and subject to the VPPA; the VPPA affects only the remedy for breach of contract claims and "not the validity of the underlying contractual obligations" (*Carnell* at *15); and the contractor failed to plead with specificity its consequential damages, which were "special damages" subject to the specific pleading requirement of Rule 9(g) of the Federal Rules of Civil Procedure.

8. In *Demetres v. E. W. Const., Inc.*, 995 F. Supp. 2d 539 (E.D. Va. 2014), the court found that the Virginia Workers' Compensation Act (VWCA) provides an exclusive remedy for a worker under Virginia law, where the subcontractor's employee who injured the general contractor's employee was not a "stranger to the work." As a result, the plaintiff's tort claim was barred.

9. In *U.S. ex. rel. Carter v. Halliburton Co.*, 19 F. Supp. 3d 655 (E.D. Va. 2014), the court held that under the False Claims Act (FCA) the first-to-file bar is triggered when an earlier-filed suit based on the same elements of fraud is pending before the Supreme Court. *U.S. ex. rel. Carter*, 19 F. Supp. 3d 655. The FCA permits only one qui tam action to be pending at any time relating to specific, alleged fraudulent activity. (*citing* U.S.C.A. § 3730(b)(5)). In this case, a relator brought a qui tam action against a military contractor claiming that the government received false bills for water purification services given to the United States military in Iraq. *Id.* The court granted the contractor's motion to dismiss.

10. In *Knox Energy, LLC v. Gasco Drilling, Inc.*, No. 1:12CV00046, 2014 WL 5310719 (W.D. Va. Oct. 16, 2014), the court granted a natural gas producer's motion for judgment as a matter of law, declaring that no contractual relationship existed between it and a drilling contractor where the contractor brought a counterclaim for breach of contract. Due to, among other evidence, the court's finding of latent ambiguity in an "addendum" to the contract, the court could not find the necessary mutual assent or reasonable grounds for an intention to agree.

11. In *U.S. ex. rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390 (4th Cir. 2013) (cert. denied sub nom), *Gosselin World Wide Moving v. U.S. ex. rel. Bunk*, 135 S. Ct. 83 (2014), two qui tam actions were filed against a government subcontractor under the False Claims Act (FCA) on grounds that the subcontractor unlawfully conspired to defraud the Department of Defense's Military Traffic Management Command (MTMC). Affirming in part, reversing in part, vacating in part and remanding with instructions, the court held that (1) as a matter of first impression, relators seeking civil penalties only have standing to sue under the FCA; (2) the lower court had authority to enter judgment against the subcontractor for less than the statutory floor per claim under the FCA; and (3) judgment for the relator in the amount of \$24M would not be an excessive fine.

Legislation:

1. VA Code Ann. § 2.2-4300 - 4377, Virginia Public Procurement Act (VPPA). The 2014 session of the General Assembly made changes to the VPPA effective July 1, 2014. As of that date, the 2013 version of the VPPA is superseded by the 2014 version. All expired sections were removed and other technical changes made. Regarding the process for competitive negotiation, language was added exempting "the single project fee limitation for environmental,

location, design and inspection work regarding highways and bridges by the Commissioner of Highways, or architectural and engineering services for rail and public transportation projects by the Director of the Department of Rail and Public Transportation.”

2. VA Code Ann. § 33.2-100 - 3202, Highways and Other Surface Transportation Systems. The 2014 session of the General Assembly revised and repealed Title 33.1 (Highways, Bridges and Ferries) and replaced it with Title 33.2 (Highways and Other Surface Transportation Systems), effective October 1, 2014. Title 33.2 also replaces portions of Titles 15.2 (Counties, Cities and Towns), 56 (Public Service Companies), and 58.1 (Taxation). Title 33.2 is comprised of 32 chapters divided into four subtitles: Subtitle I (General Provisions and Transportation Entities); Subtitle II (Modes of Transportation: Highways, Bridges, Ferries, Rail, and Public Transportation); Subtitle III (Transportation Funding and Development); and Subtitle IV (Local and Regional Transportation). Title 33.2 organizes the laws in a more logical manner, removes obsolete and duplicative provisions, and improves the structure and clarity of statutes pertaining to highways, bridges, ferries, rail and public transportation, transportation funding, and local and regional transportation, including the construction of such systems and applicable contractors.

3. VA Code Ann. § 56-265.2:1, Utilities Facilities Act, Approval by Commission required for construction of certain gas pipelines and related facilities; notice and hearing. The 2014 session of the General Assembly made changes to the Utilities Facilities Act effective July 1, 2014, amending § 56-265.2:1, which requires approval by the State Corporation Commission for the construction of certain gas pipelines and related facilities, to provide that the Commission shall not approve the construction of a natural gas compressor station in an area zoned *exclusively* for residential use unless the public utility provides certification from the local governing body that the natural gas compressor station is consistent with the zoning ordinance.

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Washington

Case law:

1. In *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 179 Wn.2d 84, 312 P.3d 620 (2013), developers hired a contractor to develop land. After obtaining preliminary county approval for the project, the contractor sent the developer a written contract containing language explaining the engineering services and estimated fee. The contract was silent as to the contractor’s project management role.

The developer suffered financial hardship and the property was lost to foreclosure. The developer then sued the contractor, claiming over \$1.5M in damages. The issues for the Washington Supreme Court included whether the independent duty doctrine applied to preserve the owners’ claims for negligence (despite factual questions regarding the scope of the contractor’s work) and negligent misrepresentation (predicated on the contractor’s alleged misrepresentations made to induce the developer to contract). The Supreme Court affirmed the Court of Appeals’ ruling and refined application of the independent duty doctrine to extend the reach of tort-based claims beyond any contractual agreement.

In assessing the developer’s negligence claim, the Court revealed that, “[h]istorically, Washington applied the economic loss rule to bar a plaintiff from recovering tort damages when the defendant’s duty to the plaintiff was governed by contract and the plaintiff suffered only economic damages.” However, under *Eastwood v. Horse Harbor Foundation, Inc.*, the Court held that a more aptly named “independent duty” doctrine provides an “analytical framework” to

assess whether “[a]n injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract.” However, the Court stated this application of the doctrine works only when the terms indicate what duties were assumed by the parties.

As for the negligent misrepresentation claim, the Court applied the independent duty doctrine to affirm the Court of Appeals’ denial of summary judgment. Notwithstanding earlier economic loss rule cases that barred misrepresentation claims in light of a written contract, the Court agreed that the contractor’s duty to avoid misrepresentations that induced the developer to enter into a contract (i.e., regarding the time to complete the project and the estimated costs for the work) arose independently of the contract. The Court acknowledged that, in some circumstances, a negligent misrepresentation claim may be viable even when only economic damages are at stake and the parties contracted against potential economic liability (although the parties can attempt to contract around these issues).

The Court noted that the first step in analyzing a professional malpractice claim is to determine the scope of the professional obligations. While a contract may assume an engineer’s common law duty to act with reasonable care, engineers may assume additional obligations by affirmative conduct. The Court agreed with the Court of Appeals that, where the contractor’s scope of work remained unclear under the agreement, which may not have been limited by the written contract, it is impossible to determine what duties the contractor owed the developer.

2. *Top Line Builders, Inc. v. Bovenkamp*, 179 Wn. App. 794, 320 P.3d 130 (2014), involved constructing a custom residence designed to meet gold-certification standard of Leadership, Energy, and Environmental Design (“LEED”). The contractor indicated it believed it agreed to construction on a “cost-plus” basis, but the executed contract was a “fixed-price contract.”

The contract required written and signed change orders. The contract authorized the contractor to proceed with changed work at the owner’s verbal direction, but indicated that the contractor would follow-up with a written change order “within the current month.” However, this did not always occur—when the need for changes in the scope of work arose, the contractor and the property owner often discussed the changes. In fact, the parties executed no written change orders or submitted any such change orders to the project lender.

Construction began in February 2008. By April 2009, when the contractor’s work was substantially complete, the property owners still owed approximately \$25,000 for base scope work and \$85,000 for extra work. When the property owners did not pay, the contractor recorded a construction lien on the property and sued to foreclose the lien. The project lender was named as a defendant. The contractor asserted its construction lien had priority over lender’s deed of trust, but asserted that the changed work should be subordinate to bank’s interest. The lender argued that (a) the contract’s written change order requirements served as the sole means for increasing the contract price for the lien statute, and therefore no lien could be maintained for the extra work without change orders and (b) the amount awarded for the oral change orders exceeding the contract price in quantum meruit were not part of the contract price, and therefore could not be liened.

The Court affirmed the trial court’s ruling, holding the parties’ conduct of discussing the changes resulted in a mutual waiver of the contract’s change order requirements. Where the price was agreed upon, the Court noted that recovery on the change orders was properly in contract and where the contract price was not agreed upon, the appropriate basis for recovery was quantum meruit.

The Court further held that both the judgment for the sums awarded in contract and the sums awarded on the change orders in quantum meruit were properly subject of the construction lien. The contract work and the extra work were both "furnished for the improvement of real property," at the "insistence of the owner," and under an initial contract and later oral request for changes, which was sufficient for Top Line's lien to attach. The Court noted that the ruling followed prior Washington appellate decisions that allowed for recovery under RCW Ch. 60.04 in quantum meruit, but which did not fully analyze the construction lien statute.

3. In *Houk v. Best Development & Construction Company, Inc.*, 179 Wn. App. 908, 322 P.3d 29 (2014), home purchasers moved into a new home purchased from real estate developers in 2004. In late 2006, the developer was administratively dissolved as a limited liability company by Washington's Secretary of State. Over three years after the developer's dissolution, the purchasers sued the LLC for damages alleging breach of contract, breach of implied warranties, breach of express warranties, negligence, and violation of Washington's Consumer Protection Act, RCW 19.86.

Relying upon RCW 25.15.330, the developer moved for Summary Judgment that the purchasers' suit was time barred by the three-year limitation period in RCW 26.15.303, which became effective in 2006. The problem, however, was not so simple since in 2010, RCW 25.15.303 was amended such that the three-year limitation period does not run until a limited liability company files a Certificate of Dissolution with the Secretary of State (here no such Certificate of Dissolution was filed). The trial court held that RCW 25.15.303, as amended, applied retroactively, and did not bar the purchasers' suit - the Court denied developer's motion for summary judgment.

On appeal, the Court reversed the decision denying summary judgment. The Court stated it presumed statutory amendments are prospective, unless there is a legislative intent to apply the statute retroactively, or the amendment is curative or remedial. The Court found that the amendments were not remedial and further determined that the purchasers' claims were time barred by RCW 25.15.303, as adopted in 2006, beginning on October 2, 2009. From that date forward, the purchasers no longer had a legal right to proceed with their claims, and the developer had a legal right to assert the statute of limitations as a complete defense.

4. In *W.G Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wash. 2d 54 (2014), a subcontractor entered into a collective bargaining agreement with its union to provide laborers for scaffolding work. As is common in this type of labor agreement, the subcontractor agreed to compensate the laborers for their work by paying wages and by making contributions to union trust funds. In June 2012, the trusts and the Union reported that the subcontractor failed to make required payments to the trusts for work performed by the laborers. The trusts and the union issued a notice of claim on lien on the student housing project under chapters 39.08 and 60.28 RCW. The Trusts filed a separate action in district court, seeking foreclosure on the lien and monetary damages.

At issue was whether Employment Retirement Income Security Act of 1974 (ERISA) preempted claims made under two Washington state laws designed to ensure that workers on public projects are paid for their work: RCW Ch. 39.08 and Ch. 60.28. When the Washington Supreme Court previously addressed this issue in 1994 with *Merit* and in 2000 with *Trig.*, it held that ERISA preempted such claims. Because of this conflict between Washington's rule and the rule followed by federal courts, the outcome of cases in Washington depended on whether the lawsuit was filed in federal or state court - leading to forum shopping and other inconsistencies.

In light of the national shift in ERISA jurisprudence, the Court overruled its own precedent to hold these types of state laws are not preempted by ERISA. Now, general contractors are no longer protected in Washington state courts from these trust fund liens.

5. In *CalPortland Co. v. LevelOne Concrete LLC*, 180 Wn. App. 379, 321 P.3d 1261 (2014), the plaintiff provided building materials to the defendant, a subcontractor. After the defendant failed to pay for the materials, the plaintiff recorded a lien against the property under ch. 60.04 RCW and began to file suit. Before the lawsuit was filed, however, the general contractor on the project recorded a bond in lieu of claim under RCW 60.04.161, issued by a surety, releasing the property from the lien. The trial court granted summary judgment in favor of the general contractor and surety because the plaintiff had failed to serve the summons and complaint on the property owner and had not requested foreclosure of the lien in its pleadings. The Court held service of process on the property owner was no longer necessary after the general contractor recorded the bond and that the plaintiff's complaint sufficiently identified the relief requested.

Legislation:

1. House Bill 2208, Expansion of GC/CM Contracting for Heavy Civil Projects Effective June 12, 2014, House Bill 2208 revises RCW Ch. 39.10, by increasing the availability of the "general contractor/construction manager" or "GC/CM" method on public construction projects. GC/CM contracting is authorized for certain Washington public projects under RCW Ch. 39.10. The new legislation improves the incentives and flexibility necessary to take advantage of the potential cost savings, efficiency, increased quality, and opportunity for involved disadvantaged business enterprises afforded by the GC/CM method for heavy civil projects. As proposed, the legislation allows the GC/CM to negotiate with the owner to self-perform up to 50% of the cost of the work to construct the project. All other work must be procured through traditional sealed competitive bidding, with the requirement that at least 30% be performed by third party contractors. The governmental project owner may alter these percentages, except the 30% always reserved for third party subcontractors. The GC/CM must submit a proposed construction management and contracting plan, including a proposed price and scope of work for the negotiated self-perform portion of the project. The GC/CM also must address its plan to include disadvantaged business enterprises on the project.

2. House Bill 1841, Electronic Competitive Bidding Allowed on State Public Works Contracts: The legislation based House Bill 1841, effective June 12, 2014, a new section is added to RCW Ch. 39.04 governing electronic competitive bidding for state public works contracts. This new section allows any state agency authorized to conduct public works contracting and competitive bidding under RCW 39.04 to accept electronic bids.

3. House Bill 2555, Modifying Design-Build Requirements on Public Contracts: House Bill 2555, effective June 12, 2014, amends two sections of RCW Ch. 39.10, the statute applicable to finalists for design-build contracts on public projects. RCW 39.10.330 now requires finalists responding to a public body's request for proposals to proffer a detailed description of its building performance goals and validation requirements. RCW 39.10.470 is amended to exempt proposals submitted by design-build finalists from disclosure until the notification of the highest scoring finalist is made under RCW 39.10.330(5).

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Wisconsin

Case law:

1. In *Grand View Windows, Inc. v. Brandt*, 2013 WI App 95, a home improvement contractor, Grand View Windows, Inc. (“Grand View”), brought a breach of contract action against a homeowner, Christina Brandt (“Brandt”), alleging that Brandt failed to make final payment for a siding project. Brandt filed counterclaims asserting breach of contract and violation of Wis. Admin. Code Chapter ATCP 110 (“Home Improvement Practices Act”), claiming that Grand View did not begin the siding work until after the time frame specified, and did not return to install the new siding for over a week after removal of the old siding, during which time the sides of her home were left exposed to the elements.

Grand View’s commercial liability insurer, American Family Insurance (“American Family”), moved to intervene and was granted such by the trial court. American Family also moved for a summary judgment against Grand View stating that it had no liability for the claims alleged by Brandt. The trial court eventually granted that motion. Brandt then filed a third-party complaint against American Family based on American Family’s policy with Grand View. Grand View’s breach of contract claim against Brandt was also ultimately dismissed.

A trial on Brandt’s counterclaims followed and all claims were dismissed, with the exception of her breach of contract claim and two claims for violating Home Improvement Practices Act provisions, prohibiting misrepresentations in order to induce contract entry or payment and requiring contractors to give customers timely notice if a delay in work is expected to occur. A jury determined that Grand View did not violate the section of the Home Improvement Practices Act prohibiting misrepresentations to induce contract or payment, but did find that it violated the provision that required the timely notice of a delay in contract performance. Milwaukee County Circuit Court awarded Brandt damages for Grand View’s violation of the Home Improvement Practices Act and a portion of attorney fees requested. It also declined to assess American Family statutory costs against Brandt under a theory that they were a “successful party” in the earlier summary judgment motion. All parties appealed.

The Court of Appeals first determined that there was insufficient evidence to support the jury’s finding that Brandt suffered a pecuniary loss because of Grand View’s failure to give timely notice of any impending delays under the Home Improvement Practices Act, articulating that the test for determining such pecuniary loss is whether the plaintiff would have acted in the absence of such timely notice. The Court next determined that Grand View’s failure to give timely notice to customers of impending delays was not an “occurrence” under American Family’s policy. Lastly, the Court determined that the trial court acted in its discretion when it declined to award costs to American Family, under either the statute governing the taxation of costs in equitable actions and special proceedings or the statute imposing costs upon counterclaims and cross-complaints.

2. In *Brandenburg v. Briarwood Forestry Services, LLC*, 2014 WI 37, two neighbors, Kelli Brandenburg and Bruce Brandenburg, brought an action against a landowner, Robert Luethi (“Luethi”), alleging that the independent contractor he hired to spray herbicide on his property, Briarwood Forestry (“Briarwood”), caused damage to their land. Bruce Brandenburg alleged damage to all eight trees on his land and Kelli Brandenburg alleged damage to seventy-one of her trees.

The Circuit Court of Trempealeau County entered summary judgment in favor of Luethi, stating generally a person who contracts for services of an independent contractor is not held liable for the actions of that contractor, unless the actions of that contractor are “abnormally

dangerous” or “ultra-hazardous.” In the Circuit Court’s view, spraying herbicides was not “abnormally dangerous” or “ultra-hazardous.” Kelli and Bruce Brandenburg each appealed. The Court of Appeals reversed stating that the Circuit Court had relied on an improper definition and that the proper standard was instead whether the actions of the independent contractor were “inherently dangerous” not “abnormally dangerous” or “ultra-hazardous.” Luethi sought to review at the Supreme Court.

The Supreme Court held that in general, one who contracts for the services of an independent contractor is not liable to others for the acts of the independent contractor, however, under the “inherently dangerous exception,” an employer of an independent contractor may be held liable for the torts of an independent contractor if the activity of the independent contractor is “inherently dangerous.” An act is “inherently dangerous” if 1) the activity poses a naturally expected risk of harm and 2) it is possible to reduce the risk of the activity to a reasonable level by taking precautions. As such, spraying herbicides posed a naturally expected risk of harm in that the herbicide was capable of killing 56 “woody plant” species and that risk could have been reduced to a reasonable level by using certain precautions such as avoiding spraying during high-velocity winds, spraying when the wind was blowing away from a neighbor’s property, spraying in cooler weather, using low pressure spray nozzles, using a thickening agent and keeping spray nozzles close to the ground.

3. In *Showers Appraisals, LLC v. Musson Bros.*, 2013 WI 79, a store owner (“Showers”) that experienced property damage from flooding in his store during severe storms brought action against an independent contractor who was retained by the State of Wisconsin to replace a storm sewer in front of the business. The Wisconsin Department of Transportation (“DOT”) along with the City of Oshkosh (“City”) hired Musson Bros., Inc. (“Musson”) for the storm sewer project beginning in Spring of 2008. Prior to the commencement of the project, the Owner had newly constructed his building and as part of that construction, was required to connect his downspouts, sump pump and parking lot drainage to the municipal storm sewer. During the project, several decisions made by Musson regarding the construction were questioned, but were ultimately allowed under the “means and methods” provision in the Standards and Specifications, which stated that the contractor is solely responsible for the means, methods, techniques and procedures of construction. One of those decisions was to disconnect the storm sewers along the roadway in front of Showers’ business during construction, however, neither the City nor Musson informed Showers that the storm sewers were disconnected. Significant rain storms that occurred in the second week of June of 2008 produced significant water that would have typically been carried away via storm sewers. Instead, hydrostatic pressure from the standing water caused Shower’s basement floor to rupture and flood with over 7ft. of water. Flooding caused \$140,000 in damages and the business was forced to operate elsewhere for four months while the business was repaired.

Showers served Musson and the City with a Summons and Complaint alleging that improper drainage, maintenance, design, excavation, construction procedures and failure to take corrective measures caused the flooding to his property. Showers sought relief from both the City and Musson. Both the City and Musson moved for summary judgment, arguing governmental immunity for its acts. Musson and the City of also brought cross-claims against one another for indemnification.

The Circuit Court of Winnebago County entered summary judgment in favor of Musson, stating the contractor had been acting as an agent of the state and was entitled to government immunity under Wis. Stat. § 893.80(4). Showers appealed against Musson, but not the City; Musson cross-appealed against City for indemnification. The Court of Appeals affirmed summary judgment for Musson because it concluded Musson was entitled to governmental immunity, however, the Court did not address the City’s or Musson’s cross-appeals. Showers sought review at the Supreme Court and review was granted.

In reversing and remanding the Court of Appeals' decision, the Supreme Court held that a government contractor seeking immunity must show both that it was an agent and that injurious conduct was caused by the implementation of a decision for which immunity was available for the government. The Supreme Court concluded that for Musson to come within the statutory shield of immunity, it had to prove that it was acting as the governmental entity's agent in accordance with reasonably precise specifications as set forth by *Estate of Lyons v. CNA Insurance Cos.*, 207 Wis. 2d 446, 558, N.W.2d 658 (Ct. App. 1996). In this case, Musson did not show that it was acting as an agent because it was not acting pursuant to "reasonably precise specifications." In addition, a contractor must clearly allege why the injury-causing conduct comes within a legislative, quasi-legislative, judicial or quasi-judicial function as set out in Wis. Stat. §893.80(4). Given its independent decision-making authority under the "means and methods" provision, Musson did not make a showing that it was an agent implementing a governmental entity's decision made within the scope of the entity's legislative, quasi-legislative, judicial or quasi-judicial functions.

4. In *United Concrete & Construction, Inc. v. Red-D-Mix Concrete, Inc.*, 2013 WI 72, construction company, United Concrete & Construction, Inc. ("United"), brought an action against a supplier, Red-D-Mix Concrete ("Red-D-Mix"), alleging breach of contract, breach of express warranty, breach of implied warranty, false representations, negligence, indemnification and contribution. In the early 2000's, Red-D-Mix contracted with United to supply concrete, but United severed the relationship when they experienced problems at several of their job sites involving excessive "bleed water" which caused damages to a number of projects. Due to escalating prices in 2007, United again decided to contract with Red-D-Mix based on assurances that the previous faults in the product were no longer an issue. Specifically, Red-D-Mix salesman, John Clark ("Clark") met with the president and foreman at United and stated that all previous deficiencies had been resolved and that Red-D-Mix could now offer a reliable product. After entering into a new contract with Red-D-Mix, United began receiving complaints from customers, alerting them to defects in the concrete.

United asked customers to sign an assignment of rights and sued Red-D-Mix. Red-D-Mix moved for summary judgment, stating the damages were speculative because United had not yet performed repairs. Red-D-Mix also argued that the negligence claims were barred under the economic loss doctrine. Red-D-Mix also stated in its motion for summary judgment that United's claim of false representation was based on puffery and that United is not a member of the public and, therefore, not protected by that statute.

The Circuit Court of Outagamie County concluded that the claims made through the assignments and the tort claims were prohibited by the economic loss doctrine and that the puffery claims made under Wis. Stat. § 100.18 were improperly being brought by a non-member of the public and United had not alleged sufficient damages to warrant a trial. The Court of Appeals reversed holding that United could present sufficient evidence to persuade a jury to award damages. The Court of Appeals also reasoned that while the homeowners had no rights against Red-D-Mix to assign, that does not prohibit United from suing Red-D-Mix or from the homeowners pursuing claims against United. As for the false representations claim under Wis. Stat. § 100.18, the Court of Appeals found the issue unfit to dismiss in summary judgment due to questions regarding Clark's new employment with Red-D-mix and his statements to United. The court also considered the possibility that a jury could find that United was a member of the public when Clark, on behalf of Red-D-Mix, solicited a new contract with United. Red-D-Mix's petition for review at the Supreme Court was granted.

In affirming in part, reversing in part and remanding with instructions, the Supreme Court held that Clark's promises to United that the "bleed water" issues had been resolved was not puffery that it was not subject to liability under the fraudulent representations statute, adding that the issue of whether the statement was puffery was for a judge to decide on motion for

summary judgment. The representations made by Clark to the United were not puffery in that they were made in regard to a technical problem, with a technical definition and a technical solution. The Supreme Court made clear that judges can decide the issue if the facts leave no room for debate. The Supreme Court also decided that the tort claims asserted through assignment from homeowners were precluded by the economic loss doctrine, however, the claims asserted directly by United could proceed in that damages were not speculative, as Red-D-Mix had argued.

Legislation:

1. 2013 Wisconsin Act 62 (2013 A.B. 4): Enacted December 11, 2013 to increase the amount of the supplement to the federal historic rehabilitation tax credit for qualified rehabilitation expenditures from 10% to 20%.

2. 2013 Wisconsin Act 124 (2013 S.B. 345): Enacted January 23, 2014, Act 124 grants the Department of Safety and Professional Services (DSPS) authority and responsibility in authorizing the construction, installation, alteration, operation and inspection of elevators and similar conveyances along with licensing requirements for elevator mechanics, inspectors and contractors as follows:

- a. The requirements of the Examining Board of Architects, Landscape Architects, Professional Engineers, Designers, and Professional Land Surveyors were modified to add reference to a “professional engineer,” as opposed to the previously articulated “engineer.”
- b. All references to “elevators” or “lifts” has been changed to reference “conveyances.”
- c. Previously, no person could construct, alter or install a conveyance unless a licensed elevator contractor has received a “permit” for that work from the department. This language and all similar language referencing permits has been changed reference “approval.”
- d. Previously, no individual could perform an inspection of an elevator in Wisconsin unless that individual was licensed as an Elevator Inspector and held a certification as an elevator inspector issued by a person approved by the American Society of Mechanical Engineers. All reference to certifications as an elevator inspector issued by a person approved by the American Society of Mechanical Engineers has been removed.
- e. Elevator Inspector continuing education requirements have been amended to require certification that during the “term of the license,” the applicant satisfied education requirements. This changed the previous requirement that education requirements had to be completed within one year before the date on which the applicant’s license expired.

3. 2013 Wisconsin Act 140 (2013 A.B. 655). Enacted on March 17, 2014, Act 140 establishing the shoreline of Lake Michigan in Milwaukee as follows:

- a. The shoreline of Lake Michigan in the city of Milwaukee is fixed and established to extend from approximately the line of East Lafayette Place extended easterly on the north to the present north harbor entrance wall of the Milwaukee River on the south as specified in an agreement between the Chicago and Northwestern Railway Company and the city of Milwaukee recorded with the office of the

register of deeds of Milwaukee County on April 23, 1913, in volume 662, pages 326-330, as document number 762955.

This Act will allow for development on land that had previously been thought to be filled lake bed and thus not ripe for development.

4. 2013 Wisconsin Act 143 (2013 A.B. 683). Enacted on March 19, 2014, Act 143 revises the structure for licensing the various levels of electricians as follows:

- a. The Act adds exemptions from licensing requirements for work done by an employee in an existing manufacturing or industrial facility, work to replace switches and outlets with a rating up to 20 amperes, and volunteer work for a qualified nonprofit corporation engaged in building homes, and also revises the exemption under prior law for work on equipment that does not have a primarily electrical function to include work on ballasts, electric signs, and luminaires.
- b. The Act temporarily exempts from the licensing requirements a person who was born before January 1, 1956, and who has at least 15 years of experience in electrical work. Upon promulgation of this licensing option, the exemption from licensing is eliminated and a person in this age and experience group is required to hold this or another type of valid license for electrical work. Department of Safety and Professional Services may enter into a reciprocity agreement with another state to recognize licensing of an electrician who has met comparable credentialing requirements.

5. 2013 Wisconsin Act 150 (2013 S.B. 640). Enacted on March 27, 2014, Act 150 amends the Notice of Cancellation that contractors are required to furnish to customers as follows:

NOTICE OF CANCELLATION

If you are notified by your insurer that the claim under the property insurance policy has been denied in whole or in part, you may cancel the contract by personal delivery or by mailing by 1st class mail a signed and dated copy of this cancellation notice or other written notice to [name of contractor] at [contractor's business address] at any time before midnight on the third business day after you have received the notice from your insurer. If you cancel the contract, any payments made by you under the contract, except for certain emergency work already performed by the contractor, will be returned to you within 10 business days following receipt by the contractor of your cancellation notice.

6. 2013 Wisconsin Act 152 (2013 S.B. 643). Enacted on March 27, 2014, Act 152 amends Wis. Stat. 82.08(1) as follows:

82.08(1) Petitions. A town that has voted to construct or repair any bridge or culvert that is on a, or that after the construction will be connected to, an existing highway maintained by the town may file a petition for county aid with the county highway commissioner.

7. 2013 Wisconsin Act 166 (2013 A.B. 562). Enacted March 27, 2014, (Corrections Bill) Act 166 exempts work performed for the University of Wisconsin System with respect to a building, structure, or facility involving a cost less than \$500,000 that is funded with the proceeds of gifts or grants made to the system from the Department of Administration's engineering powers and duties granted by Wis. Stat. §16.85.

8. 2013 Wisconsin Act 192 (2013 S.B. 370). Enacted April 4, 2014, Act 192 creates a goal that Department of Administration will attempt to ensure that at least 1% of the total amount expended in each fiscal year is paid to contractors, subcontractors and vendors that are disabled veteran-owned businesses when the Department and any agency of the Department is purchasing property or awarding construction contracts.

9. 2013 Wisconsin Act 236 (2013 S.B. 560). Enacted April 8, 2014, Act 236 amends Wis. Stat. §50.36 to state that the building codes and construction standards of the Department of Safety and Professional Services shall apply to all hospitals to the extent that they are not incompatible with any building codes or construction standards required by the conditions for Medicare participation for hospitals.

10. 2013 Wisconsin Act 270 (2013 S.B. 617). Enacted April 16, 2014 Act 270 creates:

- a. A Building Code Council with representation from five areas, skilled building trades, local building inspectors, fire services, building contractors, and architects, engineers and designers. Each area will have two representatives that are active in their fields and they will serve on the council for a 3-year term. The council will meet at least twice annually.
- b. Requirements that no city, village or town may enact or enforce an ordinance that establishes minimum standards for constructing, altering or adding to public buildings or buildings that are places of employment unless that ordinance conforms to the rules under sub. (15) (j), or if the ordinance was enacted before May 1, 2013, the ordinance was published in the manner required under s. 60.80, 61.50 or 62.11(4), the ordinance relates to fire detection, prevention or suppression components of a building, the building is not a multifamily dwelling or the department determines that the ordinance requires standards at least as strict as the rules of the department.
- c. Requirements that a city, town or village can enact and enforce an ordinance establishing a property maintenance code as long as it is stricter than that of the Department of Safety and Professional Services.
- d. Requirements that any inspection done to determine compliance with the rules related to constructing, altering, or adding to public buildings and buildings that are places of employment may be performed by an inspector certified by the Department of Safety and Professional Services to make such inspections.
- e. Requirements that a person may perform inspections of fire detection, prevention and suppression devices being installed during the construction or alteration of, or the addition to, public buildings and places of employment only if he or she has received certification as an inspector from the Department of Safety and Professional Services.

11. 2013 Wisconsin Act 291 (2013 A.B. 803). Enacted April 16, 2014, Act 291 prohibits substance abuse by employers and employees performing work on public utility projects and in public rights-of-way and requires that contractors and subcontractors have a substance abuse policy in place. If a worker is impaired they must be removed from the job site. This Act also requires compliance with the "move over slow down" law by making this law applicable to emergency or roadside service vehicles that are displaying flashing lights and are parked on or within 12 feet of a roadway.

12. 2013 Wisconsin Act 301 (2013 A.B. 444). Enacted April 16, 2014, Act 301 relates to fees imposed on the disposal of solid waste and hazardous waste at licensed solid waste and hazardous waste disposal facilities as follows:

- a. If a facility is licensed as a solid waste processing facility, any materials generated by construction, demolition or remodeling that are to be processed for recycling must be reported in volume or weight as residue to remain in compliance with its approved plan of operation.
- b. If a person is required to pay groundwater or well compensation fees and fails, within 120 days after the date of disposal, to pay the fees and charges imposed, the owner or operator of the licensed solid waste or hazardous waste facility may submit an affidavit to the department including identifying information for the person that failed to pay, a description of efforts made to collect, and a commitment that they will not accept waste from the person that failed to pay until the overdue fees are paid.

13. 2013 Wisconsin Act 358 (2013 A.B. 506). Enacted April 23, 2014, Act 358 modifies the requirements of the Examining Board of Architects, Landscape Architects, Professional Engineers, Designers, and Professional Land Surveyors to add reference to a "professional land surveyor," as opposed to the previously articulated "land surveyor." The Act also expands the definition of "professional land surveyor" to include any surveyor employed by a county having a population of 500,000 or more.

Administrative Code:

1. CR 13-014 Register September 2013 No. 693, effective 10-1-2013: In response to 2011 Wisconsin Act 146, this rule gives elevator mechanics another option to qualify for a license and revises the experience qualifications for a master plumber's exam to overall years instead of consecutive years.

The rule also eliminates the state credentialing provisions and the need for a HVAC contractor registration for ozone-depleting refrigerant handling technicians, however, when dealing with ozone-depleting refrigerants, one must still comply with federal obligations including certification.

2. CR 13-042 Register November 2013 No. 695, effective 12-1-2013: This rule creates revisions to Chapter SPS 316 to bring the state electrical code up to date with modern technology and clarify the electrical standards in the *National Electrical Code*[®] (NEC[®]). The change adopts the most recent edition of the NEC[®] and because of changes in the NEC[®] 2011 edition, amends or repeals several Wisconsin modifications that reference the NEC[®]. The revision also excludes the NEC[®] requirements for arc-fault circuit- interrupter (AFCI) protection because of the late effective date. The state agreed to postpone resolution of issues that the new AFCI requirements will create for one code cycle.

3. CR14-105 Register August 2014 No. 704, effective 9-1-2014: This rule clarifies the methods outlined in chapter SPS 321 regarding the design of wall bracing in one and two-family homes, to properly withstand wind loads.

4. CR 14-010 Register August 2014 No. 704, effective 9-1-2014: This rule clarifies continuing education requirements for home inspectors, repeals rules that are no longer effective, combines the home inspector chapters into one chapter and also includes rules changes to SPS 135 based on changes made to § 440.974 (2) under 2013 S.B. 345.

Under Chapter SPS 305, this rule aligns the renewal and education cycles for building trades individuals or businesses. This would allow them to complete their continuing education requirements up to the date of expiration of their certification, registration or licensing as opposed to three months prior to expiration.

As the American Society of Mechanical Engineers (ASME) is discontinuing its qualified elevator inspector (QEI) program, this rule change removes reference to ASME and requires applicants seeking a renewal of an elevator inspector's license to submit evidence of a certification based on the QEI-1 standard from another organization deemed acceptable by the Department.

This rule change also allows applicants seeking to obtain a journeyman plumber-restricted appliance license the option of taking the Department of Safety and Professional Services-approved exam administered by another entity. A journeyman plumber-restricted appliance license is limited to performing work in connection with an existing water system that does not require a direct connection to the drain system. This rule change also repeals rules that are no longer effective and separates the rules for journeyman plumber-restricted appliance license holders into a different section.

Lastly, as a result of the enactment of 2013 Wisconsin Act 20, this rule change repeals reference to building contractor registration in SPS 305 and 361. It also repeals and amends sections that the Department of Safety and Professional Services no longer has authority to enforce regarding flammable and combustible liquids in SPS 323, 332, and 334.

5. CR 14-017 Register August 2014 No. 704, effective 9-1-2014: This rule revision incorporates the current federal model standards in Title 24, Part 3285 of the *Code of Federal Regulations* to update the installation standards for manufactured homes, codifies the Department of Safety and Professional Services' current modifications to the federal installation standards and updates the Department's rules in SPS 326 for manufactured home communities.

6. CR 13-105 Register August 2014 No. 704, effective 9-1-2014: This rule revision incorporates the 2012 edition of the National Fire Protection Association's (NFPA 1) fire prevention code. Previously exempt federal leased buildings are subject to local code requirements and inspections in fire protection under 41 CFR 102-80.85. Revisions define "design requirements because the requirements in the NFPA 1 are usually excluded so the building-design requirements are contained in chapters SPS 361-366 instead in those chapters as well as in SPS 314. Revisions delete having the requirements in Chapter ATCP 93 take precedence over chapter 314, if such requirements are different, because those requirements are now administered by the Department of Agriculture, Trade and Consumer Protection. This revision also states that a fire inspector may issue an order to stop construction if the order relates to a fire or explosion hazard, clarifies how portable fire extinguishers are maintained and states that when a rooftop photovoltaic system is being installed, an access pathway for firefighters must be provided. Additionally, this rule requires an Underwriters Laboratories® listing for fire-department access boxes be provided after the effective date of these rules. Furthermore, this revision prohibits storing fuel with open-flame cooking equipment on an open balcony as well requires reference to the NFPA 400, Hazardous Materials Code for use and handling of hazardous materials. Updates to the fire-dues entitlement process to be consistent with a new web-based system to report fire incident are also included in this rule revision. Lastly, the rule requires an owner or operator of a building to notify the proper authority before changing the building occupancy.

7. CR 14-020 Register August 2014 No. 704, effective 9-1-2014: The revisions to Chapter SPS 318 adopt the 2013 edition of the ASME A17.1, Safety code for Elevators and

Escalators and the 2011 edition of the ASME A18.1, Safety Standard for Platform Lifts and Stairway Chairlifts. The revisions also refines how inspections and tests are done and reorganizes the current requirements to better reflect industry and regulatory best practices in the State of Wisconsin, as well as nationally.

8. CR 13-099 Register September 2014 No. 705, effective 10-1-2014: This rule revision makes amendments to Chapters NR146 and NR 812 by making changes to qualifications and training for a registered water well drilling operator, requirements for the department to issue citations related to water well drilling and pump installation, and the qualifications for performing property transfer well inspections, well filling and sealing. This rule also includes changes in procedures for property transfer well inspections, well filling and sealing procedures, citation procedures and eliminates some distance requirements that are no longer considered a health hazard.

9. Chapter ATPC 110 – Home Improvement Practices Act: The Department of Agriculture, Trade and Consumer Protection, chapter 110, currently regulates all home improvement practices in the State of Wisconsin. This rule modifies the Act as follows:

- The term “home improvement” has been redefined to specifically not include the construction of a new residence or the major renovation of an existing structure.
- The term “major renovation of an existing structure” has been added and is defined as “a renovation or reconstruction contract where the total price of the contract is more than the assessed value of the existing structure at the time the contract is initiated.”
- Provisions have been added that prohibit the substitution of product or materials that were originally specified in the contract. Generally, the Seller must obtain written consent from the buyer before substituting any products or materials, however, verbal authorization may be obtained from the Buyer provided that certain conditions are met.
- Under the previous rule, the Seller was required to provide the Buyer with lien waivers before accepting a final payment and if partial payments were required throughout the course of the project, then the Seller was to provide lien waivers for the proportionate value of all labor, services, and products furnished or delivered as of the time of the partial payment is made. This provision has been revised to create an obligation on the Seller only to provide the Buyer, prior to entry into the home improvement contract, with a separate notice that lien waivers may be requested, however, actual lien waivers need only be provided if requested by the Buyer. The Seller must keep a copy of receipt of the notice.
- A Seller is required to provide the Buyer with a timely notice of any impending delay in performance beyond that specified in the home improvement contract. If the contract is in writing, or consent is required to be in writing, the Buyer must agree in writing to the schedule change. This rule also provides that the Seller is not responsible for delays as a result of destructive acts of nature, civil disorder or by action or inaction of the Buyer.
- Generally, a Seller must inform the Buyer of all required permits required for a home improvement project and Seller must not start work on the project until all state and local permits have been issued. An exception has been created that if a project consists of several subprojects, a Seller may begin work on initial subprojects before acquiring permits for each subsequent subproject, however, no Seller may start work on any subsequent subproject until all state and local permits have been issued.
- Provisions have been added that allow the Seller to provide a summary of an inspection the Buyer if the state or local inspector who completed the inspection of the project does not provide an inspection document. The summary must include the

- inspector's name, the date of the inspection, and an inspection number or other way to identify the inspection in the state or local building inspection database.
- Generally, a Seller must provide manufacturers' product warranties to the Buyer. The Act has been amended to state that such warranties may be issued at any of the following times: a) at the time the buyer enters into a home improvement contract, b) at the time the product is installed, or c) at the conclusion of the project, if specified in the contract.
 - Generally, if a Seller makes representations that insurance or protection is provided it must be clearly outlined in the contract, including the name and address of the insurer. Under amendments to the Act, the Seller may provide a copy of a declarations page or a certificate of insurance rather than the entire policy or agreement.
 - Under the previous rule, in a home improvement contract that includes liquidated damages for a Buyer's breach of the contract, the amount could not exceed 10% of the contract price or \$100, whichever is less. The Act has been amended to repeal the \$100 maximum and retains the 10% limit.
 - The Act also adds a note that explains that where a Seller assigns the debt to a finance company before completing the contract and then fails to complete the contract, the finance company is subject to the same claims and defenses the Buyer has against the contractor.

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Wyoming

Case law:

1. In *Legacy Builders, LLC v. Andrews*, 2014 WY 103, 335 P.3d 1063, the Wyoming Supreme Court upheld a verdict in favor of two homeowners against their contractor that included repair damages that exceeded the value of diminution in value of the home because the contractor failed to introduce diminution of value evidence at trial.

The homeowners had hired Legacy Builders ("Legacy") to build them a new residence in Rock Springs, Wyoming. Before construction started, Legacy commissioned a soils report for the property which revealed that the site contained expansive soils. Following construction, the homeowners began noticing damages related to settlement, including cracked drywall, buckling foundation slab, and warped doors and windows. Although they reported these problems to Legacy, Legacy failed to correct them. Following multiple requests for corrective action which were never answered, the homeowners filed suit.

At trial, the homeowners called a damages expert who testified that the only way to stop the settlement would be through the installation of a helical pier system and that once that system was installed, there would be approximately \$200,000 worth of additional repairs that would need to be made to the rest of the home to cure the existing defects that had been caused by the previous settlement. In response, Legacy called an expert who countered the repair figures cited by the homeowners' expert but did not introduce any evidence to support a finding of diminution in value. The trial court found the homeowners' expert to be more credible and therefore adopted his damage figures over the figures proposed by Legacy's expert.

On appeal, Legacy challenged the trial court's finding that the homeowners were entitled to over \$300,000 in repair damages when the proper method for calculating their damages should have been diminution in value. In ruling on the issue, the Wyoming Supreme Court noted that under its prior precedent, if an injured party's costs of repair are "clearly excessive" or "clearly disproportionate" to the actual loss, then the diminution of value is the proper measure

of damages. Although this rule typically applies in faulty construction cases, the Court refused to apply it in the case because Legacy failed to introduce any evidence to support a finding of “clearly excessive” or “clearly disproportionate” damages. Instead, Legacy chose to counter the homeowners’ repair estimates with estimates of their own. In closing, the Court ruled that although the plaintiff has the initial burden to establish their damages, the burden shifts to the defendant to challenge the reasonableness or disproportionality of the plaintiff’s method, and if appropriate, present evidence supporting an alternative measure of damages.

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