2008-2009 Construction Law Update:

Case Law & Legislation
Affecting the Construction Industry

Presented by

Division 10 – Legislation and Environment

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INTRODUCTION

Division 10 is proud to present the Third Edition of the annual publication, ***2008-2009 Construction Law Update: Case Law & Legislation Affecting the Construction Industry.*** This year we received contributions from practitioners in 34 states. What does that mean?

First, it means that we have many volunteer attorneys who have been willing to contribute their time and efforts over the past year to provide articles and brief summaries from within their jurisdiction. These "Fifty-State" submissions have been regularly posted on the Division 10 web page and passed along to the Forum's publications committees for potential inclusion in upcoming publication articles.

Next, it means that we … and you … still have some work to do for 2010. That's right! If you are a regular contributor, we thank you for your help and 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.**

We would like to thank all the volunteers and contributors for their efforts this year. Of course, the submissions in this publication are made throughout the 2008-2009 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!

Melissa A. Orien
Co-Editor

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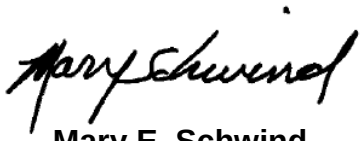

Mary E. Schwind
Co-Editor

Arizona

Legislation:

1. **A.R.S. § 12-1361 et seq. (proposed legislation under Proposition 201 – on ballot for November 4, 2008 vote)**

Proposition 201, or the "Homeowner Bill of Rights," contains significant changes and additions to A.R.S. § 12-1361 *et seq.,* which addresses defect and/or design actions against persons or organizations engaged in the business of designing, constructing, or selling single or multifamily residences ("Builders"). If passed, these changes will significantly affect the landscape of residential construction throughout the entire state of Arizona.

A. Ten-Year Warranty

Probably the most dramatic and discussed aspect of the Bill of Rights is the addition of A.R.S. § 12-1365.01, which provides for a ten-year warranty on all residential construction sold by builders:

> **Every seller of a dwelling must include in the purchase price of the dwelling without additional or separate charge a warranty of the materials and workmanship of the dwelling effective for at least ten years from the date of purchase. The warranty shall cover the original purchaser and all subsequent purchasers within ten years of the date of the original purchase.**

Obviously, this is a dramatic change from the typical one-year warranty provided with new residential construction.

From a homeowner's point of view, the imposition of a ten-year warranty, on its face, is likely appealing, particularly given the statutory language indicating that the contractor/developer cannot charge a homeowner any "extra" fee for the warranty. Of course, there is no such thing as a free lunch. While the language of the proposed statute states that builder cannot charge "extra" for the extended warranty, the simple fact remains that builders will simply add the associated costs to the price of the home. This "warranty tax" will likely be substantial due to the sheer length of the warranty and other provisions of the Bill of Rights increasing the cost to correct defect work (see section "B" below).

This warranty may also result in unintended and unwanted consequences with respect to homeowner behavior. For example, some homeowners may not properly maintain their property due to their belief that routine maintenance is covered under warranty. When problems arise due to inadequate maintenance, homeowners may convince themselves (and possibly a jury) that damages resulting from their failure to perform regular and necessary maintenance are actually construction defects. Accordingly, a ten-year warranty may force builders to essentially provide ten years of maintenance work in order to avoid lawsuits due to homeowner neglect, particularly given the harsher penalties applicable to builders under the Bill of Rights (discussed in section "C" below).

On a related note, all provisions of the Bill will take on increased significance if passed in November, likely resulting in greater scrutiny given to new and existing statutory provisions. For example, an argument could be made that the Bill's definition of "purchaser" exempts builders of custom homes from the Bill since custom home builders could be construed as an "owner" or a "builder" as opposed to a "purchaser." Similar creative legal arguments (and their associated cost) could become more commonplace in litigation as builders seek any possible refuge from the additional obligations set forth in the Bill of Rights.

Finally, a price gap may develop between new homes and resale homes given that newly-constructed homes will be subject to the "warranty tax." Accordingly, not only will a ten-year warranty likely result in higher new home prices in the midst of one of the largest housing downturns in U.S. history, it may also place new home builders at a distinct pricing disadvantage to resellers who will not be required to price-in an equivalent warranty. These negative consequences, while not apparent on the face of the Bill of Rights, must be considered in evaluating the overall merit of the proposed legislation to both owners and builders, as higher prices could result in larger numbers of potential purchasers unable to afford new homes.

B. Revisions to Notice and Claims Procedures

The Bill of Rights also alters the notice and claims procedures already set forth in A.R.S. § 12-1362. Both the current and proposed versions of the legislation hold that compliance with statutory notice provisions are a jurisdictional prerequisite to bringing an action, and thus a homeowner's failure to strictly comply with these deadlines could be fatal to defect claims. The Bill of Rights changes these requirements to the advantage of homeowners by shortening the time between when the homeowners must provide pre-litigation notice to builders before filing suit from ninety (90) days to sixty (60) days. In addition, such notices would ***automatically*** incorporate all defects that the *builder* found or ***should have found*** during an inspection, meaning that builders could face lawsuits without notice if a court later determines that the defects were reasonably discoverable by the builder.

Once notice is received, the Bill of Rights requires builders to conduct a "diligent" inspection of the residence – a reversal of current policy giving builders the option to conduct an inspection. The builder is then obligated to respond to the homeowners' notice within thirty (30) days of receiving the notice (instead of the sixty days previously provided), meaning that mandatory inspections would need to be completed within three to four weeks of the builder first receiving notice.

If the builder responds to the homeowner by acknowledging a defect or defects, the Bill of Rights ***requires*** builders to offer the homeowner the option of repairing or replacing the defect in addition to any offer of monetary compensation. This offer to repair or replace the defect must also include a list of three (3) licensed contractors (with no adverse ROC orders against its license during the prior ten years) from which the homeowner may choose to perform the work. Thus, the homeowner is ***always*** given the election of forcing the builder to correct an acknowledged defect.

These provisions likely will result in builders paying third-party contractors to correct a substantial portion of the builders' own defects even if builders are willing to self-perform the work. Given the fact that almost all defect work is currently performed by the builders and their subcontractors themselves, this change will likely result in significant additional costs to builders that will, once again, most likely be passed back to the public through increased home prices. Also, these provisions could result in economic wastefulness as builders will be forced to pay third party contractors premium prices to perform work that ordinarily would be performed by the original builder or its subcontractors at cost. Thus, the real winners could be remedial contractors, who would receive premium rates to perform work that has typically been performed at cost by builders and subcontractors.

Moreover, builders likely will attempt to obtain ten year warranties and rights of indemnity for reimbursement from all their subcontractors, forcing subcontractors to add a premium to their bid to warrant and indemnify their work for this additional nine-year period. This, of course, also assumes that the same subcontractors who performed the work will still be in business ten years later. Given the chance that some of its subcontractors will not remain in business for the full ten-year warranty period, general contractors will likely include yet another premium into their costs to repair defects by subcontractors who are no longer in business.

C. Damages / Attorneys' Fees

The Bill of Rights also changes the damages and fees available to the homeowner if the builder and homeowner are not able to resolve their differences through the claims process. Pursuant to the Bill, victorious homeowners would be entitled to (1) damages for costs to repair or replace the defective work; (2) loss of value to the residence due to defects; (3) injunctive relief, (4) consequential damages, including relocation costs and lost wages as a result of addressing construction defects, and (5) damages for the "unreasonable failure to repair or compensate the homeowner."

First, allowing homeowners to recover lost wages as a result of addressing construction defects (which could conceivably include litigation-related activities like attending depositions and trial) is somewhat novel as these sums typically are not recoverable as consequential damages. Second, the Bill of Rights provision essentially allows consequential damages for the "unreasonableness" of a contractor in addressing alleged defaults. Needless to say, it is safe to assume that every aggrieved homeowner believes that his or her builder is "unreasonable," and thus one can expect that every residential defect complaint filed pursuant to the Bill of Rights will include this kind of claim.

Further, the Bill of Rights provides that homeowners are entitled to attorneys' fees, expert fees, and costs if homeowners are successful on ***any*** portion of their "contested" action. For example, a homeowner who wins a single claim out of ten would still be entitled to ***all*** his or her attorneys' fees and costs. The use of the word "contested," however, may mean that homeowners would not be permitted to recover attorneys' fees in default actions. In any event, this provision is certainly one-sided as the Bill also forbids builders from including any fee-shifting provisions in their contracts. In fact, *any* attempted contractual waiver of *any* the provisions of the Bill would expose builders to all damages provided for by the Bill, including rescission of the purchase contract. This ostensibly includes contractual arbitration clauses altering any provision of the Bill of Rights. Thus, the only way builders could ever recover fees would be to achieve a complete victory at trial or arbitration (if the contractual arbitration clause permits the recovery of fees).

The increased threat of large, adverse judgments again will likely be passed to homebuyers in the form of a "warranty tax." This threat may also likely result in builders kowtowing to unreasonable demands by owners, considering that disputing the existence of a defect carries the risk of incurring a significant adverse jury award. In any event, providing additional penalties and fees against builders may only serve to increase litigation between homeowners and builders, a result that will only lead to higher prices and further distrust between builders and buyers.

D. Deposits / Models

The Bill imposes much stricter rules on buyer deposits. Specifically, the Bill of Rights permits buyers to cancel building contracts and recover 95% of their deposits so long as the cancellation takes place within 100 days of execution. Logically, this will impact builders' ability to gauge the seriousness of a buyer's interest and may give rise to buyers entering into several different contracts only to cancel all but one within 100 days. In another case of potentially unforeseen consequences, builders may respond to this change by dramatically increasing deposit amounts so that the allowable 5% forfeiture is sufficient to ensure the seriousness of prospective buyers. Once again, homeowners would ultimately pay the price for these changes in increased sales prices and larger deposits, which could result in reducing the number and ability of lower-income purchasers to break into the market.

Finally, the Bill requires all model homes to identify all equipment and/or features that are not included in the model's base purchase price. The price of these non-standard items must be separately priced and disclosed to buyers. Failure to comply with this provision entitles the buyer

to injunctive and monetary relief, including possibly forcing the builder to include undisclosed upgrades to the buyer at no additional cost. However, this is probably one of the least problematic portions of the Bill of Rights.

E. Statute of Limitations / ADR

The Bill of Rights would extend the applicable statute of repose for defect claims from eight (8) years to ten (10) years after substantial completion, matching the length of the mandated ten-year warranty by extending the current statute of repose by two (2) years. Homeowners who discover defects in the tenth year would receive an additional year to bring a claim, but no claims would be allowed after the eleventh year. Moreover, the Bill would change the current limitations timing by delaying the start of the warranty period until either (1) the home is actually occupied by the buyer, or (2) the first date the buyer is entitled to occupy the home by contract, whichever is earlier. This new start date likely will result in a longer warranty period since the current statute of repose commences after final inspection by the governmental body issuing the building permit for the residence.

For example, the ten-year warranty would be automatically (and indefinitely) extended for new homes sitting vacant and unsold. This presents numerous problems. For example, will subcontractors be asked to cover warranty issues for this unknown period? How will this affect CGL insurance requirements? How long will a builder require a designer to buy errors and omissions coverage? If a home sits unsold for two years, the applicable statute of limitation extends to ***twelve*** years, demonstrating how (especially in the current housing market) builders, subcontractors, and designers could be left guessing as to how long they will be expected to warrant their work. This uncertainty will force all builders, subcontractors, and designers to include a premium for their work beyond the ten-year warranty set forth in the Bill of Rights.

Finally, the Bill of Rights would *not* allow builders and homeowners to opt out of the Bill of Rights by including an arbitration clause or other method of alternative dispute resolution altering the Bill's provisions in their contracts. Thus, an arbitrator or other finder of fact likely would be compelled to acknowledge and follow all aspects of the Bill of Rights, including the Bill's attorneys' fees and damages provisions. This provision would eliminate several of the existing aspects of arbitration, most notably a builder's ability to include damage waivers and liability limitations in the builder's ADR provision the contract. As set forth above, increased litigation costs will most likely be passed on to buyers in the form of higher prices.

2. A.R.S. 32-1121

Title 32, Chapter 10: Specifically incorporates the specific definition of "owner-occupant" into A.R.S. 32-1121(A)(5) as found in A.R.S. 32-1002.

> Amends A.R.S. 32-1154(B) by narrowing who can file a Registrar of Contractor's complaint.
>
> Adds a new subsection, A.R.S. 32-1155(C), adding two instances in which a contractor is not subject to citation: (1) when the contractor is not provided an opportunity to inspect the work within fifteen days after receiving written notice from the Registrar, and (2) when the work is subject to neglect, modification or abnormal use.
>
> Adds a new Article 5 relating to general remodeling and repair contractors. Requires the Registar to summarily suspend licenses if General Remodeling and Repair Contractors do not have worker's compensation pursuant to Title 23, Chapter 6, Article 4. Also prohibits General Remodeling and Repair Contractors from accepting any new projects if five "unresolved and substantiated abandonment complaints" are filed against the contractor's license in a twelve-

month period. Finally, the Registrar has the authority to suspend General Remodeling and Repair licenses when the Registrar determines "that the public health and safety requires immediate action."

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Arkansas

Case Law:

1. In ***National Home Centers, Inc. v. Coleman***, 373 Ark. 246, ___S.W.3d___, 2008 WL 1747108 (2008), the Arkansas Supreme Court held that a lis pendens filed in conjunction with a creditor's foreclosure action served to bar the claim of a material supplier where the supplier's lien was filed after the lis pendens was filed, and the foreclosure action proceeded to final judgment without joinder of the supplier. The Court stated that although, for purposes of priority, the supplier's interests "relate back" to the last day materials were supplied, the supplier must file notice of the lien or file a lawsuit within 120 days of the final provision of materials, or else the supplier loses any claim to the property.

2. In ***Meyer v. CDI Contractors, LLC***, ___S.W.3d___, 2008 WL 2122335 (Ark. App. 2008), the Arkansas Court of Appeals addressed several arguments relating to the punitive portion of the state's licensing statute for contractors, Ark. Code Ann. § 17-25-103. CDI Contractors, LLC ("CDI"), sought a bid from Meyer for a construction project, but learned that Meyer was not a licensed contractor. CDI postponed the bidding to allow Meyer to obtain his license. When applying for his license, Meyer signed an affidavit stating that he was not currently performing any work costing $20,000.00 or more when, in fact, he was working on a project costing more than $20,000.00. Meyer was granted a contractor's license and the parties entered into a subcontract. CDI attempted to cancel the subcontract, and Meyer filed a complaint in Circuit Court. CDI sought summary judgment, arguing that that since Meyer presented false information in his application for a contractor's license, the subcontract was void under Ark. Code Ann. § 17-25-103(d), which states that no action may be brought to enforce a contract entered into in violation of the contractor's licensing statue.

Meyer argued that summary judgment on his fraudulent-inducement claim was improper because, even though Ark. Code Ann. 17-25-103(d) disallows actions under contracts entered in violation of the licensing statute, the statute does not expressly disallow an action for fraudulent-inducement. The Court of Appeals disagreed, and held that since the Meyer's claim was intertwined with the contract, he could not frame his claim differently in order to circumvent the statute. The Court noted that other states have allowed similar actions to go forward, but such cases were limited to their facts and were not applicable since Meyer's claims were "intrinsically founded on, and intertwined with, the facts surrounding the underlying contract, and the primary relief he [sought]-his lost profits-[was] the benefit of his bargain."

Meyer also argued that a question of fact existed regarding whether he intended to present false information in his contractor's application. The Court held that Ark. Code Ann. § 17-25-103 does not require that the applicant *intend* to give false information in order to be controlled by the statute's terms.

3. In ***Gatzke v. Weiss***, 2008 WL 5191102 (Ark. Dec. 11, 2008), A group of Arkansas taxpayers ("Appellants") sued several public officials, including the Director of the Department of Finance and Administration ("DFA"), alleging that Act 961 of 1997 (codified at A.C.A. § 19-4-1413) and Act 1626 of 2001 (codified at Ark. Code Ann. § 19-4-1415) (collectively

the "Acts") violated Article 19, Section 16 of the Arkansas Constitution because they permit the State to enter into construction contracts without engaging in competitive bidding. Appellants also contended that the construction contracts permitted under the Acts constituted illegal exactions under Article 16, Section 13 of the Arkansas Constitution. Appellants requested a declaratory judgment that the Acts were unconstitutional and that the contracts were illegal exactions. Additionally, appellants sought to enjoin the State from entering into any new contracts or continuing work under existing contracts.

The DFA moved to dismiss the suit, arguing that Article 19, Section 16 of the Arkansas Constitution applies only to county-funded contracts. Article 19, Section 16 provides that "All contracts for erecting or repairing public building or bridges in any county, or for materials therefore; or, for providing for the care and keeping of paupers, where there are no alms-houses, shall be given to the lowest responsible bidder, under such regulations as may be provided by law." The circuit court agreed with the DFA and granted the motion to dismiss.

The provisions of the Arkansas Constitution apply to the *State* unless there is an explicit provision to the contrary. *See* Preamble to the Arkansas Constitution ("We, the people of the *State* of Arkansas, do ordain and establish this Constitution") (emphasis added). In *Gatzke*, however, the Arkansas Supreme Court concluded that Article 19, Section 16 applied only to county contracts, reasoning that the phrase "in any county" would lack any significance unless the provision relating to public buildings and bridges was restricted to county-funded contracts. In upholding the circuit court's decision, the Arkansas Supreme Court looked to the plain meaning of the statute. *See Merritt v. Jones*, 259 Ark. 380, 387, 533 S.W.2d 497, 500–01 (1976). As further support for its holding, the Arkansas Supreme Court looked to the state contracts referenced in Article 19, Section 15 (since repealed), to demonstrate that the legislature purposely included the words "in any county" and thus intended to restrict Article 19, Section 16 to county contracts.

Therefore, the State can enter into no-bid construction contracts.

Legislation:

1. **Ark. Code Ann. § 22-9-604,** Release of retention funds for **public works contracts**. The Arkansas statute regulating public works contracts defines progress payments as the monthly estimates submitted by the prime contractor to the contracting agency for payment of the portion of work completed. The statute allows public agencies to retain 10% of the contractor's earned progress payments to assure the contractor's completion of the contract. Ordinarily, all of the retained funds are to be released to the contractor within 30 days of his completion of the contract. The statute was amended to require proportionate release of retained funds where a public works contract allows for phased construction, which may be completed on a partial occupancy. Such funds must be released within 30 days of completion of each phase and are to be released in proportion to the value of the part of the improvement completed.

2. **Ark. Code Ann. § 17-25-514, Requirements for obtaining or renewing a residential building contractor's license.** Formerly, a residential building contractor who was not required to carry workers' compensation insurance could obtain a residential building contractor's license by obtaining a certificate of non-coverage from the Workers' Compensation Commission. The licensing statute was amended to eliminate the exception. The amended statute requires all contractors seeking a new or renewed residential building contractor's license to show proof of workers' compensation coverage before their license may be issued or renewed.

3. **Ark. Code Ann. § 27-72-310, Contracts for the construction of state aid roads.** The Arkansas statute regarding construction of state aid roads was amended to raise the limit on a county judge's bid for work to be performed on state aid roads from $115,000.00 to $165,000.00. Thus, a county judge may now bid up to $165,000.00 on a contract for the construction of a state aid road.

4. **Ark. Code Ann. § 14-284-116, Contracts for construction to fire protection districts.** The statute regulating competitive bidding for the construction of rural fire protection districts was amended to increase the dollar amount necessary to trigger competitive bidding for the project from $1,000.00 to $10,000.00. Thus, for rural fire protection district construction projects valued at less than $10,000.00, the district's board of commissioner's need not open the project to competitive bidding.

5. **Ark. Code Ann. § 22-9-201, Applicability of §§ 22-9-202--22-9-204/Relating to the award of public works contracts**. The Arkansas statute regulating public works contracts was amended to state that nothing shall prohibit the contracting authority from requiring a bid security if it deems a bid security necessary. Additionally, the statute was amended to state that nothing shall prohibit the contracting authority to negotiate with the next-lowest bidder if negotiations with the lowest bidder are unsuccessful and further negotiations are not in the contracting authority's best interest.

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California

A. *Crawford v. Weather Shield Mfg. Inc.*, 187 P.3d 424 (Cal. 2008)

Construction disputes frequently involve demands for defense and indemnity pursuant to clauses contained in the contracts entered into by the litigants. For many years, the obligation to defend was controlled by the California Court of Appeal's ruling in *Regan Roofing Co. v. Superior Court*,[1] wherein the court held that the duty to defend does not arise until the indemnifying party had been determined to be negligent. The practical result of the *Regan Roofing* rule was that all parties would be responsible for their own defense through trial, and if an indemnifying party was found negligent, that party would be liable for reimbursing the defense costs incurred by the indemnified party.

The California Supreme Court's recent decision in *Crawford v. Weather Shield Mfg. Inc.* ("*Crawford*") reversed this long-standing rule, and provided that in appropriate circumstances the duty to defend can arise when the indemnified party was accused of negligent conduct. The Court reasoned that, by postponing a decision on the duty to defend until after the trial, the indemnified party is deprived of the benefit of a defense agreement, particularly since the majority of cases settle before any trial occurs. In order to give the indemnified party the benefit of what it bargained for, the Court reasoned that the duty to defend must arise when the need for a defense still exists.

In *Crawford*, the indemnity and defense agreement between Weather Shield and J. M. Peters Co. ("JMP") obligated Weather Shield "to indemnify and save [JMP] harmless against all claims for damages…growing out of the execution of [Weather Shield's] work," and "at [its] own expense to defend any suit or action brought against [JMP] founded upon the claim of such damage." A group of homeowners sued both JMP and Weather Shield, and the plaintiff homeowners asserted that the windows supplied by Weather Shield had caused damage to their houses. Thus, on the face of the complaint, it was clear that plaintiffs were seeking, at least in part, damages growing out of the execution of Weather Shield's work. Based on the plain language of the defense agreement, the trial court concluded (and the California Supreme Court ultimately agreed) that "the subcontract did give Weather Shield responsibility for JMP's legal defense against the homeowners' claims, insofar as those claims concerned the windows

[1] 24 Cal.App.4th 425 (Cal. App. 1994).

supplied by Weather Shield, regardless of whether Weather Shield was ultimately found negligent."

The California Supreme Court's ruling emphasizes the importance of careful contract drafting and negotiation. The *Crawford* Court recognized that the most important factor in determining when the duty to defend arises is the language of the defense agreement itself. The *Crawford* Court also recognized that parties could, if they so choose, agree that the duty to defend would only be a duty to reimburse the legal expenses incurred by the indemnified party. The defense provision in *Crawford* was particularly broad, obligating the indemnifying party to provide a defense if any portion of the damages alleged by the plaintiff "arose out of" the work performed by the indemnifying party. Thus, the clause operated regardless of whether the indemnifying party was negligent or not − a mere allegation that the damages "arose out of" the work performed by that party was sufficient.

B. *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586 (Cal. 2008).

A recent decision by the California Supreme Court provides previously unattainable relief to litigants harmed by their arbitrator's incorrect view of California law, so long at they had the foresight to include appropriate provisions in their arbitration agreements. In *Cable Connection, Inc. v. DIRECTV, Inc.* ("*Cable Connection*"), the California Supreme Court held that contract clauses calling for judicial review of arbitration awards on their merits are enforceable under California law. In doing so, the California Supreme Court provides relief from the long-held concern regarding arbitration: what if the arbitrator gets it wrong?

Cable Connection involved a dispute between local cable retailers and DIRECTV regarding a sales agency agreement to provide DIRECTV customers with the satellite hardware required to view television programming. The agreement at issue contained an arbitration clause that stated "[t]he arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error." At issue on appeal was whether this clause allowed review of an arbitration award based upon the arbitrators' misinterpretation of California law in permitting class-wide arbitration at the request of the local retailers. The trial court vacated the arbitration award, the Court of Appeal reversed, and the California Supreme Court reversed again, holding that the clause was enforceable.

In deciding to enforce judicial review of an arbitration award pursuant to the express language of the parties' agreement, the California Supreme Court has turned its back on the long-standing position of the California Court of Appeal, which had consistently refused to review an arbitrator's award due to a misinterpretation of law, viewing arbitration agreements which called for appellate review as "inconsistent with some of the primary purposes of arbitration, quicker results and early finality."[2] Furthermore, the California Supreme Court held that the United States Supreme Court's recent holding in *Hall Street Associates, L.L.C. v. Mattel, Inc.*[3] leaves room for states to provide additional grounds for judicial review beyond those enumerated in the Federal Arbitration Act. Thus, the law in California now allows for arbitrations with more oversight by the courts, should the contracting parties decide they want such oversight.

C. *Arntz Builders v. City of Berkeley,* 166 Cal.App.4th 276 (Cal. App. 2008).

In *Arntz Builders v. City of Berkeley*, the California Court of Appeal clarified the contractual and statutory claim procedure requirements a contractor must follow when disputes arise on public projects. The court's decision makes it more difficult for a public entity to defeat legitimate claims on procedural grounds. As such, at least initially, the decision can be

[2] *Old Republic Ins. Co. v. St. Paul Fire & Marine Ins. Co.* 45 Cal.App.4th 631 (Cal. App. 1996).
[3] 128 S.Ct. 1396 (2008).

considered a success for contractors in their dealings with public entity owners. This opinion, however, will likely have the long-term effect of encouraging public entities to take rigid positions in enforcing contractual claim procedures. Accordingly, while it has always been critical to adhere to such provisions, the *Arntz* decision gives this practice a heightened importance.

The *Arntz* case centered on the contract between Arntz and the City of Berkeley for the restoration and expansion of the City's library. Pursuant to the California Government Code, the contract included a detailed claims procedure. One feature of this procedure was that claims with a value of less than $375,000 were to be resolved pursuant to the statutory claims procedure described in California Government Code section 910. Claims in excess of $375,000 were to be mediated before litigation. As the project progressed and disputes arose, Arntz was lax in submitting claims. The City's project managers repeatedly reminded Arntz of this and warned Arntz of the potential consequences. After completion of the project, Arntz submitted a request for mediation and additional costs in excess of $9,000,000. After much back and forth, the City finally agreed to mediate the claims of Arntz and its unpaid subcontractors. These efforts were unsuccessful, and the parties resorted to litigation. At trial, the City claimed that Arntz failed to comply with both the statutory and contractual claim procedures. The trial court agreed and dismissed Arntz's claim.

On appeal, Arntz argued that the contractual requirements, not the statutory requirements, governed the claim procedure. Arntz also argued that because the amount of its claim exceeded $375,000, it was not required to submit the section 910 statutory claim. The Court of Appeal agreed, finding that the statutory structure was designed to allow contractual claim procedures as an alternative to statutory claim procedures, and that because the contract provided a sufficient claims procedure, it was not necessary for Arntz to comply with the statutory procedure. The Court of Appeal also found that contractual claim procedures can still incorporate the statutory claim procedures, and if so, they must be followed. In the *Arntz* case, however, because the claim exceeded $375,000, the Court of Appeal found that the contract did not require Arntz to submit a statutory claim.

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Colorado

Case Law:

1. In ***Colorado Intergovernmental Risk Sharing Agency v. Northfield Insurance Co.***, ___ P.3d ___, No. 07CA0058, 2008 WL 2837517 (Colo. App. 2008), *rehearing denied* (Oct. 16, 2008), a state intergovernmental risk sharing agency filed a breach of contract suit against its insurer with which it had contracted to provide tiered insurance coverage to the city for a building in which a hot springs swimming pool was located. The insurer denied coverage for loss resulting from a partial roof collapse over the pool based upon the following anti-concurrent causation clause (ACC) contained in the insurance contract: "We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." *Id.* at *1. The insurer argued that the ACC clause precluded coverage because it was determined that both the weight of snow (a covered loss) and the deterioration of roof trusses caused by wear and tear, rust, corrosion, decay, deterioration, and/or dampness of atmosphere (non-covered losses) combined to cause the collapse. On the other hand, the agency argued that the court should apply the "efficient proximate cause" or "efficient moving cause" rule, which provides that "when a loss is caused by a combination of both covered and excluded perils, the loss is fully covered by the insurance contract if the covered risk proximately caused the loss." *Id.* At trial, the jury

determined that the weight of the snow was ninety percent (90%) of the cause, while the wear and tear was ten percent (10%). The Colorado Court of Appeals, reversed the trial court's decision, and held that the ACC clause in the Northfield Insurance contract barred the Plaintiff agency from recovering funds it had paid for the loss. "An ACC denies coverage whenever an excluded peril and a covered peril combine to damage a dwelling or personal property." *Id.* at *3. The Court reasoned that the ACC clause (which is commonly found in standard insurance contracts drafted by the Insurance Services Office) reflected the intent of the parties to avoid the application of the efficient proximate cause doctrine and, therefore, coverage was properly denied when an excluded cause contributed to the loss. *Id.* at *3-4. "Rather than allow for apportionment of covered and excluded causes, we conclude that the ACC unambiguously bars any recovery if an excluded cause contributed to the loss." *Id.* at *4.

2. In ***Syfrett v. Pullen***, ___ P.3d ___, No. 08CA0243, 2008 WL 5352682 (Colo. App. 2008) a homeowner brought action against a construction contracting firm for breach of the construction contract and a claim against the firm's owner individually for breach of fiduciary duty and noncompliance with Colorado's Mechanic's Lien Trust Fund Statute, § 38-22-127, C.R.S. (2008), asserting that subcontractors, laborers, and material suppliers had not been paid. In response, the contractor argued that the homeowner lacked standing to sue under the statute. The trial court found in favor of the homeowner on its claims. On a matter of first impression, the Colorado Court of Appeals agreed with the trial court and held that a property owner has a legally protected interest to enforce the trust created by the Trust Fund Statute. The Court of Appeals reasoned that the purpose of the act is to protect subcontractors, laborers, material suppliers and homeowners from unscrupulous contractors, and to further protect homeowners from having to pay for the work of subcontractors, laborers and material suppliers more than once. *Id.* at *3-4. The Court of Appeals further concluded that by receiving judgment, the homeowner becomes the constructive trustee of any funds she collects from the contractor, and must hold the funds for the benefit of the subcontractor's, laborers' and materials suppliers' unpaid claims. *Id.* at *4.

3. In ***Redd Iron, Inc. v. Int'l Sales and Services Corp.***, No. 08CA0025, 2008 WL 5352334 (Colo. App. 2008), a subcontractor sued a property owner and general contractor, alleging, *inter alia*, unjust enrichment related to improvements made on the owner's property. Plaintiff moved for judgment on the pleadings, which was granted by the district court. In its response brief, the general contractor and owner argued that under *DCB Const. Co., Inc. v. Central City Development Co.*, 956 P.2d 115 (Colo. 1998) ("*DCB*"), the owner and general contractor could not have been unjustly enriched by the subcontractor's work because they had not engaged in "improper conduct." The subcontractor argued that the *DCB* holding was not applicable because the case did not concern a landlord/tenant relationship, as was the case in *DCB*, and that the general contractor and owner received a benefit. Based upon the submitted arguments, the trial court granted the subcontractor's motion in part as it related to the unjust enrichment claim. The general contractor and owner then appealed. The Court of Appeals determined that in order to prove unjust enrichment, the subcontractor is required to show that the general contractor or the owner engaged in "improper conduct." *Redd Iron* at *7. Under Colorado law, a party claiming unjust enrichment must prove the following elements: (1) at plaintiff's expense, (2) defendant received a benefit (3) under circumstances that would make it unjust for defendant to retain the benefit without paying. *Id.* at *2. In *DCB*, the Court held that in order to prove the third element of the claim, the injustice requires a showing of some type of improper, deceitful or misleading conduct by the landlord/owner. *Id.* at *4. The *DCB* holding, however, was strictly limited to cases in which a tenant improved its rental space, and the contractor brought claims against the landlord for unjust enrichment when the tenant could not pay. The Court of Appeals in *Redd Iron* determined that the principles articulated by the *DCB* Court, ie, that the third prong requires a showing of improper, deceitful or misleading conduct, also applies in a subcontractor/owner situation. The court held that "[i]n the subcontractor setting, the rule insulates the owner from liability, even though the owner benefited from a subcontractor's work, knows the work is being done, and wishes to have the improvement; this is so because the owner's agreement is to pay the general contractor, not the subcontractor. An additional reason is that if the owner has paid the general contractor the price due, the owner is not enriched in any

legal sense; he will have received what was his due under the contract, no more." *Id.* at *6 (relying on *DCB Const. Co., Inc.* 956 P.2d at 472-73). In so holding, the Court of Appeals reversed the trial court's finding of unjust enrichment and remanded the case for further proceedings in accordance with its reasoning and to make further factual findings as to the "unjust" circumstances.

4. In ***Denny Const., Inc. v. City and County of Denver***, ___ P.3d ___, No. 07SC236, 2009 WL 60507 (Colo. 2009) a subcontractor brought action against a general contractor, the city's board of water commissioners, and others, seeking payment for work performed on an office facility project. The contract called for completion of the facility by July 2003. However, Denny repeatedly requested extensions due to whether delays. Ultimately, the work was not fully complete at the time the Board took occupancy of the facility in November 2003. Because of the unfinished work, the Board withheld approximately $260,000.00 of the contract price, declared Denny in default, and filed a claim against Denny's surety. As a result of the Board's claim against Denny's surety, Insurance Company of the West ("ICW"), ICW decreased Denny's bonding capacity and stopped underwriting bonds for Denny altogether. Denny claimed at trial that it had substantially completed the project and that the Board breached its contract by not granting additional delays, as allowed under the contract. As a part of its claim for damages, Denny sought its lost profits from the project. At trial, the jury found that the Board breached its contract, and awarded Denny $845,000.00 in lost profits due to impaired bonding capacity. The Court of Appeals reversed, holding that lost profits due to impaired bonding capacity are "speculative as a matter of law." *Id.* at *1. Additionally, the court found that lost profits in the case were not "reasonably foreseeable" because there was no evidence that the Board actually knew that Denny would lose profits if its bonding capacity were impaired. *Id.*

The Colorado Supreme Court reversed the Court of Appeals holding that lost profits for impaired bonding capacity are not speculative as a matter of law. "Instead, we find that claims of lost profits due to impaired bonding capacity, like all claims for lost profits, must be established with reasonable certainty." *Id.* "The goal of the bonding system is to minimize retentions in and delays in the completion of construction contracts while also fostering a healthy and viable construction industry. To that end, the General Assembly has implemented a competitive bidding process for all construction contracts for public projects, and has required that those contracts be awarded with reasonable promptness to the low responsible bidder. Bonding capacity provides the best measure of a contractor's responsibility." *Id.* at *6 (internal quotations and citations omitted). "At bottom, then, a reduction in bonding capacity indicates a reduction in responsibility, which, in turn, will impair a contractor's ability to obtain public works contracts. This not speculation; on the contrary, it is the intended function of the bonding system." *Id.* In addition to reversing the Court of Appeals on the loss profit claim, the Supreme Court also held that it applied the incorrect legal standard to determine whether the lost profits were reasonably foreseeable. *Id.* at *1. "The question is not, as the court of appeals held, whether the Board *actually knew* that Denny would suffer lost profits due to impaired bonding capacity, but whether it knew or *should have known* that such loss would probably occur." *Id.* Accordingly, the Court reversed ad remanded the case for further proceedings consistent with its findings.

5. On May 1, 2008, the first Colorado state court decision was published addressing a "no damages for delay" clause. *See* ***Tricon Kent Co. v. Lafarge North America, Inc.***, ___ P.3d ___, Colo. App. No. 06CA0595 (May 1, 2008). The Court of Appeals of Colorado court was persuaded by earlier decisions which concluded that such clauses were enforceable in Colorado, but are to be "strictly construed against the owner or contractee." *Id.* at pp. 10-12 (*citing W.C. James, Inc. v. Phillips Petroleum Co.*, 485 F.2d 22, 25 (10th Cir. 1973)(additional citations omitted)). The "no damage for delay" clause is commonly used in the construction industry to limit subcontractors' from collecting additional compensation or damages for delays caused by owners, contractors or other subcontractors. While the Appellate Court enforced the clause, it nevertheless held that subcontractor Tricon was entitled to damages against general contractor Lafarge because Lafarge's "active interference" delayed Tricon's performance. *Id.* at pp.12-14. After noting that "active interference" is defined differently among jurisdictions and that some

jurisdictions require bad faith to be shown in or to invoke the "active interference" exception, the Court held that Colorado law has no such prerequisite. *Id.* at p. 15. Plaintiffs claiming "active interference" need only show that the defendant "committed an affirmative, willful act that unreasonably interfered with the plaintiff's performance of the contract, regardless whether it was undertaken in bad faith." *Id.* However, the Court further concluded "that, while it is unnecessary to show bad faith or reprehensible conduct, active interference requires more than a simple mistake, error in judgment, lack of total effort, or lack of complete diligence. *Id.* at p.18 (*citing Peter Kiewit Sons' Co. v. Iowa S. Utils. Co.*, 355 F.Supp. 376, 399 (S.D.Iowa 1973) and Steven B. Lesser & Daniel L. Wallach, *Risky Business: The "Active Interference" Exception to No-Damage-For Delay Clauses*, 23 Construction Law 26, 27 (Winter 2003)). The Court did not address the viability of other exceptions to or limitations on "no damages for delay clauses" under Colorado law. *Id.* at 19.

6. A contractual indemnity claim was reviewed in ***Boulder Plaza Residential, LLC v. Summit Flooring, LLC***, ___ P.3d ___ , Colo. App. No. 06CA1269 (April 17, 2008). On appeal, Plaintiff contended that the district court "erred by interpreting the subcontract to require a showing of fault – either negligence or breach of contract – by the defendant to trigger the defendant's indemnification obligation. *Id.* at p. 4. Among other things, the Court of Appeals of Colorado considered what the Colorado Supreme Court recognized as '"a growing trend to relax the rule of strict construction in construing indemnity contracts in commercial settings."' *Id.* (quoting *Public Service Co. v. United Cable Television of Jeffco, Inc.*, 829 P.2d 1280, 1285 (Colo. 1992). The Appellate Court focused on "the rule that 'a contractual provision should not be construed to permit an indemnitee to recover for his own negligence unless the court is firmly convinced that such an interpretation reflects the intention of the parties.'" *Id.* at p. 12 (quoting *United States v. Seckinger*, 397 U.S. 203, 211 (1970)). In applying this rule to a contractual provision which required the Defendant to indemnify the general contractor "against all claims for damage to persons and property *growing out of the work* . . .", the Court determined that indemnification language was "insufficiently specific" to prove that the Plaintiff would indemnify the general contractor for non-negligent work. *Id.* at p. 12. Thus, the Court affirmed the trial court on this issue. *Id.* at p. 16.

7. On May 15, 2008, the Colorado Court of Appeals held that the Colorado Construction Defect Action Reform Act ("CDARA") does not require a plaintiff to plead or prove that the plaintiff complied with the Act's notice requirements, or that the alleged injuries or damages arose from a "construction defect." ***Land-Wells v. Rain Way Sprinkler and Landscape, LLC***, 187 P.3d 1152, 1154 (Colo.App. 2008). CDARA applies to all civil actions "claiming damages, indemnity, or contribution in connection with alleged construction defects." § 13-20-802, C.R.S. (2008). Under section 13-20-803.5, claimants and construction professionals must confer, exchange information, and attempt to resolve claims before the claimant files an action. If a claimant files suit before the required process has been completed, the court must stay the action until the claimant complies. *See* § 13-20-803.5(9). Plaintiff appealed the trial court's directed verdict finding that the plaintiff failed to prove: "(1) that she complied with the notice requirements of the Construction Defect Reform Act, sections 13-20-801 through 807, and (2) that the sidewalk's icy condition was the result of a 'construction defect.'" *Id.* at 1153. In its decision, the Court of Appeals reasoned that although CDARA limits certain types of claims against construction professionals, *see* § 13-20-804, it does not alter the substantive elements of a plaintiff's claim. "Because CDARA did not require plaintiff to prove anything more than the elements of her common law negligence claim, the court's ruling was incorrect." *Id.* at 1154.

8. On May 29, 2008, the Colorado Court of Appeals held, *inter alia* that "the two-year statute of limitations applicable to construction defect claims, rather than 90-day limitations applicable to contribution and indemnity claims, applied to claims asserted by the general contractor because the homeowners neither settled any claims nor filed a construction defect lawsuit against Richmond whereby a final judgment could be entered on such claims. ***Richmond American Homes of Colorado, Inc. v. Steel Floors, LLC, et al.***, 187 P.3d 1199 (Colo.App. 2008). Richmond American Homes of Colorado, LLC ("Richmond Homes") appealed the trial

court's judgment dismissing as time barred certain claims against subcontractors. There, Richmond filed a complaint against defendants for negligence, breach of contract, and breach of express warranties, seeking damages based upon defective workmanship on the homes. *Id.* at 1202. As a part of Richmond's Initial Disclosures, it disclosed a spreadsheet that separately listed each of the approximately 3,000 homes at issue and specified the dates when Richmond had completed the repairs on each home. *Id.* The trial court granted the defendants' motion for determination of law that Richmond could not recover "any costs associated with repairs to homes made more than ninety (90) days" before the original complaint was filed pursuant to the ninety-day period set forth in section 13-80-104(1)(b)(II), C.R.S. (2007). The Court of Appeals reversed the decision finding that "in our view, repairing damages to an existing home in the absence of a formal complaint, arbitration proceeding, or settlement of a dispute where the homeowner has bargained for work in exchange for a release of a construction professional's liability does not involve the resolution of a 'claim' for purposes of triggering the ninety-day period in section 13-80-104(1)(b)(II)." *Id.* at 1205. The Court concluded, "[w]e view that provision as applying to either the resolution of disputes which has resulted in a final judgment or the settlement of an action or claim of liability which a third party could or actually did commence against the claimant." *Id.*

9. On June 26, 2008, as a matter of first impression in Colorado, the Colorado Court of Appeals held that a homeowners' failure to afford a vendor a reasonable opportunity to cure precluded any claim for breach of warranty. ***Ranta Construction, Inc. v. Anderson***, 190 P.3d 835 (Colo.App. 2008). In that case, the owners and contractor signed an agreement to build a custom home in Telluride, Colorado, for the contract price of $1,500,000.00. The owners elected to manage the construction contract themselves. They selected custom windows, and purchased the windows through a vendor and paid it directly. Shortly after installation, defects began appearing including bowing, breaking and leaking. The defects were ultimately determined to be the result of defective glass and the sealing system. Before the contractor and vendor could complete the repairs, one of the owners sprayed the windows with water, which made the scheduled repairs impossible. The owners then barred the vendor and contractor from the property and withheld all progress payments due to the contractor. According to the standard AIA General Conditions § 13.2, the contractor had a duty to repair the defective condition of the windows in a manner that it deems appropriate to conform with the contract requirements. *Id.* at 840. The trial court concluded that, under the terms of the contract, the contractor had a duty to repair the windows and that, because the owners prevented the repair, they could not rely on the contractor's failure to repair as a basis for withholding progress payments. *Id.* The Colorado Court of Appeals affirmed.

10. On September 18, 2008, the Colorado Court of Appeals held that the Colorado Construction Defect Reform Act's ("CDARA") allowance of a contribution or indemnification claim to be filed within ninety (90) days after resolution of the claim for which indemnity or contribution is sought does not toll the applicable six (6) year statute of repose. ***Thermo Development, Inc. v. Central Masonry Corp.***, ___P.3d___, No. 07CA1190, 2008 WL 4330275, *1 (Colo.App. 2008). There, plaintiffs were developers of a condominium complex in Denver. As a result of water intrusion, a condominium owner and the condominium association brought suit against plaintiffs. Plaintiffs settled that action and less than ninety days later brought suit against defendants seeking contribution and indemnification. *Id.* Section 13-80-104, C.R.S. (2008), contains both a statute of limitations and statute of repose that are applicable to suits against architects, contractors, builders or builder vendors, engineers, inspectors, and others involved in real property construction or improvements. *See* § 13-80-104(1)(a), (1)((b)(I), (2), C.R.S. (2008). On appeal, plaintiffs argued that the trial court erred in holding that section 13-80-104(1)(b)(II) does not toll the six-year statute of repose. They contended that the trial court's interpretation of that section eviscerates the General Assembly's intent to preclude "shotgun-style" litigation where a contractor names all of the subcontractors regardless of liability to avoid the possible expiration of the statute of limitations or the statute of repose. *Id.* at *2. The Court of Appeals disagreed. In its reasoning, the Court stated that: "[a] statute of limitations takes effect when a claim arises, while a statute of repose bars the bringing of a suit after a set period of time, regardless whether

an injury has occurred or a claim has arisen. Thus, the General Assembly's use of substantially the same language in sections 13-80-104(1)(a) and (1)(b)(II)(B), that the claims must be brought within a specified period after the claims 'arise, and not thereafter,' indicates that it was addressing the issue of when the statute of limitations ran, not the statute of repose. Hence, this language signifies that the General Assembly did not intend to extend the statute of repose with regard to the types of claims that may be brought under section 13-80-104(1)(b)(II)(B)." *Id.* at *4.

Legislation:

1. **SB09-040, Regulation of Manufactured Homes:** [Proposed] Modifies the recording requirements for certain documents related to a manufactured home. In cases where a manufactured home was affixed to the ground prior to a specified date and a certificate of permanent location was not filed and recorded, requires a person applying to the department of revenue for a certification of title for the manufactured home to provided certain information in order to prove ownership of the home.

2. **HB09-1080, Building Code Official Civil Immunity:** [Proposed] Grants qualified immunity from civil action to a building code official who, while acting in his or her official capacity, assists during a state of disaster emergency.

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Connecticut

Case Law:

1. In ***Lindade Construction, Inc. et al. v. Continental Cas. Co. et al.****, No. X10-CV-07-5008768-S (Conn. Super. Ct. November 24, 2008)*, the plaintiffs, individually, entered into subcontracts with defendant A.P. Construction, as general manager, for work on a project know as Southport Green. In conjunction with the subcontracts, defendant Continental Casualty Company, as surety, and A.P. Construction, as principal, posted a payment bond in the amount of $32,258,195. The plaintiffs claimed that they were not fully paid by A.P. Construction and that their bond claims were improperly denied.

The plaintiffs filed a motion for summary judgment as to the issue of liability on their bond claims. The defendants argued, relying on a "paid if paid" clause in the subcontracts, that since payments from the owner were a condition precedent to any payments to the plaintiffs, and it was undisputed that the owner had not paid A.P. Construction, summary judgment should not be granted. The plaintiffs argued that enforcement of a "paid if paid" clause would result in the subcontractor not getting paid, even though they fully performed, if the general contractor never got paid. The plaintiffs analogized "paid if paid" clauses to a waiver of rights to payment under the payment bond.

In finding for the defendants, and upholding the "paid if paid" clauses, the court relied on the strong public policy favoring freedom to contract. Additionally, the court held that the plaintiffs "misconstrue[d] the purpose of the bond," because it was not meant to protect the plaintiffs. The court also rejected the plaintiffs' argument that a "paid if paid" clause was essentially a waiver of payment bond rights because a "paid if paid" clause does not prohibit the plaintiffs from seek payment directly from the owner pursuant to C.G.S. § 42-158i *et. seq*., making a claim on the bond or using other statutory remedies, such as a mechanic's lien, to ensure payment.

2. In ***Pelletier v. Sordoni/Skanska Const. Co.,*** the Connecticut Supreme Court reversed a $41.4 million judgment entered against a general contractor in favor of the employee of a steel and welding subcontractor who was injured when a two-ton cross beam fell and struck him. The Supreme Court concluded that the trial court had improperly concluded that the general contractor owed a nondelegable duty to inspect all steel welds. That duty arose from the applicable building codes. The Court held that no such nondelegable duty existed because the building code contemplated that qualified third parties might be hired to inspect steel welds and because the subcontract provided that the subcontractor was "fully responsible for inspection and testing and that it could hire a third party to inspect the work" in accordance with the building codes—which it did. Accordingly, the Supreme Court reversed judgment and remanded the case.

3. In ***Archambault v. Soneco/Northeastern, Inc.,*** the Connecticut Supreme Court reversed a $3.4 million jury verdict in favor of an employee of an excavation subcontractor against a general contractor for injuries sustained when a trench collapsed. The issues on appeal included whether the trial court improperly: (1) precluded the general contractor from introducing evidence that the subcontractor's negligent conduct was the sole proximate cause of the employee's injuries; and (2) instructed the jury that the general contractor owed the employee a nondelegable duty to keep the construction site safe.

In resolving the first issue, the Court adopted the principle that a defendant is entitled to assert, under a general denial, that the negligence of an employer who is not a party to the action is the sole proximate cause of the plaintiff's injuries. Accordingly, the Court held that the general contractor should have been allowed to assert that the employer-subcontractor's negligent conduct was the sole proximate cause of the employee's injuries, despite that the subcontractor ceased to be a party when the trial court granted its motion for summary judgment on the basis of the exclusivity provision of the Workers' Compensation Act.

The Court also held that the trial court improperly instructed the jury that the contractor had a nondelegable duty to provide a safe work site. The Court noted that although the general contractor had overall responsibility for safety on the work site, the subcontractor had agreed to comply with applicable safety rules, maintain safe working conditions, accept responsibility for all work, and accept liability for any loss, damage or destruction from any cause other than the general contractor's sole negligence. Accordingly, the Court concluded that the general contractor had no nondelegable duty to ensure safety on the work site.

4. In ***Department of Transportation v. White Oak Corporation***, the issue before the Connecticut Supreme Court was whether Connecticut General Statutes § 4-61, which waives the state's sovereign immunity with respect to certain claims arising under public works contracts, permits a general contractor to commence a second arbitration against the state to pursue claims that previously had been, or could have been, arbitrated between the parties in a prior action. The Supreme Court held that the waiver of sovereign immunity set forth in § 4-61 requires all existing disputed claims arising under a public works contract to be litigated or arbitrated in a single action. Because the plaintiff general contractor's claims for delay damages existed at the time its notice of claim had been filed in the first arbitration and because it failed to pursue the claim in that proceeding, the Supreme Court concluded that it was barred by the doctrine of sovereign immunity from bringing a second arbitration.

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Florida

Case Law:

1. **In *Arnold, Matheny and Eagan, P.A. v. First American Holdings, Inc.**, 982 So.2d 628 (Fla. May 1, 2008)*, the Florida Supreme Court interpreted Florida's garnishment statute and the obligations it imposes on third parties. The court answered the following certified question:

> DOES AN ATTORNEY GARNISHEE HAVE A DUTY TO ISSUE A STOP PAYMENT ORDER FOR A CHECK DRAWN ON HIS OR HER TRUST ACCOUNT AND DELIVERED TO THE PAYEE PRIOR TO THE RECEIPT OF A WRIT OF GARNISHMENT IF THE SERVICE OF THAT WRIT OCCURS PRIOR TO THE PRESENTMENT OF THAT CHECK FOR PAYMENT TO THE ATTORNEY'S BANK?

The court held that Florida law imposes on both bank and non-bank garnishees the duty to retain funds held by the garnishee, even after a check on those funds has been drawn by the garnishee and delivered to the payee.

The court further held that the funds remain in the possession or control of the attorney garnishee if service of the writ of garnishment occurs after a check is drawn on an attorney's trust account has been written and delivered to a client but before presentment to the attorney's bank. The attorney in those circumstances has an obligation to inquire of the bank as to the status of the funds in its account and to issue a stop payment order if he or she has the ability to do so.

2. In *Trytek v. Gale Industries, Inc., ___So.2d___, 2008 WL 5170586 (Fla. December 11, 2008)* (Opinion Not Final), the Florida Supreme Court addressed the following question certified as a matter of great public importance:

> Where a lienor obtains a judgment against a property owner in an action to enforce a construction lien brought pursuant to section 713.29 Fla. Stat. (2005), are trial courts required to apply the "significant issues" test articulated in Prosperi v. Code, Inc., 626 So.2d 1360 (Fla. 1993), in determining which party, if any, is the "prevailing party" for the purpose of awarding attorneys' fees?

The Florida Supreme Court answered the question in the affirmative. It also however concluded that it is within the trial court's discretion to determine that neither party is the "prevailing party" for purposes of awarding attorney fees and that neither is entitled to fees. It remanded the case for the trial court to consider the award of fees in light of the Supreme Court's opinion.

3. In ***Auto-Owner's Insurance Company v. Pozzi Window Company**, 984 So.2d 1241 (Fla. 2008)*, upon rehearing, Justice Pariente wrote the opinion in the June 12, 2008 Pozzi decision. The Florida Supreme Court concluded that because the subcontractor's defective installation of the defective windows is not itself "physical injury to tangible property," there would be no "property damage" under the terms of the CGL policies. Accordingly, there would be no coverage for the costs of repair or replacement of the defective windows. Conversely, if the claim is for the repair or replacement of windows that were not initially defective but were damaged by the defective installation, then there is physical injury to tangible property. In other words, because the windows were purchased separately by the homeowner, were not themselves defective, and were damaged as a result of the faulty installation, then there is physical injury to tangible property, i.e., windows damaged by defective installation. Indeed, damage to the windows themselves caused by the defective installation is similar to damage to any other

personal item of the Homeowner, such as wallpaper or furniture. Thus, coverage would exist for the cost of repair or replacement of the windows because the subcontractor's defective installation caused property damage.

4. In ***Phoenix Walls, Inc. v. Liberty Pasadena, LLC****, 980 So.2d 1286 (Fla. 2d DCA 2008)*, Phoenix Walls, Inc., a drywall and stucco subcontractor sought certiorari review of the trial court's discharge of its charging lien filed as a counterclaim against the property owner. The trial court departed from the essential requirements of law by resolving a factual dispute on a motion to strike , rather than at an evidentiary hearing. The claim of lien specifically referenced a direct contract through a letter of agreement. The dismissal of the lien caused irreparable harm as there was no evidence that Phoenix could pursue its claim against the bond.

5. In ***Fisher Island Holdings, LLC v. Cohen****, 983 So. 2d 1203 (Fla. 3d DCA 2008)*, the court held that delay damages and damages for alternative living arrangements awarded to homeowners against their contractor are not duplicative and both can be recovered against the contractor. Mr. and Mrs. Cohen (Cohens) sued Fisher Island Holdings (Contractor) alleging breach of contract arising out of the construction and purchase of their home. A jury awarded the Cohens damages for (i) delay in construction and (ii) alternative living arrangements. Contractor argued that the jury's award of damages for the delay and alternative living arrangements constituted impermissible double recovery. The Court of Appeals held that because the timeframe for each award of damages did not overlap and there was no double recovery for any one period of time, the damages awarded to the Cohens were not impermissibly duplicative.

6. In ***BDI Construction Company v. Hartford Fire Ins. Co.****, 995 So.2d 576 (Fla. 3d DCA 2008)*, the court held that a contractor's claim against a subcontractor against the subcontractor's surety on the performance bond accrued when the contractor accepted the work and made final payment to the contractor, and not when the overall project was complete and accepted by the owner.

7. In ***Trintec Const., Inc. v. Countryside Village Condominium Association, Inc.****,992 So.2d 277 (Fla. 3d DCA 2008)*, the court held that individual unit owners are not indispensable parties to a lien foreclosure action of a roofing company. The roofer was hired by the Association to repair roofs on several commonly managed condominiums.

8. In ***Brookshire v. GP Const. of Palm Beach, Inc.****,993 So.2d 179 (Fla. 4th DCA 2008)* the court addressed a contractor's failure to timely file an action to enforce its lien.

Section 713.21(4), Florida Statutes provides:

> Upon filing a complaint therefor by any interested party the clerk shall issue a summons to the lienor to show cause within 20 days why his or her lien should not be enforced by action or vacated and canceled of record. Upon failure of the lienor to show cause why his or her lien should not be enforced or the lienor's failure to commence such action before the return date of the summons the court shall forthwith order cancellation of the lien.

The contractor's failure to file an action to enforce its lien within twenty days but instead filed a motion to compel arbitration. The owner filed a petition for writ of mandamus asking that the appellate court issue an order compelling discharge of the lien. The appellate court held that the statute does not allow for the tolling of the twenty day period and that failure to show cause or file suit within twenty days mandated discharge of the lien.

9. In ***R & B Holding Company, Inc. v. Christopher Advertising Group, Inc.****, 883 So.2d 867 (Fla. 3d DCA September 9, 2008)*, the Third District Court of Appeal held that replacement cost is not the method of valuation for commercial property that is converted over a

ten year period where there is no showing of any need for the reproduction of the property and no intention to reproduce it. Kendall Toyota appealed a final judgment in excess of five million dollars. The Plaintiff sued Toyota for civil theft of advertising materials kept by Toyota after terminating the ad agency. The measure of damages is reviewed de novo.

There was no Florida case which had determined the measure of damages for such unreturned items and therefore the court looked to other jurisdictions. It remanded for a new trial, although Judge Cope's concurrence in part and dissent in part notes that a new trial on damages was waived. The Plaintiff must prove the "value of the property converted" or recover only nominal damages. The measure of damages caused by the conversion is the cost of re-creating the database.

10. In ***Port-A-Weld, inc. v. Padula & Wadsworth Construction, Inc.,****984 So.2d 564 (Fla. 4th DCA 2008)* the court determined, as a matter of first impression, that the significant issues test cannot be contractually modified. The subcontractor sued the general contractor for unpaid monies due. The general contractor counterclaimed for delay damages. The trial court entered judgment for the subcontractor but held that the contractor was the prevailing party entitled to contractual attorney fees. The trial court then entered an order that determined that both parties prevailed but neither was entitled to fees. The appellate court reversed in part finding that on the record that the subcontractor, Port-A-Weld was the prevailing party entitled to attorney fees and that the contractual 76% threshold was not enforceable as a matter of public policy.

11. In ***Donan v. Dolce Vita Sa, Inc.****, 992 So.2d 859 (Fla. 4th DCA 2008)*, a matter of first impression in Florida, the court held that the trial court acted within its discretion when it made an exception to section 56.29(5) Fla. Stat. The statute allows for a judgment creditor to attach a judgment debtor's chose in action through supplementary proceedings. In this case the trial court properly quashed the notice of sheriff's sale knowing that the judgment creditor, Donan, was going to purchase Dolce Vita's, the debtor's, statement of claim against Donan in a pending arbitration matter for breach of contract damages. Donan was attempting to collect attorney fees after Dolce Vita's first complaint for breach of contract and an improper lis pendens were dismissed and Dolce Vita filed a new complaint for breach of contract that was referred to arbitration. The court reasoned it was inequitable to allow Donan to purchase the claim against him effectively dismissing the claim against him without resolution on the merits.

12. In ***Niehaus v. Big Ben's Tree Service, Inc.***, 982 So.2d 1253 (Fla. 1st DCA 2008), Mary Niehaus (Homeowner) appealed circuit court's ruling that Big Ben's Tree Service (Contractor) had a valid lien on Homeowner's property. The trial court made five findings of fact as follows: (1) Homeowner contacted Contractor to remove a broken tree which was in danger of falling; (2) Contractor claimed Homeowner agreed to have the tree cut down and "removed" for $4,800; (3) Contractor intended "remove" to have industry meaning of simply moving the tree; (4) Homeowner believed "remove" meant to take the tree from her property; and (5) Contractor never explained the industry meaning of "remove" so Homeowner's understanding of the meaning was reasonable. The Court of Appeals stated the rule that under Florida law, a construction lien can arise only when a valid contract exists between the parties. They went on to say that for a contract to exist, the parties must reach agreement as to the meaning of each material term. Based on the trial court's finding that the parties had different understandings of the term "removal" which was a material term because it defined the Contractor's duties, the parties failed to enter into a contract. They held that having failed to enter into a contract, a lien could not attach to the Homeowner's property.

13. In ***Loewe v. Seagate Homes, Inc.****, 33 Fla L. Weekly D1748 (Fla. 5th DCA 2008),* Seagate Homes (Developer) and Mr. and Mrs. Loewe (Loewes) entered into a contract for the construction and purchase of a new home. The Loewes alleged that less than a week after they took occupancy of the new home, a closet door fell of its track and caused serious and permanent injury to Mrs. Loewe. The purchase contract contained a seller's warranty that the

construction would be of good quality and in accordance with generally accepted industry standards. The contract also contained an exculpatory clause which purported to release Contractor from any liability for personal injury caused by Contractor's construction practices regardless of whether the injury resulted from Contractor's negligence, gross negligence, or intentional conduct. The trial court found the exculpatory clause to be unambiguous and enforceable. The court of appeals reversed because the Loewes' complaint was dismissed prior to a determination of whether the Contractor's alleged negligence also constituted a building code violation, holding that a party may not contract away its responsibility to comply with a building code when the person with whom the contract is made is one of those whom the code is designed to protect. They further held that an exculpatory clause in a contract for construction and purchase of a residence is unenforceable to the extent it attempts to release the contractor from liability for intentional tort or negligence because the state's comprehensive regulation and licensing of building contractor's and building construction standards reflected a clear public policy to protect purchasers of residential homes from personal injuries caused by improper construction practices.

14. In ***Sierra Club v. Van Antwerp***, 526 F.3d 1353 (11th Cir., May 9, 2008), the Court of Appeals reversed and remanded the district court's holding which invalidated clean water act permits issued by the Army Corps of Engineers to Rinker Materials and other mining concerns holding that the district court applied the wrong standard of review. The court stated that the "[district] court's role is to ensure that the agency came to a rational conclusion, 'not to conduct its own investigation and substitute its own judgment for the administrative agency's decision.'" In its conclusion, the Court of Appeals stated that the district court "predetermined the answer to the ultimate issue, concluding that the [Army] Corps [of Engineers] should not permit mining in the Lake Belt, and analyzed the permit process with that answer in mind." The court continued, stating "no matter what the [Army] Corps [of Engineers] concluded, and no matter what evidence supported that conclusion, the [district] court would have banned mining because of its own conclusion that mining in the Lake Belt is a bad thing."

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Georgia

Case Law:

1. ***Travelers Cas. & Sur. Co. of Am. v. Reznick Group, P.C.***, 271 Fed. Appx. 833 (11th Cir. 2008). The Eleventh Circuit Court of Appeals dismissed a surety's case against an accounting firm for losses on a performance bond the surety issued based on inaccurate financial statements the accounting firm prepared. The court analyzed the case under Georgia's "middle ground" test, which is used to determine professional liability for negligence in supplying information that is relied on by third parties. "[A] professional who supplies information can be liable for negligence only to a known person, or limited class of persons, where the professional was manifestly aware of the use to which the information was to be put and intended that it be so used." Where a complaint alleges "knowledge of . . . broad purposes", there is no liability under Georgia law since the professional's liability must be limited to "loss suffered through reliance on the information supplied in a transaction [the professional] intends the information to influence or knows that the recipient so intends or in a substantially similar transaction." The complaint alleged liability for transactions that were accepted by third parties and that the accounting firm knew the information it provided would be utilized by parties in deciding whether to extend credit to the contractor, but these allegations were too broad to show that the accountants had specific knowledge a surety would rely on the financial statements in determining whether to issue a bond.

2. ***Lanier at McEver, L.P. v. Planners and Eng'rs Collaborative, Inc.***, 663 S.E.2d 240 (Ga. 2008). The Georgia Supreme Court voided as contrary to public policy a clause in a civil engineer's contract with a developer that limited the engineer's liability for all claims, including third-party tort claims, to the amount of the engineer's stated fee. The contract stated that the parties agreed to "limit the liability of [the engineer] and its subconsultants to [the client] and to all construction contractors and subcontractors on the project *or any third parties* for any and all claims, losses, costs, damages of any nature whatsoever . . . so that the total aggregate liability of [the engineer] and its subconsultants to all those named shall not exceed [the engineer's] total fee . . . ." (emphasis added). Holding that the operation of this clause would require the client to indemnify the engineer for liability to members of the general public asserting tort claims, the court found the clause violated the anti-indemnity statute codified at O.C.G.A. § 13-8-2(b). This subsection of the Georgia Code makes void as contrary to public policy all provisions in construction contracts that purport to "indemnify or hold harmless the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee . . . ." The court rejected the engineer's argument that the clause merely capped the amount of liability and found instead that the clause would shift liability to the client by requiring indemnification of the engineer for all amounts exceeding the contract fee.

3. ***John Thurmond & Assoc., Inc. v. Kennedy***, 668 S.E.2d 666 (Ga. 2008). The Georgia Supreme Court clarified that the proper measure of damages for defective or faulty construction work may be either the cost of repair or the dimunition in value. A homeowner discovered deficiencies with a contractor's work and brought an action for breach of contract, negligence, and breach of warranty, presenting evidence of the cost to repair the faulty construction. The trial court directed a verdict for the contractor on the grounds that the homeowner had not presented evidence of the fair market value of the home after the faulty repairs. The Georgia Supreme Court reviewed Georgia law on the proper measure for damages for defective or faulty construction work, namely, that the damages are the cost of repair unless such cost is disproportionate to the property's loss of value. Prior decisions also held that damages could be measured from the diminution in value of the property after the injury occurred. The court noted that frequently both measures, cost to repair and diminution in value, are in evidence and complimentary to each other because the cost of repair is typically illustrative of the difference in value. The two measures are "alternative" though often used interchangeably. An injured party may choose to present its case for breach of contract or negligent construction using either method or both. Since the homeowner sought to recover using only the cost of repair method, "evidence of the fair market value of the improved property [was] not a necessary element of his claim for damages." This rule does not dispense with the principle that costs of repair may not be recovered if they are disproportionate to the diminution in the fair market value of the property so as to constitute an economic waste. The burden is on the defendant to present evidence challenging the reasonableness of the cost of repair and of an alternative measure of damages for the jury's consideration.

4. ***Schofield Interior Contractors, Inc. v. Standard Bldg. Co., Inc.***, 668 S.E.2d 316 (Ga. Ct. App. 2008). The Georgia Court of Appeals concluded that a project manager may be individually liable for negligence in the performance of his duties. The court's decision was based upon the proposition that every construction contract includes an implied duty to perform construction services in a non-negligent manner. This implied duty, the court held, provides the basis for a cause of action in tort. Citing a string of decisions holding agents personally responsible for negligent conduct during the performance of services for their principal, the court found the project manager personally owed a duty of care to the plaintiff and could be held liable for his negligent performance. The court further held it sufficient for the plaintiff to plead that the project manager "demonstrated a lack of knowledge" of construction methods and to recite several specific instances of allegedly negligent conduct.

Legislation:

O.C.G.A. § 44-14-360 to 44-14-369, Liens of Mechanics and Materialmen.

Georgia's legislature enacted significant changes to the required forms, time frames, and procedures under Georgia's lien law effective March 31, 2009. The changes include, but are not limited to, the following:

- Lien claims must be filed in 90 days rather than three months. The claim of lien must include a statement of expiration and a notice of the owner's right to contest the lien. A copy of the claim of lien must be sent to the owner within two business days of filing.
- The lien claimant must commence a lien action on the debt underlying the lien within 365 days from the date of filing the claim of lien, rather than 12 months from the time that the debt became due. The notice of filing a lien action must be sent within 30 days rather than 14 days. The definition of a lien action has been expanded to include arbitration proceedings or filing a proof of claim in bankruptcy.
- The owner will be able to shorten the time that the lien claimant has to commence a lien action on the underlying debt by filing a notice of contest of lien. The lien claimant will have 60 days from the time of receiving the notice to commence the lien action.
- The statutory form for lien waivers has been altered. Waivers must be in boldface capital letters in at least 12 point font. The time for a conditional lien waiver to become binding upon a party who does not file an affidavit of non-payment has increased from 30 days to 60 days. The interim lien waiver form must now include a warning that it will become unconditional after 60 days.

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Hawaii

Legislation:

1. HB 2238 - Requires public housing projects constructed or managed with state or county funds and federal and state low-income housing rentals to remain affordable in perpetuity. Governor's veto was overriden.

2. HB 2502 - Allows construction and operation of solar energy facilities on class D or E agricultural land. Signed by the Governor on April 23, 2008.

3. SB 644 - A first-in-the-nation requirement that single family dwellings have solar water heaters beginning in 2010. The bill allows variances if an engineer or architect finds that solar would be impractical because of insufficient sun, would cost more than would be saved by lower utility bills, or if an alternative renewable energy system is used. Existing solar energy tax credit would be available for homes built before 2010. (Signed into law on June 26, 2008).

4. SB 2293 - Exempts new multi-family housing condominium development from some affordable-housing requirements as an incentive and flexibility for private-sector development of affordable housing. Signed by the Governor on May 29, 2008.

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Indiana

Case Law:

1. ***Spring Hill Developers, Inc. v. Arthur*****,** 879 N.E.2d 1095 (Ind. Ct. App. 2008)

Issue: Do the doctrines of promissory estoppel and partial performance validate an oral agreement to develop and sell property, where the injured party is still able to recover from the property owner in quantum meruit?

Spring Hill Developers arose from an oral agreement between a property owner and a surveyor to form a company to develop the property by making infrastructure improvements, replatting the parcel into building lots, and selling the lots for home construction. After a dispute arose involving waste disposal, which led to arbitration, the property owner sold the property before the development work was completed. The surveyor filed suit, seeking specific performance of the oral agreement. The trial court denied summary judgment to the surveyor, finding the statute of frauds rendered the oral agreement unenforceable. On appeal, the surveyor argued the equitable doctrines of promissory estoppel and partial performance entitled it to enforcement of the agreement.

The Court of Appeals refused to apply these doctrines in the surveyor's favor. Promissory estoppel requires 1) a promise by the promissor; 2) made with the expectation that the promisee will rely thereon; 3) which induces reasonable reliance by the promisee; 4) of a definite and substantial nature; and 5) injustice can be avoided only by enforcement of the promise. *See First Nat. Bank of Logansport v. Logan Mfg. Co.,* 577 N.E.2d 949, 954 (Ind. 1991). Although there were questions of fact regarding the first four elements, to satisfy the fifth element the surveyor would have to prove an injury "so substantial and independent as to constitute an unjust and unconscionable injury and loss." *Brown v. Branch,* 758 N.E.2d 48, 52 (Ind. 2001). The surveyor's damages fell into two categories: expectancy damages consisting of lost revenue on the sale of the property, and reliance damages consisting of the value of the work the surveyor performed on the property. The expectancy damages were not recoverable under a promissory estoppel theory, and the reliance damages were not so great, in the court's opinion, that they represented an unjust or unconscionable loss, since the surveyor could still recover from the owner in *quantum meruit* for the value of his services. Consequently, the court denied summary judgment on the promissory estoppel theory.

Likewise, the court found the doctrine of partial performance did not apply. Partial performance may remove an oral agreement from the statute of frauds where one party "has performed his part of the agreement to such an extent that repudiation of the contract would lead to an unjust or fraudulent result . . . ." *See, Summerlot v. Summerlot,* 408 N.E.2d 820, 828 (Ind. Ct. App. 1980). As was the case with the surveyor's promissory estoppels argument, the court found its damages were not so great that injustice could be avoided only through enforcement of the oral agreement.

2. ***Hopper Res., Inc. v. Webster***, 878 N.E.2d 418 (Ind. Ct. App. 2007)

Issue: Do illegal acts committed in the performance of a construction contract prevent the contractor from recovery on a mechanic's lien against the project?

In *Hopper*, a contractor appealed the trial court's denial of relief on its mechanic's lien and breach of contract actions arising from the contractor's work on a home addition. One of the requirements of the contract was that the contractor obtain a building permit for the work. To obtain a permit, the contractor signed the homeowner's name on a "Homeowner's Affidavit," swearing that the homeowner or members of his family would perform the work, and that no

subcontractors would be used. Although the contractor performed most of the work, a dispute arose regarding its quality. When the contractor sent workers to the site to install pea gravel and vapor barrier under the addition to comply with code requirements, the homeowner refused to permit them to perform the corrective work. The contractor then filed suit against the homeowner for breach of contract and to foreclose its mechanic's lien.

Although the owner attempted to maintain a counterclaim against the contractor for fraud, the trial court deemed it untimely. Nonetheless, the trial court found that the principles of equity prevented it from awarding judgment to the contractor. Since a lawful permit was a condition precedent to the contractor's performance of, and payment for, the work, the homeowner was justified in refusing to permit the contractor to complete the project. Because the contractor should not be permitted to benefit from its own wrongdoing, the trial court awarded judgment against it on its complaint.

The Court of Appeals affirmed the judgment. Since one must come into a court of equity with clean hands, it was not clearly erroneous for the trial court to deny recovery to the contractor based on its wrongdoing in forging the building permit. The contractor argued that Indiana courts have previously permitted recovery on an illegal contract, citing *Phend v. Midwest Engineering and Equip. Co.,* 93 Ind. App. 165, 177 N.E. 879 (1931), and *Drobst v. Professional Bldg. Serv. Corp.,* 153 Ind. App. 273, 286 N.E.2d 846 (1972). The court rejected this argument, since it was within the equity jurisdiction of the trial court to deny recovery. The court also disregarded the contractor's claim that the homeowner acquiesced in the forging of the building permit.

The language of the affidavit itself, which represented that it was signed by the homeowner, was sufficient for the trial court to conclude the permit was illegally obtained. And even if the homeowner shared equal fault in the permit's illegality, the trial court was justified in leaving the parties as it found them. *See, Counsel No. 6138 v. Bargersville St. Bank,* 620 N.E.2d 732, 735 n.2 (Ind. Ct. App. 1993). Finally, the court refused to reverse the trial court's judgment on the breach of contract claim. Even though the homeowner had prevented the contractor from remedying the work to comply with code requirements, the affidavit provided that any corrective work would be performed by a "master installer" in the trade in question. The contractor provided no proof that it held such qualifications or that it was even licensed to perform the work, only that it had worked under another contractor's license previously. Consequently, the homeowner was not required to permit the contractor to complete the faulty work, and was not liable for breach of contract.

3. ***Irmscher Suppliers Inc. v. Capital Crossing Bank*****,** 02A05-0712-CV-686, 2008 Ind. App. LEXIS 1099 (Ind. Ct. App. 2008)

Issue: Does a mechanic's lien holder who filed suit to foreclose its lien, then unsuccessfully moved to consolidate a subsequent mortgage foreclosure on the same property, waive its interest in the property by failing to answer the mortgagee's complaint in the later-filed action?

In *Irmscher Suppliers*, a material supplier appealed a trial court's entry of summary judgment against it in a mortgage foreclosure action. The supplier had recorded a mechanic's lien against the mortgage property and filed suit to foreclose the lien. The mortgagee filed its own suit to foreclose its mortgage, and later amended the complaint to name the supplier as a defendant to answer for its interest in the property. The supplier moved to consolidate the two cases, which motion was denied; however, the supplier never answered the amended complaint. The trial court awarded summary judgment to the mortgagee on the issue that the mortgage was a first lien against the real estate, superior to the supplier's interest in the real estate. The trial court then entered a final judgment and decree of foreclosure in which it found the supplier had no interest in the real estate.

On appeal, the supplier argued that because it filed its action before the mortgagee, the court in which the lien action was filed had exclusive jurisdiction over the lien. This argument was

unpersuasive. Under *K.S. v. State,* 849 N.E.2d 538, 540 (Ind. 2006), the trial court's error, if any, was of a legal nature, not jurisdictional. And since the supplier failed to challenge the trial court's exercise of jurisdiction over the case, and did not move to dismiss the second action or assert the existence of the pending action as a defense, the supplier waived any claim of legal error associated with the case pending in two different courts. Because it failed to answer the allegations in the amended complaint that the supplier had no interest in the property, the supplier's lien was extinguished.

4. ***Swan Lake Holdings, LLC v. Hiles*****,** 2008 Ind. App. LEXIS 1244 (Ind. Ct. App. 2008)

Issue: Is the owner of a construction project liable for an unsafe property condition caused by roof leaks where it knew of the leaks, but not of the damage the leaks caused?

A golf course appealed a trial court's finding that it was partially responsible for injuries to a construction work that occurred when a rotten purlin – a roof supporting member – gave way and caused the worker to fall. The golf course had hired a contractor to repair a fiberglass overhang over the course's driving range. During construction, the fiberglass panels were removed, and the workers walked over the purlins, an accepted industry practice. One of the purlins gave way, causing the worker to fall. At trial, the golf course moved for a directed verdict that it was not liable to the worker because it had no superior knowledge of the condition that caused the accident. The trial court denied this motion, and the jury found the golf course was 35% liable for the worker's injuries.

On appeal, the golf course argued that it could not have known the purlins were rotten and would give way because the fiberglass overhang obscured the view of the structural members. The court disagreed, citing evidence that the purlins were not completely obscured by the fiberglass, permitting the golf course to see that the purlins were unpainted, and that it would have been obvious to the golf course owners that the overhang was leaking for quite some time, which led to the rot that caused the purlin to give way. Since the golf course should have known that repeated exposure of the unpainted wood purlins to moisture would cause the purlins to rot, the golf course's knowledge was superior to the contractor's entitling the worker to recover in part for his injuries.

The golf course argued that it should not be liable because it did not control the manner in which the work was performed, citing *Daisy v. Roach,* 811 N.E.2d 862 (Ind. Ct. App. 2004). This argument was not convincing: in *Daisy*, a worker was injured because he failed to adequately secure a ladder on icy ground. However, in the case at bar, the worker's injuries were caused by the rotten purlin, not by the worker's failure to take adequate safeguards against injury.

5. ***LaSalle Group, Inc. v. Electromation of Del. County, Inc.*****,** 880 N.E.2d 330 (Ind. Ct. App. 2008)

Issue: Is Ind. Code § 32-28-3-17, which invalidates arbitration provisions in construction contracts requiring arbitration outside Indiana, pre-empted by the Federal Arbitration Act?

In *LaSalle*, a subcontractor on an Indiana construction project sued the general contractor for breach of contract. The general contractor moved to stay the lawsuit and to compel arbitration according to the terms of the contract, which required the arbitration to take place in Michigan. The trial court denied the motion to compel arbitration, citing Indiana Code § 32-28-3-17, which provides that a provision in a construction contract requiring arbitration to take place outside the state is void.

The Court of Appeals reversed the trial court's judgment, finding that the Federal Arbitration Act, which applies to arbitration provisions in construction contracts involving interstate commerce, preempted the Indiana law limiting the enforceability of arbitration agreements. State law may be pre-empted to the extent it "stands as an obstacle to the accomplishment and

execution of the full purposes and objectives of Congress." *MPACT Constr. Group, LLC v. Superior Concrete Constructors, Inc.,* 802 N.E.2d 901, 904 (Ind. 2004)(*quoting Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)). State statutes have been preempted where they "explicitly made certain arbitration clauses unenforceable or placed serious burdens on the enforceability of arbitration provisions." *MPACT,* 802 N.E.2d at 905. Although states may apply state law principles applicable to any contract to invalidate an arbitration provision, they may not enforce laws that are specific to arbitration provisions, since doing so would undermine the effectiveness of federal law. *See*, *Allied-Bruce Terminix Companies, Inc. v. Dobson,* 513 U.S. 265, 281, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995).

Because the Indiana law in question applied only to arbitration provisions in construction contracts, it was not a state law provision applicable to *any* contract, and therefore was preempted by the federal act. In reaching its conclusion, the court looked to opinions from other jurisdictions and noted that courts that have considered the applicability of state law provisions governing arbitration have consistently determined that state law is preempted by the Federal Arbitration Act. *See*, *KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.,* 184 F.3d 42 (1st Cir. 1999) (Rhode Island law that invalidated contract clauses requiring venue outside the state preempted by the federal act); *OPE Intern. LP v. Chet Morrison Contractors, Inc.,* 258 F.3d 443, 447 (5th Cir. 2001) (Louisiana law requiring in-state arbitration preempted because it did not apply to contracts generally).

6. ***State Group Indus. (USA) Limited v. Murphy & Assocs. Indus. Servs.*,** 878 N.E.2d 475 (Ind. Ct. App. 2007)

Issue: Does a clause in a contract for the supply of construction materials barring exemplary or consequential damages preclude the supplier's liability under Indiana's Crime Victims Statute?

State Group arose from a contract between a general contractor and a material supplier to supply salinity probes and other components for a Corps of Engineers project. During the course of the project, the supplier failed to supply the required equipment, and made a number of misrepresentations and misleading statements relating to its ability to produce the probes and its payment for them. The general contractor sued the supplier for breach of contract, and amended the complaint to allege fraud and deception based on the misrepresentations, seeking treble damages and attorney's fees under Indiana's Crime Victims Statute codified at Ind. Code § 34-24-3-1. The trial court awarded judgment to the general contractor and found that the supplier had knowingly made false and misleading statements with the intent to obtain property; however, the court refused to award attorney's fees or exemplary damages, citing a provision in the contract that prevented either party from recovering attorney's fees, lost profits, special, consequential or exemplary damages in the event of a breach of the contract. As a result, the general contractor was awarded only its direct damages incurred in replacing the equipment the supplier failed to provide.

The general contractor appealed the trial court's decision, arguing that the provision in question was void because it was contrary to public policy; and that even if it was enforceable, the provision did not bar damages under the Crime Victim Statute. The Court of Appeals noted that while no Indiana case explicitly provides that parties to a contract cannot agree to contract for liability for intentional tortious acts, cases from other jurisdictions generally hold that such agreements are void as violative of public policy, and that the court's research did not reveal a case in any jurisdiction in which such a clause was upheld.

Nonetheless, the court did not rule on the basis of public policy, since it found the provision in question did not bar recovery for damages arising from an intentional tort. Although a contract may purport to release a party from its own negligence, under *Marsh v. Dixon,* 707 N.E.2d 998, 1000 (Ind. Ct. App. 1999), such a release must "*clearly* and *unequivocally* manifest such a release. *Id.* (quoting *Ind. State Highway Comm'n v. Thomas,* 169 Ind. App. 13, 346 N.E.2d 252, 260 (1976). To be effective, the release must specifically refer to the negligence of

the party seeking release. Since the provision in question did not mention criminal or fraudulent conduct on the part of the supplier, the release was not sufficient to put the general contractor on notice of the burden associated with the release. Consequently, the case was remanded to the trial court to exercise its discretion in rewarding the exemplary damages.

7. ***Hayes v. Chapman*, 894 N.E.2d 1047 (Ind. Ct. App. 2008)**

Issues: Is an action brought under Indiana's Home Improvement Contract Act subject to the notice and cure provisions of Ind. Code § 24-5-0.5-2(a)(8)? Does a trial court commit clear error by awarding prejudgment interest on a mechanic's lien that contains a mathematical error?

In *Hayes,* a homeowner appealed the trial court's judgment foreclosing a mechanic's lien in favor of a builder who remodeled a 150 year-old home. The homeowner and builder were friends who agreed that a significant amount of work would be performed on a time and material basis. No start or end date for the work was discussed, and the builder did not provide a written estimate of the total cost of the project. The agreement was never reduced to writing. During construction, the homeowner requested a number of changes to the plans, which substantially increased the cost and the time required to perform the work. The builder worked on the project for over two years before the homeowner terminated the agreement without providing the builder a written notice of defective or incomplete work. The builder billed the homeowner at irregular intervals throughout the project, and the homeowner had not objected to the amount of the bills, although toward the end of the project he requested additional time to pay for the work, citing "money issues." Upon termination, the builder requested payment, and submitted an itemized bill for the unpaid balance. Thereafter, the builder recorded a mechanic's lien and filed suit to foreclose the lien, which resulted in a judgment in favor of the builder.

The homeowner appealed, claiming that the trial court erred by refusing to grant the homeowner relief under the Home Improvement Contract Act ("HICA"), found at Ind. Code § 24-5-11-1 et seq., which provides that a home improvement contractor who fails to provide a written contract commits a deceptive act that is actionable by the homeowner under Ind. Code § 24-5-0.5-4. The Court of Appeals held that such an action is subject to the notice and cure provisions of Ind. Code § 24-5-0.5-2(a)(8), which require the homeowner to provide notice and an opportunity to cure the deceptive act. An action may only be brought if the act is uncured or incurable, meaning that the contractor acted with intent to defraud or mislead the consumer. Since the homeowner did not provide notice of the deceptive act, and the contractor's failure to comply was not intentional or willful, the failure to provide a written contract was not an incurable deceptive act. Consequently, the homeowner's failure to give notice precluded him from bringing an action. Further, the statute of limitations, which runs for two years from the date of the deceptive act, had expired: the verbal agreement was made in early 2001, and the homeowner's counterclaim was not filed until May 2004. Because the homeowner was not entitled to bring an action under the HICA, the court did not consider the question of whether the homeowner had sustained damages as a result of the lack of a written contract.

The homeowner also challenged the trial court's order foreclosing the mechanic's lien, which contained an inadvertent overstatement of $200. Instead of accepting the homeowner's argument that the overstatement was a false statement under oath that rendered the lien unenforceable, the trial court reduced the contractor's recovery from $13,983.00 to $13,783.00 to account for the mathematical error. The trial court also awarded prejudgment interest despite the homeowner's contention that the error made the amount too uncertain to justify prejudgment interest. The trial court's entry of a decree of foreclosure and award of prejudgment interest was affirmed. Prejudgment interest was mandatory because the amount of damages could be determined by mathematical computation. *See Cincinnati Ins. Co. v. BACT Holdings, Inc., 723 N.E.2d 436, 441 (Ind. Ct. App. 2000)*; *Wash. County Mem'l Hosp. v. Hattabaugh, 717 N.E.2d 929, 933-34 (Ind. Ct. App. 1999)*.

In Judge Kirsch's dissent, he wrote that the majority's ruling undermined the purpose of the HICA, which provides that a violation is "actionable" under IC 24-5-0.5-4 without mentioning cure or incurability. Under the majority's analysis, a home improvement contractor could escape liability by proceeding without a written contract until given notice, at which time it could cure the defect by providing a written contract.

8. ***Midwest Biohazard Services v. Rodgers*****,** 893 N.E.2d 1074 (Ind. Ct. App. 2008)

Issue: Is the removal and disposal of biohazard waste the kind of work that can sustain a mechanic's lien?

In *Biohazard*, a company that specialized in waste disposal appealed a trial court's order dismissing its mechanic's lien suit, which arose from work performed to clean and dispose of waste that originated from a decomposing body. The contractor removed carpet in several rooms and cleaned and disinfected ceilings, walls, and floors. When the homeowner failed to pay for the services, the contractor recorded a mechanic's lien and filed suit to foreclose. The trial court dismissed the claim for foreclosure of the mechanic's lien on the basis that the services provided did not entitle the contractor to a mechanic's lien. Venue was then transferred to the county in which the decedent's son resided and the trust was administered.

The Court of Appeals reversed the trial court. The term "repair" is not defined by the mechanic's lien statute, and is therefore given its plain, ordinary, and usual meaning. *See*, *State v. DMZ, 674 N.E.2d 585, 588 (Ind. Ct. App. 1996)*; *I.C. § 1-1-4-1(1)*. Consequently, the *Biohazard* court consulted an English language dictionary for the meaning of the term, and found that the contractor's services met one of the definitions of the term - "to restore to a sound healthy state." In addition, the purpose of the mechanic's lien statute, which focuses on whether the work improved the value of the property, suggested that the work entitled the contractor to a mechanic's lien, as the court believed the removal of biohazard contaminants would undoubtedly increase the value of the home. Since the trial court erred in dismissing the mechanic's lien claim, its decision to transfer venue to a different county was erroneous, and was also reversed.

9. ***Reuille v. Brandenburger*****, 888 N.E.2d 770 (Ind. 2008)**

Issue: *Is a party that reaches a favorable settlement after mediation a "prevailing party" entitled to attorney's fees?*

In *Brandenburger*, the Indiana Supreme Court considered whether a homeowner who succeeded in reaching a favorable settlement in mediation was entitled to attorney's fees under a contract provision entitling the "prevailing party" to reasonable costs and expenses of dispute resolution. The homeowner unsuccessfully appealed the trial court's order denying attorney's fees. *See*, *Reuille v. E. E. Brandenberger Constr., Inc., 873 N.E.2d 116, 2007 Ind. App. LEXIS 2067 (Ind. Ct. App., 2007).* The homeowner filed suit against a contractor and a window manufacturer in connection with water damage and mold caused by leaking windows. The contract provision at issue stated:

> In any action at law or in equity, including enforcement of an award from Dispute Resolution, or in any Dispute Resolution involving a claim of five thousand dollars or more, the prevailing party shall be entitled to reasonable costs and expenses, including attorney fees.

After mediation, the contractor agreed to pay the homeowner $32,000.00 for a release from all claims except the homeowner's attorneys' fees and expenses. The amount paid was sufficient to repair the windows. The homeowner filed a memorandum with the trial court, arguing that he was entitled to attorney's fees under the "prevailing party" provision of the contract. The trial court found the homeowner was not a prevailing party and was not entitled to attorneys' fees.

The contract did not define "prevailing party," so the court turned to Black's Law Dictionary for the ordinary meaning of the term:

> The party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention. The one in whose favor the decision or verdict is rendered and judgment entered.

This definition was found to contemplate a trial on the merits and the entry of judgment. This reading was consistent with the approach of several Indiana decisions issued before the parties entered into the contract. *See Heritage House of Salem, Inc. v. Bailey, 652 N.E.2d 69, 79-80 (Ind. Ct. App. 1995)* (plaintiff is not a prevailing party where it obtained a preliminary injunction but where judgment ultimately was rendered for the defendant); *State Wide Aluminum, Inc. v. Postle Distribs., Inc., 626 N.E.2d 511, 516-17 (Ind. Ct. App. 1993)* (State Wide is not a prevailing party under § 34-1-32-1(b) (now *§ 34-52-1-1*) because it did not receive a judgment); *State ex rel. Prosser v. Ind. Waste Sys., Inc., 603 N.E.2d 181, 189 (Ind. Ct. App. 1992)* (a favorable ruling on a motion is not a judgment allowing the recovery of costs as a prevailing party). The homeowner contended that Indiana followed the catalyst theory, under which a party is a prevailing party if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct; however, the cases relied upon by the homeowner were either federal cases that were not binding precedent or cases involving federal statutes, and were therefore inapplicable.

The court noted that it seemed unlikely that parties would intend for a mediation settlement to result in prevailing party status, since one of the goals in mediation is to remove the contentious atmosphere of formal litigation to facilitate negotiation. In addition, the parties could have agreed to a more precise fee-shifting arrangement under which a party would be a prevailing party if it obtained a favorable settlement. *See Nichols Cyclopedia of Legal Forms Annotated* § 3:220 (rev. vol. 2005); 20A Am. Jur. 2d *Legal Forms* § 265:11 (2008).

10. ***McComb v. Am. Renovations of Indiana*****,** 892 N.E.2d 1255 (Ind. Ct. App. 2008)

Issues: Does a mechanic's lien holder have standing to challenge a construction lender's foreclosure action? Under Ind. Code §32-28-3-2, which provides that a mechanic's lien on a building is not impaired by foreclosure of a mortgage on the land, does a mechanic's lien take priority over an earlier-recorded construction loan mortgage?

In *McComb*, two general contractors appealed the trial court's determination that their mechanic's liens were inferior to a construction lender's mortgage. One lienholder contended the trial court erroneously ordered foreclosure of the mortgages, claiming the lender was the first to breach the construction loan agreement and, therefore, was unable to enforce the mortgages under *Wilson v. Lincoln Federal Savings Bank,* 790 N.E.2d 1042, (Ind. Ct. App. 2003) (a party in material breach of a contract may not enforce the contract against a party who breaches the contract later). Ruling that the lienholder lacked standing to challenge the foreclosure action , the trial court relied on *Gonzales v. Kil Nam Chun,* 465 N.E.2d 727, 729 (Ind. Ct. App. 1984), which holds that only the parties to a contract, those in privity with those parties, and third-party beneficiaries may seek to enforce a contract. Since the lienholder did not claim to fall into any of those classifications, the trial court did not err in determining the lienholder lacked standing.

Both lienholders challenged the trial court's finding that the construction lender's mortgage took priority over the mechanic's liens, which had the effect of denying the lienholders any recovery on their liens, as proceeds of the foreclosure sale were less than the lender's judgment. The Court of Appeals affirmed the trial court's ruling, discussing the interaction of several sections of the Indiana Code and the significance of caselaw in determining mechanic's lien priority. Subsection 32-21-4-1(b) provides that a mortgage takes priority according to the date it is filed. In cases based on this language, Indiana courts have held a mortgage is superior to a mechanic's lien if the mortgage is recorded before the work was begun or the materials

supplied. *See Provident Bank v. Tri-County Southside Asphalt, Inc., 804 N.E.2d 161, 163 (Ind. Ct. App. 2004)*, *aff'd on reh'g*, *806 N.E.2d 802 (Ind. Ct. App. 2004)*, *trans. denied.* Subsection 32-28-3-2(b) provides: "If: . . . the land is encumbered by mortgage; the lien, so far as concerns the buildings erected by the lienholder, is not impaired by . . . foreclosure of mortgage. The buildings may be sold to satisfy the lien and may be removed not later than ninety (90) days after the sale by the purchaser." And finally, subsection 32-28-3-5(d) states: "[t]he mortgage of a lender has priority over all liens created under this chapter that are recorded after the date the mortgage was recorded, to the extent of the funds actually owed to the lender for the specific project to which the lien rights relate."

The lienholders argued that despite the language of this subsection, subsection 32-28-3-2(b) creates an exception for those who construct new improvements on real estate. In rejecting this argument, the court examined the existing case law before enactment of 32-28-3-5(d). In *Ward v. Yarnelle, 173 Ind. 535, 91 N.E. 7 (1910)*, the Supreme Court found the existing statutes did not explicitly determine the priority between a mortgage executed to raise funds for construction of improvements on property and the mechanic's liens of those who provided the labor and supplies necessary to complete the construction. The *Ward* court held that because a mortgagee and a mechanic's lienholder are engaged in a common enterprise of improving the property and the improvements are necessary to protect the mortgagee's interest, the mechanic's lien and the mortgage have equal priority. In 1999, 32-28-3-5(d) was adopted. The only written opinion discussing the import of this subsection is Judge Sharpnack's dissent in *Provident Bank, 804 N.E.2d 161*, in which Judge Sharpnack concluded that the legislature intended for 32-28-3-5(d) to fill the statutory gap identified in *Ward*, with the result that where the funds secured by the mortgage are for the project that gave rise to the mechanic's lien, the mortgage lien would have priority over the mechanic's liens recorded after the mortgage.

The *McComb* court found this reasoning persuasive and consistent with the principle that where two statutes cover the same subject, the more specific statute will prevail over the more general, as identified in *Lockard v. Miles, 882 N.E.2d 288, 290 (Ind. Ct. App. 2008)*. Because the trial court found the funds from the mortgagee's loan were for the specific project that gave rise to the mechanic's liens, the trial court was correct that the mortgage took priority over the mechanic's liens. *Provident Bank* was not applicable to the case at bar because in *Provident Bank* there was no indication the mortgage secured funds that had been used for the construction of the improvement.

11. ***Indianapolis-Marion County Pub. Library v. Charlier Clark & Linard, et. al.,*** *2009 Ind. App. Lexis 183 (Ind. Ct. App. 2009)*

Issues: Does the economic loss doctrine bar recovery for monetary damages to the owner of a construction project when a design professional commits errors that damage the project and cause a risk of personal injury?

In the *Indianapolis-Marion County Public Library ("IMCPL")* case, the library appealed a lower court's entry of summary judgment in favor of a structural engineering firm that was alleged to be negligent in its preparation of some aspects of the library's design. The library had no contract with the engineer; instead, it contracted with an architect for design of the entire project. The architect contracted with the engineer to provide a structural design for the project. Alleged problems with the structural design caused the library to incur damages in the form of delay settlements, additional construction management service costs, utilities, and rent for an alternate facility, extra architectural and engineering services, increased insurance premiums, and legal fees. Included in the additional work were destructive testing of the structure, demolition of portions of the structure, and repairs to ensure the building's structural integrity.

The trial court ruled that the economic loss doctrine precluded the library's recovery from the engineer. Since there was no personal injury or damage to property other than the project itself, the trial court found the losses claimed by the library were best suited to recovery in

contract, not tort, citing *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150 (Ind. 2005). The library appealed, contending the trial court erred in several respects: that Indiana courts had not extended the economic loss doctrine to cases in which a plaintiff has a direct non-contractual claim against a design professional; that the economic loss doctrine was inapplicable because the engineer's negligence damaged the library's property and caused an imminent risk of personal injury; that the engineer and other appellees misrepresented certain facts; and finally, because the economic loss doctrine is inapplicable where the defendant provides only services rather than a tangible product.

In affirming the trial court's decision, the *IMCPL* court discussed the role of the economic loss doctrine in Indiana law. The doctrine developed in cases involving the sale of goods as a way of enforcing the concept of contractual privity, but has been expanded beyond the area of product liability. *See, Hydro Investors, Inc. v. Trafalgar Power, Inc*., 227 F.3d 8, 18 (2d Cir. 20009); *BRW, Inc. v. Dufficy & Sons, Inc*., 99 P.3d 66 (Colo. 2004). The *IMCPL* court noted the doctrine has three general purposes: to maintain the fundamental distinction between tort law and contract law; to protect commercial parties' freedom to allocate risk by contract; and to encourage the commercial purchaser, who is best suited to assess the risk of loss, to assume, allocate, or insure against that risk. *IMCPL,* 2009 Ind. App. LEXIS 183 at 19, citing *1325 North Van Buren, LLC v. T-3 Group, Ltd*., 2006 WI 94, 293 Wis. 2d 410, 716 N.W.2d 822, 831 (Wis. 2006). The court stressed the distinction between tort and contract law, noting that while contract law is dependent on obligations imposed by agreement and therefore seeks to ensure that parties receive the benefit of their bargain, tort law is intended to protect society as a whole from physical harm to person or property and arose from society's interest in human life, health, and safety. *IMCPL* at 19-20, citing *Daanen & Janssen, Inc. v. Cedarapids, Inc*., 216 Wis. 2d 395, 573 N.W.2d 842, 846-47 (Wisc. 1998).

The court went on to discuss the status of the economic loss doctrine in relation to construction projects under *Gunkel v. Renovations, Inc*., 822 N.E.2d 150, 153 (Ind. 2005). In *Gunkel*, the Indiana Supreme Court found that a homeowner could recover in negligence from a contractor whose faulty work damaged other parts of the home that were not included in the construction project, explaining that "the economic loss rule does not bar recovery in tort for damage that a separately acquired defective product or service causes to other portions or a larger product into which the former has been incorporated." *Gunkel*, 822 N.E.2d at 156. However, contract is the sole remedy for the failure of a product or service to perform as expected, and although construction claims are not necessarily based on "goods" or "products," as those terms are commonly understood, actions arising from construction projects are subject to the economic loss doctrine. *Id*.

The *IMCPL* court distinguished the circumstances in *Gunkel* from the present case. Although in *Gunkel*, the homeowner had contracted directly with the contractor whose negligence damaged other parts of the home, the library had no direct dealings with the engineer. The design of the entire project, which included the structural design, was the "product" the library purchased; consequently, the engineer's work was one component of that product. The only property damage resulted from damage to the project itself, and most of the library's damages were purely economic – delay damages, additional construction management, architectural and engineering costs, and legal fees. Because the library's damages were "economic losses" as defined by the economic loss doctrine, the library was unable to recover in tort.

The library argued that a number of exceptions to the economic loss doctrine should apply, stressing the distinction between claims based on a design professional's breach of the applicable standard of care and standard breach of contract claims arising from a construction project. In this regard, the library contended the engineer owed a duty to the public akin to the duties owed by other professionals, including attorneys, accountants, physicians, and real estate agents, relying on the Florida case *Moransais v. Heathman*, 744 So.2d 973 (Fla. 1999). The *Moransais* court found that negligence actions against professional should not be barred under the economic loss doctrine, because doing so would prevent recovery of what are normally purely

economic damages, and that Florida recognizes a common law cause of action against professionals. The *IMCPL* court rejected this reasoning, noting that Indiana law under *Gunkel* prohibited precisely the type of action in question in *Moransais*.

The court also rejected the library's assertion that the economic loss doctrine should not apply where the negligent party creates an imminently or inherently dangerous condition. The court noted that an exception to the economic loss doctrine arises in the absence of privity when an architect creates an imminently dangerous condition that results in personal injury. *See*, *Hiatt v. Brown*, 422 N.E.2d 736, 740 (Ind. Ct. App. 1981). The court noted the library did not have to wait until the dangerous condition caused personal injury – the library was entitled to take steps to prevent injury and then seek to recover those costs from the parties with which it had contracted to provide the design – but it had to do so under a contract theory, not a negligence claim.

The library also urged the court to adopt a "negligent misrepresentation" exception to the economic loss doctrine, claiming the engineer was negligent in conveying false or misleading information in connection with shop drawings and meetings at the project site. Most jurisdictions that have adopted the negligent misrepresentation exception follow the Restatement (Second) of Torts, section 552 (1976), which provides that one who provides false information for the guidance of others in the course of his profession can be subject to liability for loss caused by reliance on the false statements. Indiana has not adopted section 552; however, in *Thomas v. Lewis Eng'g, Inc*., 848 N.E.2d 758 (Ind. Ct. App. 2006), the Court of Appeals held a professional may be liable to a third party where the professional has actual knowledge that the third party will rely on the professional's opinion. The *IMCPL* court observed that although a number of other jurisdictions have recognized the negligent misrepresentation exception to the economic loss doctrine, Indiana courts have not. While the *Lewis Engineering* case suggests a professional may be liable for a negligent misrepresentation, the *Lewis* court treated negligent misrepresentation as an independent tort, not an exception to the economic loss doctrine. Because the library did not sue on a negligent misrepresentation theory, the exception was inapplicable.

12. ***DLZ Indiana v. Greene Cty., Ind.,*** 2009 Ind. App. LEXIS 397 (Ind.Ct.App. 2009)

Issue: *Do an engineering firm and a consultant that enter into an agreement with a project owner "jointly and in collaboration" constitute a joint venture under Indiana law where the agreement provides the engineer is primarily responsible for the services, and the engineer and consultant do not agree to share profits from the project?*

In *DLZ*, a consultant appealed a trial court's entry of partial summary judgment finding the consultant and an engineering firm formed a joint venture to provide architectural services for a construction project. The engineer and the consultant both executed an agreement with the project owner. The first paragraph of the agreement stated, in relevant part:

> This agreement . . . by and between [UCE] (hereinafter referred to individually as "United") and [DLZ] (hereinafter referred to individually as "DLZ"), jointly and in collaboration (hereinafter collectively referred to as "the Firm"), and [the owner] . . . .

The agreement required "the Firm" to provide all architectural services for the design and construction of the project. However, it also contained a provision relating specifically to the division of responsibility and liability for the services, which provided that the engineer would "act as the principal and have full responsibility and liability for all services to be provided under the terms of [the agreement]," and that the consultant would "have responsibility and be liable to the Owner, as a third party beneficiary, for the services it provides."

The engineer and consultant entered into an AIA Standard Form of Agreement Between Architect and Consultant, which provided that the consultant was an independent contractor who

would not be responsible for the acts or omissions of the engineer. The consultant would be responsible for its own acts or omissions, but would "not have control over or charge of and shall not be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or of any other persons or entities performing portions of the Work." The consultant would be paid by the engineer at agreed-on hourly rates with a "not to exceed amount."

The owner filed suit against the engineer and consultant as a joint venture, and the trial court entered partial summary judgment on that issue, concluding a joint venture existed due, in part, to the language of their agreement with the owner providing they were entering into the agreement "jointly and in collaboration" as "the Firm," and that the engineer represented to its insurer that it was in a joint venture with the consultant. The trial court found the language in the agreement that divided liability and project responsibility between the engineer and consultant merely allocated the risk between the engineer and consultant and did not negate their status as a joint venture.

The Court of Appeals reversed the trial court. The standard for whether a joint venture exists is set forth in *Walker v. Martin*, 887 N.E.2d 125 (Ind. Ct. App. 2008). Under *Walker*, several conditions must exist for a joint venture to be present: the parties must be bound by a contract providing for a community of interests and joint or mutual control – an equal right to direct or govern the undertaking. *Walker*, 887 N.E.2d at 138. In addition, the joint venture agreement must provide for the sharing of profits. *Id*. The *DLZ* court found these conditions were not satisfied. The agreement with the project owner did not provide for mutual control of the project by the engineer and consultant. The fact that the engineer and consultant were referred to collectively as "the Firm" did not determine their relationship, as that term has no particular meaning in the law. Under *Minniear v. Estate of Metcalf*, 286 N.E.2d 700 (Ind. Ct. App. 1972), a party's characterization of an association as a joint venture does not, standing alone, prove a joint venture exists. Because the agreement expressly provided that the engineer was responsible for all services provided under the agreement, and the consultant was only responsible for its own services, the owner was on notice that the engineer and consultant were not a joint venture. Additionally, the agreement between the engineer and consultant also established that the engineer and consultant did not intend to be a joint venture. The consultant was a subcontractor to the engineer, and was not responsible for the engineer's acts or omissions. The engineer retained control over the project.

The court also concluded the engineer and consultant did not intend to share profits from the project. The consultant agreed to be paid at an hourly rate for its services, and although the agreement with the owner obligated the owner to make payments to "the Firm," the evidence showed only that the consultant was paid by the engineer after the engineer received payment from the owner. The payment of professional fees to the consultant was not a distribution of profit under *Walker*, 887 N.E.2d at 138 (payment per board foot of wood hauled or miles traveled was not profit sharing) or *Inland Steel v. Pequignot*, 608 N.E.2d , 1378, 1382 (Ind. Ct. App. 1993) (a contract for steel shipments at predetermined rates is not profit sharing). Because the engineer and consultant did not exercise joint or mutual control over the project and did not agree to share profits from the project, no joint venture existed. The trial court's entry of summary judgment for the owner was reversed, and the case was remanded.

13. ***Carr Development Group, LLC v. Town of North Webster,*** 899 N.E.2d 12 (Ind. Ct. App. 2008)

Issue: *Is a contract that varies materially from the parties' understanding subject to reformation where the drafter fails to disclose the variance to the other party, who executes the contract without reviewing it carefully?*

In *Carr*, a developer appealed a trial court's reformation of a contract between the developer and a local government body for the construction of a sanitary sewer system. The developer offered to construct the sewer system to serve real estate it wished to develop, and

requested that the town agree to allow the developer to connect the system to the town's sewer system, and that the town would assume responsibility for the operation and maintenance of the system. The town agreed to consider the request as long as the agreement would not cause the town to incur a negative financial impact, either by contributing funds to the sewer system's construction or by waiving fees it would normally receive in connection with the provision of sewer service. The developer presented an agreement to the town, which was not executed. More than a year later, the developer submitted another proposed agreement, which the town executed. The town's representatives did not thoroughly review the second agreement because they believed the material terms of the agreement were the same as the agreement that was previously submitted.

During the following year, the town realized the second agreement differed from the first in that it required the town to waive sewer tap and connection fees. The developer's representative admitted that he knew the agreement was amended to include the waiver of fees, but chose not to disclose the amendment, instead choosing to see whether the town would object. After the developer refused to delete the fee waiver provision, the town filed a complaint for declaratory judgment, asking the court to either declare the agreement unenforceable due to the modification of the material terms of the agreement without the town's knowledge, or to reform the agreement to conform to the terms of the first agreement the developer submitted. The trial court reformed the agreement by ordering the deletion of the fee waiver provision.

The Court of Appeals affirmed the reformation of the contract. Under *Peterson v. First State Bank*, 737 N.E.2d 1226 (Ind. Ct. App. 2000), reformation is appropriate where there is a mutual mistake such that the written instrument does not reflect the parties' intent; or where there has been a mistake by one party accompanied by fraud or inequitable conduct by the other party. The *Carr* court cited the standard for "fraud" in this context:

> [W]here one party to a contract undertakes to draw up the contract in accordance with a previous understanding, but drafts the contract contrary to that understanding, and permits the other party to sign the same without informing him that the contract is not in conformity with the previous understanding, such conduct . . . is fraudulent.

People's Trust and Savings Bank v. Humphrey, 451 N.E.2d 1104, 1112 (Ind. Ct. App. 1983), citing *McNair v. Public Savings Ins. Co. of America*, 163 N.E. 290 (Ind. Ct. App. 1928). The developer contended the town's negligence in failing to carefully read the second proposed agreement precluded the trial court from ordering reformation of the contract. The court rejected this argument. Although the developer's silence as to the changes in the agreement was not an affirmative misrepresentation so as to constitute actual fraud, the developer's silence was the kind of "inequitable conduct" that justified reformation of the contract. Consequently, the trial court did not err in ordering reformation of the contract.

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Iowa

Legislation:

1. Iowa Code Chapter 26, Public Bidding Requirements. Persons reading the public bonding requirements (Iowa Code Chapter 573) should consider the statutes in tandem.

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Kansas

Case Law:

1. ***Double M Const., Inc. v. State Corp. Com'n***, ___ P.3d ___, 2009 WL 276522, 2 (Kan. 2009), the Kansas Supreme Court held that Plaintiff, a subcontracted excavator, had a duty to independently comply with the Kansas Underground Utility Damage Prevention Act ("KUUDPA"), which requires an excavator to provide advance notice to all operators of underground facilities of its intent to excavate at least 2 full working days before the scheduled excavation start date, regardless of whether general contractor provided notice of the planned excavation in compliance with the statute.

Plaintiff was acting as a subcontractor for Double J Pipeline, LLC, the general contractor, to provide excavation services. Under the terms of the contract, Double J was "to excavate under and around existing utilities," and, "spot and expose line crossing ahead of equipment." The contract also stated, "[Plaintiff] is not responsible for damage to any existing underground utility lines that have not been located and uncovered prior to our trenching."

Before beginning the excavation, Double J Pipeline notified Kansas One Call, the operator of underground facilities pursuant to KUUDPA , that it would be excavating. Double J Pipeline then directed Plaintiff to excavate along the planned gas-gathering route. Kansas One Call's records indicated Plaintiff did not independently contact Kansas One Call to request utility locations or to provide notification of its intent to excavate. During the excavation, equipment owned and operated by Plaintiff struck and ruptured a 20-inch high-pressure natural gas transmission line. Natural gas escaped through the rupture and ignited, resulting in the death of Plaintiff's employee and property damage.

The Kansas Corporation Commission ("KCC") issued an order directing Plaintiff to show why punitive proceedings should not be instituted against it. Plaintiff filed a response denying liability. The KCC found Plaintiff at fault and assessed a $25,000 penalty, which was half the statutory maximum for two violations. Plaintiff appealed. The Court held that the plain language of the statute imposed a duty on the excavator directly engaged in excavation activities to provide the required notice and that the statutory duty could not be delegated to another party. Therefore, the KCC's order stood.

2. In ***Johnson v. United Excel Corp.***, 200 P.3d 38, 2009 WL 248113 (Kan. App. 2009), the Court held that an insurance agency's issuance of a certificate of insurance provided to the general contractor did not estop the insurer from denying coverage of a subcontractor employees' injury claim when coverage for the employee was specifically exempt from the policy. The certificate of insurance represented that the subcontractor had secured a workers' compensation policy in compliance with its subcontract. The Court reasoned that because the certificate of insurance included a disclaimer that unambiguously warned the general contractor not to rely on the certificate to determine whether the subcontractor had secured the appropriate coverage, the certificate could not be relied on to impose liability on the insurer.

3. In ***Buchanan v. Overley***, 178 P.3d 53 (Kan. App. 2008), the Court required that the claimant, a contractor, verify the truth of the facts asserted in a mechanic's lien statement filed pursuant K.S.A. § 60-1102. The mechanic's lien statement represented that the labor and materials supplied to the project were set forth in an attached exhibit. The claimant did not state, nor did he verify, his address for purposes of service of process, as required by the statute. His address, however, was printed on every page of the attached exhibit. The Court held the claimant should have put his verified address on the face of the lien statement and, by failing to do so, did not strictly comply with the requirements of the statute for perfection of a mechanic's lien, thereby invalidating the lien.

4. In ***Rural Water Dist. No. 3 of Miami County v. Miller Paving & Const., L.L.C.***, 190 P.3d 973 (Kan. App. 2008), the Appellate Court ruled that Defendant, an excavator, had a duty to use ordinary care in any excavation when it knew, or should have known, that underground water lines would be found in or near the excavation sites. The Defendant argued the Trial Court applied the duty of care imposed by the Kansas Underground Utility Damage Prevention Act ("KUUDPA"), despite the Trial Court's determination that KUUDPA did not apply.

The Defendant further argued that because the legislature excluded water lines from KUUDPA, the duty of care under common law must be less stringent than the KUUDPA. However, the Appellate Court affirmed the Trial Court's ruling that the common law remains in full force and effect where the Constitution is silent, or where the legislature has failed to act in accordance with K.S.A. 77-109. The Appellate Court also agreed the common law provides that a utility already in place has a property interest right, thus creating a duty for an excavator to use ordinary care during its excavation. As such, the excavator was found liable for the damaged water lines it had knowledge of.

5. In ***Alliance Steel, Inc. v. Piland***, 187 P.3d 111 (Kan. App. 2008), the Court required Plaintiff, a supplier of building materials, to strictly comply with K.S.A. § 60-1103(a)(1), which provides a lien statement must include the name of the contractor on the building project at issue. Plaintiff believed Douglas Grooms to be the contractor on the project because he arranged for Plaintiff to supply the building materials and listed himself as general contractor on Plaintiff's jobsite information sheet. On the contrary, Robert D. Dunlap was the contractor on the project because Grooms did not have a general contractor's license in Finney County. While Dunlap and Grooms were both involved in the project, Grooms had no contractual relationship with the Defendant. As a result, the Court found there was no evidence Grooms was the Defendant's contractor, regardless of any representation Grooms made to Plaintiff.

Legislation:

K.S.A. § 16-121, which voids and renders unenforceable as a matter of public policy any indemnification provision in a construction contract or any other connected agreement requiring one party to indemnify another for negligence liability, was amended to include all contracts. The revised K.S.A. § 16-121 also bars indemnity agreements between parties for intentional acts or omissions that result in liability and prohibits contracts requiring one party to provide liability insurance coverage to another.

However, contracts not affected by K.S.A. § 16-121 has also been expanded to include 1) agreements to indemnify contractors with respect to strict liability under environmental laws; 2) indemnification agreements that are an integral part of an offer to compromise or settle certain disputed claims; and 3) separately negotiated provisions whereby the parties mutually agree to a reasonable allocation of risk, if each such provision is based on generally accepted industry loss experience, and supported by adequate consideration.

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Kentucky

Case Law:

In *Steeplechase Subdivision Homeowners Ass'n, Inc. v. Thomas*, __ Ky. App. __ (2008), the homeowners association appealed from an order and judgment awarding judgment on a

mechanic's lien asserted against a common area in the subdivision on which the neighborhood clubhouse and swimming pool were located. The homeowners associated asserted that the lien was not enforceable under KRS 376.010. Because the lien was for maintenance, street cleaning services, and mowing services, the appellate court held that that it was unenforceable and reversed.

Louisiana

Case Law:

1. In ***Teche Electric Company v. M.D. Descant, Inc.*****,** ___So.2d___, 2008 WL 5177841, Descant, the general contractor, entered into a contract with the State of Louisiana for the construction of a War Veterans Home. Descant subcontracted the electrical portion of the project to Kirk Knott Electric, who received a majority of their materials from Teche Electric Supply. From April 2003 to February 2004, the time period in which Teche was supplying electrical materials to the project, Kirk Knott filed for bankruptcy. On April 23, 2004, Teche filed a Statement of Lien and Privilege against Kirk Knott and mailed a notice of nonpayment to the State and to Descant on May 6, 2004. On February 14, 2005 the Bond for Removal of Lien filed by Descant was recorded and on March 1, 2005, Teche filed suit for the full amount of its statement.

Descant filed a motion for summary judgment claiming that Teche failed to preserve its right to lien the public works project because it failed to furnish notice of nonpayment within 75 days of the delivery of the materials as is required by La.R.S. 38:2242(f). Teche argued that its letter mailed on May 6, 2004 sufficiently filed notice of non payment and therefore, requested summary judgment in its favor. The trial court granted summary judgment in favor of Teche and the Defendant, Descant, appealed.

The Court of Appeal was asked to interpret LA RS 38:2242, and held that LA RS 38:2242 required that the notice of nonpayment be filed with the owner and contractor before filing the lien on a public project. Therefore, the Court reversed the trial court's holding and granted summary judgment in favor of Descant.

2. In *Paragon* ***Lofts Condominium Owners Association, Inc. v. Paragon Lofts, L.L.C.*****,** ___So.2d___, 2008 WL 5263771, Paragon Lofts Condominium Association filed a suit against the developers of the condominiums and the general contractor of the project. The contractor filed a Third-Party Demand against the subcontractor for indemnity. The subcontractor filed a motion for summary judgment, which the Court granted, and the contractor appealed.

The Court of Appeal stated that the obligation of indemnity may be express, as in a contractual provision, or implied in law. The Court, in affirming the trial court's decision, held that a contractor is not entitled to indemnity from a subcontractor if the subcontractor was not exclusively at fault, unless there is an express indemnity obligation to that affect.

Legislation:

H.B. 220, to amend and reenact LA RS 37:2156(A), 2168, and 2188(A) to change the renewal date for licensing by the Louisiana State Licensing Board of Contractors from December 31 of the year they are issued to the anniversary of the date on which the license was originally issued. Under Act 576, licenses will be renewed on the anniversary of the date the license was originally issued and may be renewed for a one, two, or three year renewal term. Furthermore, the license will become invalid on the last day of the term for which it was issued unless renewed,

and the person shall have fifteen days following the expiration date to file an application for renewal without the payment of a penalty or other examination.

H.B. 558, to amend and reenact LA RS 38:2212(A)(3)(a), (b), and (c) to require that a project not be advertised for bid, if at the end of the contract document phase, it is determined that the designer's estimate is more than the funds budgeted by the public entity for the project. Also, the designer's estimate shall be read aloud upon opening bid. The Act also requires that the bid form contain bid security or Bid Bond, Acknowledgment of Adenda, Base Bid, Alternates, Bid Total, Signature of Bidder, Name, Title and Address of the Bidder, Name of Firm or Joint Venture Corporate Resolution and Louisiana contractors License Number, and on public works projects where unit prices are utilized, their inclusion in the bid form.

H.B. 610, to amend and reenact LA RS 38:2212(A) and 2212.1(B)(4) to provide the option for contractors to electronically submit bids for public contracts through a uniform and secure electronic interactive system. There are three exceptions to this Act. Public entities that are currently without available high speed internet access are exempt, any parish with a police jury form of government and a population of less than fifty thousand shall be exempt, and any city or municipality with a population of less than twenty-five thousand shall be exempt.

H.B. 662, enacted LA RS 14:202.1 to create the crime of home improvement fraud. It defined home improvement fraud stating that it is committed when a person who has contracted to perform any home improvement, or who has been subcontracted for the performance of any home improvement and knowingly engages in: 1. failing to perform the work during a 45 day period of time or longer after receiving payment; 2. the use by the contractor of any deception to cause a person to enter into a home improvement contract; or 3. the damaging of a property by the contractor to entice a person to enter into a contract for home improvements.

S.B. 72, to amend and reenact LA RS 38:2318.1(B) and to enact LA RS 38:2225.2.2 to authorize the city of Slidell to utilize design-build method in the construction or repair of any public building or structure that has been destroyed or damaged by Hurricane Katrina, Hurricane Rita, or both. The city of Slidell's authority will extend for two years, from July 1, 2008 to July 1, 2010, after which time only those projects that were contracted for prior to that date may proceed.

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Maryland

Case Law:

1. ***Walter v. Atlantic Builders Group, Inc***, 180 Md. App. 347 (2008), the Court affirmed a judgment for a contractor of personal liability against the managing agent of one of its subcontractors for violation of the Maryland Trust Fund Statute, §§ 9-201 and 9-202 of the Real Property Article of the Annotated Code of Maryland. This was the first time that a Maryland Court found an individual liable under the Statute. The Court held that the fact that the managing agent had personal control of the funds to be disbursed and did not pay his subcontractors the funds specifically allocated for them by the contractor was sufficient to maintain liability. However, in *Selby v. Williams Construction Services,* 180 Md. App. 53 (2008), the Court held that the Statute did not impose personal liability on an owner of a subcontractor where funds were not specifically earmarked for a supplier. The Court noted "the mere insufficiency of funds to pay all down-the-chain subcontractors or suppliers is not a basis for the imposition of personal liability of the managing agent of the debtor contractor corporation." *Id.* at 65.

2. ***Potomac Constructors, LLC v. EFCO Corp.***, 530 F.Supp. 2d 731 (D. Md. 2008), a general contractor for a bridge project brought an action against a steel formwork supplier alleging breach of contract and negligent design, and seeking indemnification and damages for delay of the project. The supplier filed a motion for summary judgment. Generally, Maryland applies the economic loss doctrine and "precludes plaintiffs from bringing negligence actions to recover purely economic losses." *Id.* at 737. However, Maryland will allow a plaintiff to "recover the cost of correcting negligently created defects that produce a substantial risk of death or personal injury." *Id.* In this case, the Court held that summary judgment was appropriate for the plaintiff's delay damages but not for the plaintiff's damages related to the poor design of the formwork. The Court noted that the defendant's tardiness did not create any risk of death or injury and as such were barred by the economic loss doctrine. As for the poor design, the Court held that the fact that the "formwork often buckled, bowed, moved, and at times blew out" was sufficient for a jury to conclude that the physical injury exception to the economic loss rule was applicable. *Id.* at 738.

Legislation:

1. **§ 9-304 of the Real Property Article of the Annotated Code of Maryland:** Effective September 30, 2008, §9-304 provides that, for private contracts in excess of $250,000, if a contractor has furnished 100% security (either through surety bonds or through other mechanisms authorized by Maryland law) to guarantee the performance of the contract and to guarantee payment of suppliers of labor and materials, then the percentage of the contract that an owner can retain to guarantee performance is limited to 5% of the contract price. Further, a contractor's retention from a subcontractor may not exceed the percentage of retention held by the owner from the contractor, and a subcontractor's retention of contract funds from another subcontractor may not exceed the percentage of the subcontractor's funds being retained by the contractor. There are additional exceptions and the Section should be consulted for those exceptions.

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Massachusetts

Case Law:

1. In ***Couture v. Molinari, Inc. et al.,*** 2009 WL 323426, (Mass. Super.), the Court granted summary judgment to owner, the Town of Northbridge, on claims of negligent hiring and *respondeat superior,* but denied summary judgment on public nuisance and negligence claims. Claim arose from downtown renovation project in which Town contracted with several utility companies who in turn subcontracted with Molinari to perform excavation. Plaintiff homeowner claimed that Molinari struck underground pipes causing sewage and water to flood his basement. Town was granted summary judgment on the negligent hiring and *respondeat superior* claims because utility companies, not Town, had hired Molinari. Summary judgment was denied, however, on the public nuisance claim and on the negligence claims. Court denied summary judgment on remaining claims because there was no showing that town had conformed to an established standard of care.

2. In ***Pitcherville Sand & Gravel, Inc. v. Holden Sand & Gravel Co., Inc.,*** 24 Mass. L. Rptr. 243, 2008 WL 2745262 (Mass. Super.), the Court ruled that while subcontractors cannot lay claim as third-party beneficiaries to performance bonds, they are intended beneficiaries of payment bonds. The Town of Ashburnham hired Holden Sand & Gravel, which subcontracted with Pitcherville Sand & Gravel to supply necessary fill. Thereafter, Pitcherville

supplied the fill but Holden failed to pay. Pitcherville notified the Town of the nonpayment and the Town responded that Holden only had a performance bond. Although the original specifications that Holden bid on required Holden to secure payment and performance bonds, the bond actually issued was called a "Contract Bond" and did not specify whether it was for performance or payment. Despite the bond provider's assertion that it was only a performance bond, the court found the provider's reference to the site specifications in the bond itself created an issue of material fact as to whether the bond was also for payment, which would entitle Pitcherville to bring a claim as a third-party beneficiary.

3. In ***Madore v. Bell***, 2008 WL 82232 (Mass. Super.), a defendant in litigation arising from construction of a residential renovation project cross-claimed against the other, claiming violation of the Massachusetts Consumer Protection Statute, Chapter 93A. The Court looked at eight factors to determine whether a joint venture existed: (1) agreement manifesting intention to associate for profit; (2) contribution of money, property, effort, knowledge, or skill to common undertaking; (3) joint property interest in subject matter of the venture; (4) right to participate in management; (5) expectation of profit; (6) right to share in profits; (7) duty to share in losses; and (8) a limitation to a single undertaking. The Court found that a joint venture existed and dismissed the Consumer Protection Statute claim.

4. In ***LeBlanc v. Walsh Brothers, Inc. et al.***, 23 Mass. L. Rptr. 676, 2008 WL 1800098 (Mass. Super.), the Court ruled that an indemnity agreement two subcontractors was not a construction contract, and therefore Massachusetts anti-indemnification statute, G.L. c. 149, § 29C did not void agreement.

5. In ***Brennan et al. v. Morano et al.***, 24 Mass. L. Rptr. 101, 2008 WL 2097392 (Mass. Super.), the Court held that the economic loss doctrine barred plaintiff's negligence claim where only damages claimed were a diminution in property value, rather than a physical injury to the property.

6. In ***MSI Realty Trust v. CGZ Holding Corp.***, 71 Mass. App. Ct. 1125, 887 N.E. 2d 313, 2008 WL 2150029 (Mass. App. Ct.), Court held that arbitrator did not exceed his authority when he determined whether claim was arbitrable; arbitrator found that contract language and conduct of the parties showed that they had preserved their agreement to arbitrate, even though demand for arbitration arising from payment dispute was not filed within thirty day period required by contract.

7. In ***Commonwealth of Massachusetts v. Bechtel Corp. et al.,*** No. 06-04933 (Suffolk Co., Mass., Super. Ct.) contractors Bechtel/Parsons Brinckerhoff and several smaller companies agreed to pay more than $450 million to settle a civil lawsuit over a fatal tunnel collapse in July 2006. The settlement also covered the costs of leaks and design flaws caused by the contractors in the "Big Dig." The settlement does not bar the contractors from receiving future government contracts.

8. In ***Family and Estate of Milena Del Valle v. Powers Fasteners et al.***, (Suffolk Co., Mass Super. Ct.) defendant settled negligence claim brought by estate of woman who died when ceiling of tunnel collapsed for $6M. In the related criminal case, *Commonwealth of Massachusetts v. Powers Fasteners, Inc., (*Suffolk Co., Mass Super. Ct.), state prosecutors agreed to drop a manslaughter charge against Powers Fasteners, the only company to face criminal charges in connection with the fatal collapse, after the epoxy company agreed to pay $16M to the state and city. Under the terms of the settlement, the company also agreed not to conduct any business with state or local government until January 1, 2012, and to recall the epoxy that was implicated in the ceiling collapse.

Legislation:

1. **Chapter 80 of the Acts of 2008 /"An Act Further Regulating Employee Compensation"** mandating treble damages for all wage and hour violations, will be of particular concern to the construction industry as misclassifying an "employee" as an independent contractor constitutes a violation of the statute. This bill was a response to *Wiedmann v. The Bradford Group, Inc., et al.*, 444 Mass. 698, 831 NE2d 304 (2005), which suggested treble damages for such conduct may be discretionary rather than mandatory. The new law holds employers liable for triple damages without exception. Prevailing employees are also entitled to recover their costs and attorneys fees.

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Minnesota

1. City of Lonsdale v. NewMech Co., 2008 WL 186251 (Minn. Ct. App. 2008)

NewMech bid on the City of Lonsdale's project to construct a new wastewater treatment plant. In compiling its bid, NewMech relied on a bid from BNR Excavating that arrived just twenty minutes before the bid deadline. BNR's bid was more than $1 million lower than other excavators, but BNR's estimator assured NewMech that the bid was complete and included all labor and material costs. NewMech's bid was read low. NewMech had 24 hours to withdraw its bid without penalty if it discovered any mistake. NewMech's management met with BNR's project manager during that 24-hour period and decided not to withdraw its bid, though no one calculated the cost of providing items that BNR acknowledged it had left out of its bid. In the two days after the deadline for withdrawal, BNR submitted revised bid proposals to NewMech that added over $700,000 to its bid price.

The Lonsdale City Council awarded NewMech the contract. Before the deadline for NewMech signed the contract, BNR refused to enter into a subcontract. At that point, NewMech told the City that it could not go forward, and suggested the City rebid the excavation work or permit NewMech to withdraw. The City then awarded the contract to the second-low bidder and sued NewMech for the excess completion costs of almost $1 million (the difference between the low and second low bids). After a four-day trial, NewMech was found liable to the City for the bid-bond's penal sum, $245,000, and BNR was ordered to reimburse NewMech for half that amount.

Everyone appealed unsuccessfully. The City asked the court to up the judgment amount to $1 million; and NewMech and BNR asked to be relieved of all responsibility. The City argued that its recovery should not be limited to the penal sum of the bid bond. According to the City, the construction contract became effective upon award and NewMech defaulted on the contract and should be responsible for the entire $1 million. The court disagreed, holding that NewMech's potential liability was limited to the bid bond's penal sum of $245,000 regardless whether the City's actual damages were more or less than that sum.

NewMech argued in turn that it should not be responsible for breaching the contract because it made a "unilateral mistake," in that its bid contained a material and substantial mistake in the cost of the excavating work. The court also rejected that argument, holding that NewMech could not use the defense of unilateral mistake because it was aware when it submitted its bid that it had limited knowledge of the basis of BNR's bid, but treated that limited knowledge as sufficient.

In its turn, BNR argued that NewMech's bid was obviously mistaken and that NewMech could not have justifiably relied on it. The Court disagreed, noting that BNR delivered its bid just twenty minutes before the bid deadline and that BNR's estimator had reassured NewMech that the bid was accurate. The Court let the original judgment stand.

2. ***Liberty Mutual Insurance Co. v. Northeast Concrete Prods., LLC***, 756 N.W.2d 93 (Minn. Ct. App. 2008)

The United States Navy contracted with M. A. Mortensen for the construction of a parking garage. Mortensen then subcontracted with Northeast Concrete Products to perform the concrete work. Liberty Mutual Insurance Company issued a performance bond for the project, guaranteeing that Liberty would remedy any breach by NECP and complete the subcontract.

In July 2004, Mortenson declared default, terminated NECP's subcontract, and demanded that Liberty complete the project. Liberty attempted to remedy the situation by asking Mortenson to rescind the default. Mortenson refused to do so and notified Liberty that, unless Liberty took the project over, Mortenson would be forced to do so and would look to Liberty for reimbursement of costs incurred. Liberty agreed to take over, reserving its rights to contest the validity of the termination. NECP continued working, relinquishing its right to receive any further payments and specifically asking Mortenson to pay Liberty directly.

In May 2005, Mortenson demanded arbitration, seeking damages from Liberty and NECP. Liberty demanded that NECP defend and hold Liberty harmless, and then began settlement discussions with Mortenson. Liberty and Mortenson settled in August 2006. Liberty then offered to assign NECP its $1.6 million subcontract balance claim in return for reimbursement of Liberty's out-of-pocket losses arising from the issuance of the bond, and a release from any and all claims related to the project, including any claims that Liberty acted in bad faith by taking over the project. NECP did not respond to Liberty's offer, and instead agreed to accept a $400,000 payment from Mortenson in return for a release from all claims. The district court froze the $400,000 payment and placed it in escrow, eventually releasing it to Liberty upon a finding that Liberty was entitled to exoneration and indemnification from NECP. The district court also dismissed NECP's claim that Liberty's take-over of the subcontract was conducted in bad faith, and NECP appealed.

Noting that a showing of fraudulent intent is not required to prove that a surety acted in bad faith, the court of appeals addressed each of NECP's bad faith claims in turn. First, the court of appeals found that Liberty acted in good faith when it took over the project because it thoroughly investigated Mortenson's grounds for termination, it attempted to persuade Mortensen to rescind the default, and Liberty either had to take over NECP's obligations or face liability for defaulting on the bond. The court also found that Liberty's counsel did not learn about its underwriting relationship with Mortenson until nearly 2.5 years after the default, so it could not have been a factor in the decision-making process. Secondly, the court of appeals found that Liberty acted in good faith in trying to settle with Mortenson because it contacted NECP several times in an effort to encourage global settlement and kept NECP informed of its negotiations. Thirdly, the court found no evidence that either Liberty or Mortenson intended to waive NECP's arbitral claims. Finally, the court dispensed with NECP's argument that Liberty attempted to "blackmail" them into assignment, finding that repeated attempts at negotiation do not constitute "blackmail."

Since there was no evidence that Liberty acted in bad faith, the court of appeals affirmed the district court's judgment.

3. ***International Technology Corporation v. Secretary of the Navy*****,** 523 F.3d 1341 (Fed. Cir. 2008)

The Navy awarded a contract for environmental services at a number of contaminated sites, with the specific services for each site to be specified in a series of delivery orders. Unlike most federal contracts, the contract did not include a differing site conditions (DSC) clause.

One delivery order was for the treatment of pesticide-contaminated soil at the Naval Communications Station in Stockton, California. The contractor awarded a fixed-price subcontract to treat the soil using a solvent extraction technology for the removal of DDT and other contaminants from the soil. In preparing its bid, the subcontractor relied upon soil contents shown in samples in reports referenced in the delivery order. The subcontractor had problems treating the contaminated soil due to higher-than-expected levels of clay in the soil. The clay levels were considerably higher than the clay content in the samples listed in the reports.

The contractor sued the federal government on behalf of the subcontractor to recover the additional soil treatment costs caused by unexpectedly high concentrations of clay in the treated soil. The court noted that a contract's misrepresentation about site conditions can support a claim for breach of contract, whether or not the contract includes a DSC clause. With our without a DSC clause, the contractor must prove (1) a reasonable contractor reading the contract as a whole would interpret them as a representation about site conditions, (2) the contractor reasonably relied upon the representation when bidding, (3) the actual site conditions differed materially from those represented, and (4) the contractor suffered damage as a result of the difference. The court left undecided the question whether, to recover for misrepresentation, the contractor must also establish that the government was negligent or otherwise at fault in making the misrepresentation. (The owner does not need to be at fault for a contractor to recover under a DSC clause.)

The Court denied the claim, finding that the contractor failed to meet the first and second requirements. Finding the contractor's proof deficient on the first requirement, the Court wrote that, in light of the contract as a whole, the clay composition levels in the report were not a representation of the contaminated soil. The contract did not say that the contractor could rely upon the report samples and the report "was not intended as, and would not have been reasonably interpreted as, a representative report on the overall composition of the contaminated soil." The Court also found that soil composition data in a separate feasibility study "reflected the presence of amounts of clay substantially exceeding the percent in the soil samples, which "would have prevented a reasonable contractor from interpreting the contract documents as indicating that only a low level of clay was present in the overall stockpile." As a whole, then, the contract did not misrepresent soil conditions.

The Court further found that, even if the first requirement was satisfied, the contractor could not meet the second because a reasonable contractor would have had reason to question the clay content figures in the samples. The contractor had actual knowledge that these samples were collected only from the immediate edge of the large soil stockpile and did not include any samples from deeper within the soil stockpile. The contractor testified that he had relied on the randomness of the sampling, "but his own testimony makes clear that the samples were not random with respect to the whole stockpile, but only with respect to its perimeter." "[The contractor" could not have reasonably relied on any representation as to the clay content of the soil because it knew that, due to flaws in the sampling methodology underlying [the soils report], that table actually revealed nothing at all about the soil toward the middle of the stockpile."

4. ***Allison Engine Co, Inc. v. United States*****,** 128 S. Ct. 2123 (2008).

Two employees of an assembly subcontractor (in a project to build missile destroyers for the Navy), brought a *qui tam* (one in the name of the Government) False Claims Act suit against their own employer and other subcontractors. The employees alleged that invoices submitted to

the shipbuilders fraudulently sought payment for work that violated the contract specifications by virtue of being defective, not meeting standards, or not being properly inspected.

The issue before the United States Supreme Court was whether a defendant can be liable for submitting fraudulent invoices to a private party (like the shipbuilders). The sections of the False Claims Act at issue make a company liable if it "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government" or if it "conspired to defraud the Government by getting a false or fraudulent claim allowed or paid." The *qui tam* plaintiffs argued that the shipbuilders had received contracts directly from the Government, so that all the funds being used to pay the defendants had come from the Government, and therefore the False Claims Act applied. The Supreme Court disagreed, finding that the plain language of the statute required that a defendant intend that the Government itself pay the fraudulent claim. The Court was concerned that, if invoices made to private parties fell under the False Claims Act, the statute's application would be "almost boundless." The Court clarified, however, that plaintiffs do not need to prove that the false invoice was presented directly to the Government to prevail under the False Claims Act—it is sufficient if a subcontractor submits a fraudulent claim to the general contractor, intending that the general contractor use that claim in its bill to the Government.

5. ***Kelleher Construction Corp. v. Transportation Insurance Co.,*** 2008 WL 2891003 (D. Minn. 2008)

In 1997, a subcontractor, Kelleher Construction, installed streets, curbs, and gutters in the Courts of Nanterre residential development in Plymouth, Minnesota. In 2006, the Court of Nanterre Homeowners Association sued Moen Leuer Construction, the general contractor, alleging that Moen was responsible for defective design and construction. Moen then sued Kelleher seeking contribution and indemnity and further alleging that, to the extent Moen is found liable for damages, that liability results from the negligence and breach of contract of others.

In September 2007, Kelleher tendered Moen's complaint to its liability insurer, Transportation Insurance Company. Transportation rejected the tender, denying any obligation to defend or indemnify Kelleher because there were no indications of damages resulting from Kelleher's own work.

Following Transportation's denial of coverage, Kelleher sued Transportation for breach of contract and declaratory judgment. Transportation claimed that the damages asserted against Kelleher fall within the policy's "your work" exclusion. Like most CGL policies, the Transportation policy excluded coverage for damage to the insured's work itself; the only coverage is for property damage or personal injury caused by defects in the work or its negligent installation. Transportation's position was based upon statements by the plaintiff's expert that only the pavement installed by Kelleher needed to be replaced and that there was no evidence that the concrete damaged anything other than itself.

The Court held that Transportation's denial of coverage was premature and that Transportation should have defended Kelleher under a reservation to challenge coverage after the facts had been further developed through discovery. The allegations in the complaint generally alleged "improper design and construction" and, because the facts did not clearly place the claims outside the scope of coverage, Transportation should have defended.

6. ***Aten v. Scottsdale Insurance Company*****,** 511 F.3d 818 (8th Cir. 2008)

Aten contracted with Leslie Joe Hanke and Castlerock Construction, LLC, for the construction of a new home. Upon taking possession of the house, Aten discovered a variety of defects, including missing trim, exposed sheetrock screws, damaged sheetrock, improperly plumbed interior walls, uneven floors, gaps between the flooring and walls, off-center doors, improperly installed door jambs, uneven and cracked floors in the garage and basement, and an

improperly graded basement floor that resulted in water damage. Aten sued the builders to recover damages for the defective construction. Neither builder appeared, and a default judgment was entered in Aten's favor. This resulted in Aten's inability to conduct discovery to determine who caused the defective work.

Aten then sued Castlerock's GCL insurer, Scottsdale Insurance, alleging that the insurer was obligated to pay Castlerock's default judgment. Scottsdale moved to dismiss. The district court dismissed Aten's claim, finding that Scottsdale never breached its insurance policy because Aten's damages were not a result of a covered occurrence, and even if they were, the damages were properly excluded under the policy's terms.

Aten appealed, and the court of appeals reversed and remanded the case to the district court for two reasons: (1) the water damage was a covered occurrence; and (2) discovery might establish that the basement floor was either poured or leveled by a subcontractor, or the work suffering water damage was performed by a subcontractor, either of which would provide an exception to the policy's exclusion.

7. ***Sather v. King,*** 2008 WL 170508 (Minn. Ct. App. 2008) (unpublished)

The Sathers were remodeling their home when heavy rainstorms struck, causing mold and other damages. The Sathers hired an attorney to represent them in a lawsuit against State Farm Insurance Company to enforce the Sathers' homeowners' policy. State Farm denied the Sathers' mold claims and moved to have the lawsuit dismissed. The court dismissed the Sathers' lawsuit.

The Sathers then sued their attorney for malpractice, asserting that he negligently failed to discover a State Farm operations manual that, they argued, could have been used as evidence of the policy's interpretation to prove that their claims were covered. Additionally, the Sathers asserted that their attorney failed to assert the "resulting loss exception" in their homeowners' policy.

The Court held that the attorney was not negligent because the Sathers' insurance policy did not cover the Sathers' mold claims. Furthermore, the Court held, the attorney was not negligent in failing to discover the manual for. The Court dismissed the case because the Sathers did not show that, but for their attorney's action, they would have prevailed with their claims against State Farm.

8. ***Integrity Mutual Ins. Co. v. Klampe et.al.*****,** 2008 WL 5335690 (Minn. Ct. App. 2008) (unpublished opinion)

Hruska Builders entered into a home remodeling contract with the Klampes. According to the homeowners, the contractor's poor workmanship resulted in widespread damage to the residence. The Court noted that much of the damage resulted from changes to the plans and specifications knowingly and intentionally performed by the contractor.

Hruska Builders brought a declaratory judgment action regarding Integrity Mutual's duty to defend or indemnify it. The Court of Appeals affirmed the District Court's decision that there was no coverage under the policy. The Court of Appeals remarked that a CGL policy is designed to insure tort liability, not contractual liability. A contractor's substandard workmanship is a matter of contract, and therefore not covered under a CGL policy. A key concept for the Court was the contractor's ability to control his risk through the manner in which he performed his work. Because the contractor was in control of the risk, the resulting damage could not be considered an "occurrence" within the meaning of the policy.

Finally, the Court found no coverage for damage resulting from pipes that burst after being frozen. A provision in the policy excluded coverage for "property damage" to any part of

the property on which the contractor was performing work, if the property damage arose out of that work. Here, the contractor removed a wall and exposed the pipes to freezing conditions. Therefore, the Court concluded that the exclusion applied.

9. ***Superior Construction Services, Inc. v. Belton,*** 749 N.W.2d 388 (Minn. Ct. App. 2008)

Homeowners hired Superior Construction Services, Inc., to perform repairs on their home in May 2002. The majority of the work was completed by January 2003. However, Superior did not return to finish the work until March 2005. In June 2005, Superior filed a mechanic's lien on the home.

Before Superior returned to finish the work, however, the homeowners took out a mortgage with a bank. The bank filed its mortgage in January 2005, six months before Superior recorded its mechanic's lien.

In the lawsuit that followed, the bank contended that its mortgage had priority over the mechanic's lien. The court agreed. Although a mechanic's lien is generally given priority over a mortgage if work on the project started before the mortgage is filed, that principle is defeated if the contractor's claim is based upon work that was completed some time after the project had originally been abandoned. In this case, the court clarified that whether a contractor intended to abandon a project earlier will be determined based on objective criteria, not subjective intent. While Superior's president testified that he did not intend to abandon the project, the court relied on the fact that Superior did not provide any labor or materials during a two-year period and that there was no communication between it and the homeowners for at least fifteen months. The court concluded that Superior had abandoned work on the home and that its lien for later work did not relate back to its initial work.

10. ***Collins Electrical Systems, Inc. v. Redflex Traffic Systems, Inc.,*** 2008 WL 933488 (Minn. Ct. App. 2008) (unpublished)

In 2005, the City of Minneapolis contracted with Redflex Traffic Systems to install and operate traffic light enforcement cameras at some intersections within the city. Redflex subcontracted with Network Electric to install the camera systems. Network Electric subcontracted with Collins Electrical Systems to work on the camera systems. Collins completed its work for Network Electrical in 2005, but Network Electrical did not pay Collins the $290,000 due under the subcontract.

Collins sued the City of Minneapolis and Redflex to foreclose a mechanic's lien Collins filed against the real estate that was improved by its work. Collins also sued the City for failure to require Redflex to furnish a payment bond.

The City asked the court to dismiss the lien claim on the ground that the property was public. Mechanic's liens cannot be filed on property held and used for public purposes; they can only be filed on private property and on public property that is not used for a public purpose. The Court of Appeals dismissed the lien claim, holding that street intersections are used for public purposes.

The City also asked the court to dismiss the claim that the City was liable to the supplier, Collins, for failing to require Redflex to furnish a payment bond. Public owners must by law require contractors on public projects to furnish payment bonds to ensure that all subcontractors and material suppliers receive payment. A claim on the bond is a substitute for the contractor's lien claim on public projects. To hold a public body responsible for failing to obtain a payment bond, however, a claimant must first show that the defaulting contractor or subcontractor was insolvent when payment was due. The City argued that Collins's complaint was insufficient because it alleged that Network Electric was insolvent without expressly stating that Network

Electric was insolvent *at the time* Network Electric defaulted. The Court of Appeals rejected the argument, holding that Collins's complaint gave sufficient notice of its claim.

11. ***Southside Plumbing & Heating v. Plourde,* 2008 WL 4646327** (Minn. Ct. App. 2008) (unpublished)

In this case, the Court of Appeals determines the appropriate award of attorneys' fees for a subcontractor who won its mechanic's lien suit, but twice had to respond to the homeowner's appeal of the attorneys' fees award.

Southside Plumbing & Heating, a subcontractor, filed a mechanic's lien seeking $1,251.33 for its work on a residence owned by Mr. Plourde. After almost two years, Plourde agreed to pay the lien amount, but refused to pay any of the attorneys' fees that Southside was entitled to under the mechanic's lien laws. The district court ordered Mr. Plourde to pay the $1,251.33, plus an additional $8,000 in costs and attorneys' fees to Southside. On appeal, the Court of Appeals determined that the attorneys' fee award was unreasonable because it was disproportionate to the amount of the lien. The Court of Appeals remanded to the district court to determine what a reasonable amount would be.

On remand, the district court reduced the attorneys' fee award by only $312.25. Mr. Plourde appealed again. The Court of Appeals, after chastising the district court for not complying with the spirit of its remand order, modified the attorneys' fee award by subtracting approximately $3,000. Mr. Plourde was ordered to pay $3,753.99 in attorneys' fees.

12. ***Wallboard, Inc. v. Foss Drywall, Inc.*,** 758 N.W.2d 356 (Minn. Ct. App. 2008)

Wallboard, Inc. supplied drywall for the renovation of a Bath & Body Works store at the Crossroads Center in St. Cloud. Although the party that purchased drywall from Wallboard was paid in full by the general contractor, Wallboard was not paid. Even though Wallboard had not provided pre-lien notice, Wallboard recorded a mechanic's lien against the Crossroads Center for the unpaid amount.

The court held that Wallboard's mechanic's lien was invalid because no pre-lien notice was given. Although there is an exception to the pre-lien notice requirement in cases where "the existing property contains more than 5,000 total usable square feet of floor space," the Court held that the exception did not apply to Wallboard's lien because the Bath & Body Works store was 4,375 square feet. The court declined to interpret the statute as applying to the entire Crossroads Center (as opposed to just the tenant space).

13. ***Rich Johnson Homes v. Sheehan,*** 2008 WL 1972276 (Minn. Ct. App. 2008) (unpublished)

In September 2003, general contractor Rich Johnson Homes ("RJH"), and homeowner Daniel Sheehan entered into a home remodeling contract. The Sheehans moved into a rental property during the project through the end of March 2004. The contract stated that the project would be complete by April 2004. The project was not completed by April 2004, so the Sheehans extended their lease through July 2004.

On August 1, 2004, the Sheehans moved back into their home, which was still not complete. In October 2004, RJH sent an undated, unsigned change order to the Sheehans. Under the contract, extra costs could only be added upon written change orders. The Sheehans stated they would not pay the increased amount due in the unsigned change order. RJH then left the project incomplete. The Sheehans hired another contractor to complete RJH's work. The Sheehans paid that contractor $98,696.59 for its work.

Later, RJH filed a $179,458.05 mechanic's lien against the Sheehans to recover the unpaid amount due under the contract. The Sheehans counterclaimed against RJH for breach of contract. The district court ruled in favor of the Sheehans and awarded them $9,920.56. The amount of the Sheehans' award was offset by the amount that was left owing on the contract and the amount the Sheehans paid Orfield to finish RJH's work. Additionally, the award included rent and storage fees incurred as a result of the project lasting longer than anticipated. The district court did not include the amount claimed in the change order because it was not consented to by the Sheehans as stated in the contract. Additionally, RJH failed to present clear and convincing evidence that an oral modification of the written contract existed.

14. ***Corn Plus Co-Operative v. Continental Cas. Co.,*** 516 F.3d 674 (8th Cir. 2008)

Corn Plus hired Wanzek Construction to perform welding work in an expansion of an ethanol processing facility in Winnebago, Minnesota. Under the contract Wanzek was responsible for welding pipes. While Wanzek substantially completed its work, it did not meet the project specifications due to incomplete weld penetration. For these reasons, Corn Plus claimed that repairs of the defective welds were necessary to avoid the risk of structural damage to the piping system.

Wanzek tendered defense of the claims asserted by Corn Plus to its insurer. Wanzek's insurer denied coverage contending that the policy excluded coverage for repairing faulty work. Corn Plus and Wanzek then entered into a "Miller-Shugart" agreement to settle their claims for $2.5 million. The agreement did not allocate the $2.5 million into itemized damages.

In a Miller-Shugart settlement, an insured who has been denied coverage agrees with the claimant on a judgment for an amount collectible solely from the insurance policy. The claimant then releases the insured from personal liability. The claimant's recovery is limited to the amount that can be collected from the insurers.

After entering into the Miller-Shugart agreement, Corn Plus continued its lawsuit against Wanzek's insurer. The court ruled that property damage caused by Wanzek's faulty welding triggered insurance coverage, but the court also concluded that the policy exclusions (the "damage to your work" exclusion and the "impaired property" exclusion) excluded coverage for repairing the defective welding and its consequential costs, as well as for loss of use of the facility. The insurer asserted that the Miller-Shugart agreement was unenforceable.

The Court of Appeals ruled that, because the Miller-Shugart agreement had not allocated the damages incurred by the type of loss, the settlement amount included covered and noncovered claims.

15. ***Lester Building Systems v. Louisiana–Pacific Corporation*****,** 2008 WL 467426 (Minn. Ct. App. 2008) (unpublished), *pet. for rev. granted* (Minn., April 15, 2008)

Louisiana-Pacific (LP) manufactured exterior siding that Lester Building Systems used to build livestock barns. After a few years of using the siding, Lester began receiving complaints from customers that the siding was failing, and ceased using the product. In 1995, Lester's customers filed a class-action in Oregon Federal Court against LP, who settled the dispute, receiving a release of the customers' individual claims and insulating Lester from claims made by the customers.

In 2000, Lester sued LP, alleging that it was entitled to damages for lost profits, the purchase price for the siding, and the cost of repairing Lester's customers' barns. The jury found that LP breached its express and implied warranties and defrauded Lester, returning a verdict for $13 million in lost profits, $13.2 million in repair costs, and $3.4 million for Lester's purchase of the siding.

LP appealed. The Court of Appeals held that, in addition to limiting repair-cost damages to amounts that a re-seller has not already received as purchase-price damages, a manufacturer's liability is also conditioned on the reseller's potential liability to end users. Allowing a re-seller to recover repair-cost damages in cases where the re-seller has been released from liability would give a windfall to the re-seller and would undermine settlements between end users and manufacturers of defective products.

Here, Lester's customers waived their claims against LP, and LP had a reasonable expectation that it could not be sued under the same claims again. Thus, the court of appeals reversed the district court's decision.

16. ***Integrity Floorcovering v. Broan-Nutone, LLC,*** 521 F.3d 914 (8th Cir. 2008)

A bathroom ventilation fan manufactured by Broan-Nutone and installed in a warehouse in 1979 allegedly malfunctioned and caused a fire in 2004. The owner sued Broan-Nutone, which asked the court to dismiss, arguing that the owner's claims were barred by the ten-year statute of repose found in Minn. Stat. 541.051, subd. 1(a). This statute requires a claimant to sue within two years after discovering the problem, but within an outside limit of ten years. In this case, nearly 25 years had elapsed since the fan was installed. The owner argued that the statute was not meant to apply to damages caused by defective products and that it was not the legislature's intent to protect product manufacturers. Alternatively, the owner argued that that the fan should be classified as "equipment or machinery," not as "ordinary building materials," thus qualifying for an exception that removes equipment or machinery from the application of the statute of repose.

The court found that the plain language of the statute covered the bathroom ventilation fan. Since the fan was required by the Minnesota Building Codes and was provided to remove humidity, thereby preventing property deterioration, the fan was considered a permanent addition and an improvement to real property. The court also defended its decision to apply the statute of repose in the case because, when a product is incorporated into a structure, proving causation and the source of damages becomes more difficult.

The court also rejected the owner's alternate argument that the fan was governed by the exception. The court found that, though bathroom fans could be considered equipment and machinery, they were clearly ordinary building materials because they were commonly and integrally incorporated into buildings, were required by the building codes, and were beyond the manufacturer's control and direction. Finally, the court refused owner's request to establish a list of ordinary building materials for the Minnesota courts to follow, emphasizing that the equipment and machinery exception to the statute of repose was only to be used in exceptional circumstances.

17. ***Nationwide Mutual Insurance Co. v. Venmar Ventilation, Inc.,*** U.S.D.C., D. Minn., No. 07-3133 (Nov. 4, 2008) (unpublished)

Two homeowners sued the manufacturer of a heat recovery ventilation unit (HRV) over a basement fire that they claim was caused by a faulty motor in the HRV. The lawsuit was started more than two years after the fire, which means that the lawsuit was time barred under Minnesota's statute of limitations for improvements to real property. The manufacturer could have raised the defense of untimeliness, but did not. The manufacturer then "third-partied" the motor supplier into the lawsuit, asking the supplier to indemnify the manufacturer for any judgment that might be entered in favor of the homeowners against the manufacturer. (A defendant in a lawsuit has may seek full or partial reimbursement from any "third-party defendant" who is ultimately responsible for all or part of the claimant's injuries or damage.)

The motor supplier asked to be dismissed from the lawsuit because, it argued, the homeowners' original claim against the HRV manufacturer was untimely and that the manufacturer should have raised the defense. The manufacturer argued that, by law, the

manufacturer's indemnity claim against the supplier did not expire until two years after the homeowners received a judgment against the manufacturer. Because judgment had not yet been entered against the manufacturer, the manufacturer argued, its indemnity claim against the supplier was timely. The court, however, noted that, like all third-party defendants, "[the supplier] is entitled to assert any defense that [the manufacturer] had to [the homeowners'] claims" and that "[t]his includes a statute of limitations defense to 'the homeowners'] original claim against [the manufacturer]." In other words, the supplier could assert all of the manufacturer's defenses in addition to the supplier's own.

The supplier was dismissed from the lawsuit, leaving the manufacturer to go it alone. The manufacturer remained responsible to the homeowners for the motor's defects and no longer had a remedy against the motor's supplier.

18. ***Daley Farms of Lewiston v. Habben*****,** 2008 WL 2105980 (Minn. Ct. App. 2008) (unpublished)

Daley Dairy Farms is a large dairy farm operator who owns four holding basins built in 1997. Soon after the basins were constructed, bubbles appeared under the liners that were placed along the side and bottom of the basins. Over the course of several years, the bubbles grew in size and number.

In 2005, Daley farms sued regulatory agencies, design firms, testing firms, and construction companies for damages caused by the bubbles in the basin liners. The defendants argued that Daley Farms' claims should be dismissed because Daley Farms failed to bring its claims within the two-year statute of limitations period for improvements to real property. Daley Farms acknowledged that it was aware of the bubbles in the basin liners for over two years, but that it was not aware that the bubbles were a defect until 2004.

The court dismissed the case because Daley Farms had notice of the defective bubbles in the basin for over two years. Under the statute, a lawsuit must be started within two years after becoming aware of a problem. The person need not know the cause of the problem for the two years to start running; it only needs to know that there is a problem.

19. ***Li v. Zawadski*****,** 2008 WL 933459 (Minn. Ct. App. 2008) (unpublished)

A general contractor constructed a home in 1996. The home was later sold on April 8, 2000. Before closing, the owners signed a purchase agreement that disclosed that the home had a wet basement and had roof, wall, or ceiling damage caused by water. In addition, they signed an addendum to the purchase agreement that stated that they were aware that the basement had a leak in the back room. The owners also had a home inspection conducted, which revealed a variety of defects, including missing shingles, improper and inadequate grade/drainage, stucco defects, inadequate damp proofing, and foundation leaks. After closing, the owners replaced shingles and repaired a leak near the basement door.

In July 2005, an inspection revealed elevated moisture ratings and echoed the defects from the 2000 pre-closing inspection. After receiving this report, the owners mailed a letter to the contractor, who telephoned them and left a message requesting an opportunity to inspect the home. The contractor was denied an opportunity to inspect the home. Instead, the owners hired another company to further inspect the home. This company provided a written summary identifying the same defects as the two previous inspections, ultimately blaming these defects on code violations in the original construction.

The owners asserted claims of breach of contract, negligence, and breach of statutory new-home warranty. The contractor asked the district court to dismiss the case asserting that the breach of contract and negligence claims were barred by the two-year statute of limitations in Minn. Stat. § 541.051, subd. 1(a). They also argued that the statutory new-home warranty claim

did not comply with the written notice requirements of the new-home warranty law, Minn. Stat. § 327A.03. The district court dismissed the case.

The Minnesota Court of Appeals found that the district court erred in dismissing the new-home warranty claim because it improperly applied the two-year statute of limitations found in § 541.051 instead of applying the period specified by § 327A.03, which begins the limitations period when the owners discovered, or should have discovered, the builder's refusal or inability to ensure the home was free of major construction defects. The court found that the dismissal was improper because the district court made no findings on the builder's ability or desire to remedy the defects. The district court also erred because it made no findings regarding the timing or sufficiency of written notice.

In addressing the common-law claims of breach of contract and negligence, the Court of Appeals found that the district court mistakenly made conclusions of fact, rendering dismissal inappropriate. Specifically, the court of appeals held that for non-statutory claims, it is the knowledge of the "injury," and not knowledge of the defect, that triggers the limitations period. The court also stated that, where reasonable minds could differ about the discovery of the injury, dismissal is inappropriate. While the district court found that the owners were aware, or should have been aware, of the injuries in April 2000, the court of appeals did not feel that the record supported such a clear conclusion.

20. ***Smith v. Lindstrom Cleaning & Construction, Inc.*****,** 2008 WL 2020493 (Minn. Ct. App. 2008) (unpublished)

Homeowners hired Lindstrom Cleaning & Construction to repair fire and water damage to their home. A few months after the repairs were complete, one of the owners had increased allergy problems. Two years later, in February 2002, tests showed visible mold in the home. In July and September 2002, the homeowners wrote letters stating there had not been mold before the fire. The homeowners' claims were barred by the two-year statute of limitation for improvements to real property. The homeowners failed to sue within two years after discovering the mold.

21. ***Siewert v. Northern States Power*****,** 757 N.W.2d 909 (Minn. Ct. App. 2008)

The Siewerts, dairy farmers in Wabasha County, sued NSP in 2007, claiming that stray voltage had caused losses in their dairy operation. They filed an amended complaint in 2007. They had noticed drops in their milk production in the late 1980s, but did not consider stray voltage as a source until 2004. NSP moved for summary judgment, asserting among other grounds the statute of repose for improvements to real property (Minn. St. 541.051).

The Court applies the "common sense" test of *Pacific Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 554 (Minn. 1977), to determine if something is an "improvement to real property." Under that test, the key factors are expenditure, permanence, increase in the property's value, and alteration beyond ordinary repair. Following a long discussion about whether the delivery of electricity is an "improvement" to real property, the Court concluded that neutral to ground voltage is "not likely" to constitute an improvement to real property. In the end, the Court turned to the exception in the statute for the "maintenance, operation or inspection" of the improvement, and concluded that the Siewerts' claims were sourced primarily in NSP's failure to test and inspect the lines and therefore fell within the exception.

22. ***Federal Insurance Co. v. Westurn Cedar Supply, Inc.*****,** 2008 WL 686556 (D. Minn. 2008) (unpublished)

A general contractor's insurer sued the siding subcontractor for reimbursement for payments it made to a homeowner after a fire during construction. Westurn Cedar, the siding subcontractor, had hired an independent contractor to perform some of the siding work. That

individual moved a halogen lamp that was attached to the side of the house, and the lamp started the fire that destroyed the home.

The issue before the court was whether Westurn was liable for the negligence of someone who was not an employee, but an independent contractor. The federal district court determined that Westurn was liable for the independent contractor's actions. Contractors are liable to those who hire them for the negligent actions of their subcontractors.

23. ***Metro Paving, Inc. v. Luedeman*****,** 2008 WL 181627 (Minn. Ct. App. 2008)

Metro Paving built a driveway for Luedeman. After encountering difficulties in grading, Metro Paving decided to grade the area in the opposite direction from what was specified in the contract. Luedeman was unsatisfied and refused to pay. Metro Paving sued for full payment. The court determined that Metro Paving was not entitled to payment because substantial performance never occurred. Substantial performance satisfies the requirements of a construction contract and entitles the contractor to the contract price, even if minor, unintentional deviations from the contractor or defects in the work.

A contractor who substantially completes its work is entitled to full payment under the contract minus the cost of curing any deviations or defects. But when a contractor deviates from the contract intentionally, even to substitute something that the contractor believes is as good as what the contract calls for, the contractor is not entitled to payment. Here, because the contract required grading in a specific direction but Metro Paving graded in the opposite direction without Luedeman's approval, substantial performance never occurred so Metro Paving had no right to payment.

24. ***Morrissey v. Gurtek Custom Builders*****,** 2008 WL 1868325 (Minn. Ct. App. 2008) (unpublished)

In this case, the Morrisseys appealed a decision by the district court excluding their expert witness and dismissing the case for lack of evidence of causation.

The Morrisseys argued that the district court excluded the expert based solely on the court's perception that the expert lacked credibility, which is a decision that is supposed to be made by the jury under Minnesota law. The court of appeals, however, found that the district court based its exclusion on the expert's unreliability and lack of qualifications, and determining whether an expert is qualified is a matter that rests "almost entirely" within the court's discretion.

The district court's record showed that the witness' contracting license had been revoked in 2001. It also showed that another district court used the revocation as a basis to exclude this witness in another case. Based on these facts, the court of appeals found no misapplication of law, but did note that lacking a license alone does not automatically preclude an expert from testifying; the basis for revocation is crucial to a determination.

The court of appeals also disagreed with the Morrisseys' contention that the district court erred in dismissing the case for lack of evidence of causation because they failed to disclose their intent to call any other witnesses as a causation expert until the day of trial. To begin with, the Morrisseys failed to ask the district court for a continuance, or a less severe sanction, at the motion hearing. In addition, the Morrisseys' failed to timely disclose other experts, despite knowing two months in advance that Gurtek intended to bring a motion to exclude, which was prejudicial to the defendants. Finally, the Morrisseys were well aware of the fact that their expert had no license and was previously excluded in another case, rendering the district court's dismissal of their claim not so much a sanction, as a consequence of their inability to prove their claim. Allowing the other unidentified experts to testify to causation would have prejudiced the defendants because they had no opportunity to challenge the proffered experts' qualifications or opinions.

25. ***Fernandez v. Vargas*****,** 2008 WL 4628506 (Minn. App. 2008)

Vargas built a house for Fernandez. To reduce the cost, Fernandez assisted by providing building materials and labor. After completion of construction and moving in, Fernandez found several problems. Within six months of discovery of the problems, Fernandez sued Vargas for breach of contract and breach of Minnesota's one-year warranty for residential construction.

Vargas first argued that Fernandez did not give the necessary six-month written notice of repair for a warranty breach. The court disagreed. The complaint to the lawsuit, which was served within six months of discovery of the warranty breaches, provided proper written notice of repair. Fernandez did not need to give a separate written notice. The court also found that Fernandez gave Vargas the opportunity to repair the alleged defects by oral notice. That notice, coupled with the complaint, served as a sufficient opportunity to repair under Minnesota law.

Vargas next argued that Fernandez's involvement in the construction precluded his ability to recovery under a statutory warranty. Minnesota's one-year warranty requires a builder to warrant that a home is free from defects "caused by faulty workmanship and defective materials due to noncompliance with building standards" for one year after completion. Fernandez alleged over 30 different problems. The court found that Fernandez was "extensively involved in personally working on the construction of his own home and directing numerous details of the construction activity." After hearing conflicting evidence from Vargas and Fernandez, the court concluded that Fernandez could not claim breach of warranty on most of his claims because he took responsibility for the work that caused the problems. For instance, mold and moisture problems were created by landscaping and siding, both of which Fernandez took responsibility for. The court rejected other claims because Fernandez did not offer evidence of any damages from the purported defects. The court found only three specific defects for which Vargas was responsible. For each of those three defects, the undisputed evidence showed that Vargas was responsible for the work, that the work was defective, and that the defective work was a breach of Minnesota's one-year warranty for residential construction.

26. ***Tony Eiden Co. v. Auto-Owners Ins. Co.*****,** 2009 WL 233883 (Minn. App. Jan. 26, 2009)

This opinion establishes which insurers should be responsible for coverage in mold cases. It involves a contractor, Tony Eiden Company, who was sued by homeowners after they discovered water damage and mold in their eight-year-old home. Eiden tendered the claim to four insurance companies and three of those companies defended Eiden and settled the homeowners' claims. Eiden and those three insurers then brought a declaratory judgment action against the fourth insurer, State Auto Insurance Company, for contribution.

State Auto's commercial general liability policy covered Eiden from October 15, 2002, to October 15, 2003. The homeowners notified Eiden of their water intrusion claim on October 17, 2002, and sued Eiden in September of 2003. After a two-day trial, the district court found that wood in the home began rotting within a year or two after it was constructed in 1994, and State Auto had no obligation to defend or indemnify Eiden.

The Minnesota Court of Appeals affirmed the ruling that State Auto did not have to defend or indemnify Eiden. The Court explained that State Auto had issued an occurrence-based policy to Eiden, and that Minnesota courts do a three-step analysis to determine coverage under occurrence-based policies. The first step is to determine whether some damage occurred during the policy period. In this case, because the home's wood began rotting within a year of construction and continued through November of 2003, there was some damage during the policy period. Because there was some damage under multiple policy periods, the Court moved to the second step and determined whether the homeowners' injuries arose from a discrete event or a

series of events. (The third step applies only if there was no discrete event or series of events and involves allocating coverage among the applicable insurance policies.)

In this case, the Court found that the wood rot arose from a series of discrete and identifiable events: repeated water intrusion during the first few years after construction. It declined to find that this was a continuous injury that lacked an identifiable causing event or series of events, such that the damages had to be allocated among other policies, in part because Minnesota law discourages allocation among multiple policies. The Court also noted that, even if allocation were appropriate, State Auto could take advantage of an exception to liability for insurers when no appreciable new damage took place during their policy period. Here the district court had found no appreciable new damage took place after October 15, 2002.

Finally, the Court of Appeals declined to find State Auto had a duty to defend, citing Minnesota case law that an insurer that provides a defense is not entitled to recover its defenses costs from insurers that fail to defend the insured. No exception to that rule applied, so the defending insurers were unable to recover a portion of their attorneys' fees from defending Eiden.

27. ***S.M. Hentges & Sons, Inc. v. Mensing,*** A08-0418 (Minn. App. Jan. 13, 2009)

This was a consolidated mechanic's lien action. Property Owner entered into purchase agreement ("PA") whereby an LLC would purchase the property. LLC contracted with Contractor A ("A") for various services and construction of residential lots on the property. LLC also contracted with Contractor B ("B") to make various improvements to the property and street, and "advanced" the work in exchange for profit-sharing provisions. LLC and Property Owner later amended the PA so the LLC could assign its interest to B. Eventually, Property Owner served Notice of Cancellation of the PA. LLC, A and B all did not cure LLC's defaults under the PA. A and B initiated mechanic's-liens on the property. A did not provide Property Owner with prelien notice; B did provide prelien notice.

The trial court concluded that A failed to establish a valid lien due to lack of prelien notice and that B satisfied all statutory requirements for the lien. A appealed, claiming exemption under Minn. Stat. § 514.011, subd. 4b because the improvements were "more than four family units" and were "wholly residential in character." A also claimed that engineers, as a class, are not required to provide prelien notice. Property Owner appealed, claiming that B should not have been permitted to file a lien because B had an equitable ownership in the property. Property Owner also claimed that B did not file a proper prelien notice.

With respect to the "family units" aspect of A's appeal, the Court of Appeals concluded that the district court was wrong to focus on Property Owner's status as landowner and not land developer, because Minn. Stat. § 504.011, subd 4b does not distinguish between the two. According to the Court, the statutory focus is on the size and character of the improvement. The Court relied on *Polivka Logan Designers, Inc. v. Ende*, 251 N.W.2d 851, 853 (Minn. 1977) to hold that any distinction based on the owner's status is already factored into the statutory exemption. In that case, the Minnesota Supreme Court determined that Minn. Stat. § 514.011 was intended to protect homeowners and small businessmen, not larger businessmen, where larger businessmen have property involving more than 10,000 total square feet. *See* Minn. Stat. § 514.011 subd. 4(ii). Here, the Court felt that the statute's focus on the size of the unit (more than four family units) meant that an owner of a five-unit condo or townhome, and a five-lot property both constituted a large businessman. Therefore, the prelien notice was not required. As such, the Court did not consider the class of "engineering services" exemption.

Regarding the equitable ownership question, Property Owner relied on *Nelson v. Nelson*, 415 N.W.2d 694 (Minn. App. 1987), where the Court of Appeals decision that held a contract for deed qualifies as an equitable interest. Here, the Court said that "possession is important" and that Property Owner's granting B access to the property for the purpose of making improvements pursuant to the contract with the LLC did not qualify as possession.

As for B's prelien notice, the Court determined that because the Minn. Stat. § 514.011, subd 4b exception applied, B was not required to serve a notice, so the issue of whether it was properly served is irrelevant.

28. ***Itron, Inc. v. WEB Construction, Inc.***, A08-0442 (Minn. App. Jan. 20, 2009)

This case arose out of a construction contract that contained a mediation and AAA arbitration provision. Property Owner sought arbitration for defective construction. General Contractor (GC) retained Construction Attorneys GC-1 and GC-2. GC submitted a "Checklist for Conflicts" form, including as an interested party one of the employees of the Sub Contractor (SC). The arbitrator was subsequently appointed, and acknowledged his ongoing obligation to diligently check for conflicts and disclose any potential conflicts. GC notified SC it believed SC was responsible for the damages, and requested a SC representative at the mediation. SC denied liability through its attorney (SC attorney). GC then hired Insurance Attorneys GC-3 and GC-4, who practiced at the same firm as GC-1 and GC-2, to secure insurance coverage for the arbitration. The arbitration took place May 21-22, 2007.

In late May 2007, GC-3 and GC-4 wanted to depose a representative from SC for the insurance action. GC-4 phoned the SC attorney, discovered that the attorney was working at a new firm, the same firm as the arbitrator. In June, GC-4 copied the SC attorney on a subpoena to SC. SC attorney then ran a conflicts check and discovered he was conflicted due to the arbitration. The law firm did not bill any time to the SC for that work.

In July, the arbitrator awarded Property Owner damages.

Property Owner moved the district court to confirm the award, GC moved to vacate. District court confirmed the award in January 2008, concluding that the arbitrator did not have a conflict that would require the court to vacate, that arbitrator did not exhibit "evident partiality", and that the manifest disregard of the law doctrine did not apply because it has not been adopted in Minnesota. GC appealed. Court of Appeals affirmed the district court.

-- Fraudulent Failure to Disclose a Conflict of Interest

The Court read Minn. Stat. §§ 572.10 and 572.19 together to indicate that a failure to disclose a conflict is not itself sufficient to justify a court in vacating an arbitration award. Rather, there must be some connection between the failure to disclose and the arbitration award. First, GC would have to show that it was prejudiced. Second, GC would have to show that the arbitrator had a conflict, and that the arbitrator's lack of disclosure impacted the award.

Safeco Ins. Co. v. Stariha, 346 N.W.2d 663 (Minn. App. 1984) sets forth the disclosure standards for commercial arbitrators; arbitrator should disclose any of their own or their partners' or business associates' existing or past financial or business relationships which might reasonably create an appearance of partiality or bias. This is subject to a reasonableness standard, and the Court found the facts of the instant case were all reasonable. The party challenging an arbitration award must clearly establish the existence of a long-standing and repeated relationship between the arbitrator and the interested party before a court will overturn.

-- Evident Partiality

Evident partiality generally arises when a neutral arbitrator has contracts with a party or another arbitrator that might create an impression of possible bias. *Aaron v. Illinois Farmers Ins. Group*, 590 N.W.2d 667, 669 (Minn. App. 1999). The Court distinguished those facts from the instant case on evident partiality in two respects. First, GC and SC were not a single entity, even though their interests were aligned on the outcome of the underlying dispute. Second, GC had not shown that the arbitrator's relationship with SC was "substantial" (arbitrator did not have a

contract with one of the parties, arbitrator's dealings did not occur over several years with longstanding financial benefits). Also, party alleging the partiality typically is the party disadvantaged by the alleged bias or contacts. Here, Court concluded that GC was not the disadvantaged party because the relationship between arbitrator and SC would appear to aid GC, whose interests were aligned with SC. Instead, arbitrator favored Property Owner with nearly all of its damages.

-- Manifest Disregard for the Law

This doctrine allows the court to vacate an arbitration award where the arbitrator understands and correctly states the law but proceeds to disregard the same. This doctrine has never been adopted in Minnesota, and the Court declined to adopt it now.

29. ***EnComm Midwest, Inc. v. Larson, et al.***, A07-2337 (Minn. App. Jan 27, 2009)

Property Owners entered contract with General Contractor (GC) to construct several buildings on the property. After construction, GC filed a mechanic's lien on the property. GC brought an action seeking to foreclose its lien, interest, costs, and attorneys fees; as well as breach of contract. Claims were for Buildings A and C. Owner brought breach of contract counterclaim. At hybrid bench/jury trial, court acted as fact-finder on mechanic's lien, jury acted as fact-finder on other claims.

GC filed a motion for directed verdict with respect to its breach of contract claim on Building C, which Property Owners stipulated. Court granted the motion.

Jury found by special verdict that GC failed to substantially perform the contract with respect to Building A, GC breached the contract with respect to Building A, which caused $135K in damages to Property Owners, and that Property Owners failed to mitigate $50K of those damages.

GC sought over $102K in attorneys fees for 366.25 hours of work at $305 per hour. Court determined that 250 hours at $200 per hour was more appropriate because GC was not entitled to fees for the portion of the case in which it did not prevail, and the mechanic's lien did not require a significant amount of attorney time to prepare for trial.

Ultimately, district court calculated GC's award by starting with the lien, which included the breach of contract damages, then subtracted Property Owner's breach of contract damages, then adding back attorneys fees and cost-and-disbursements. Both parties appealed.

Owner argued that the jury's findings that GC failed to substantially perform and breached the construction contract precluded an award of damages on the mechanic's lien. The Court determined that Property Owner's right to deductions for defective improvements is one of recoupment, not counterclaim. *Knutson v. Lasher*, 18 N.W.2d 688, 692 (Minn. 1945). Recoupment is purely defensive, allowing an equitable adjustment of the lienor's recovery in light of the lienor's breach of contract in the transaction from which the lien arrives. While a counterclaim can allow the Property Owner to recover more than the value of the lien, recoupment can only reduce the amount of the lien. The amount recouped represents the portion of the unpaid contract price for which the Property Owner did not receive the full value of the bargained-for improvements due to the lienor's breach.

Owner also challenged the district court's attorney-fee award to GC for its mechanic's lien claim; argues the amount should be reduced, for various reasons. The Court quickly rejected each argument. Award must bear a reasonable relation to the amount of the judgment secured. *Lyman Lumber Co. v. Cornerstone Constr., Inc.*, 487 N.W.2d 251, 255 (Minn. App. 1992). The test is (1) the time and effort required, (2) the novelty or difficulty of the issues, (3) the attorney's skill and standing, (4) the value of the interests involved, (5) the results secured at trial, (6) the

loss of opportunity for other employment, (7) the losing party's ability to pay, (8) the customary charges for similar services, and (9) the certainty of payment.

GC argues the district court abused its discretion in reducing the claimed hourly rate from $305 to $200. The district court found the attorney's charges were reasonable, but without explanation reduced the price. Court of Appeals could not determine whether district court considered relevant factors. Court of Appeals reversed and remanded for district court to redetermine the reasonable rate.

30. ***Donnelly Bros. Constr. Co., Inc. v. State Auto Prop. and Cas. Co.***, No. 27-CV-06-20371, 2009 Minn. App. LEXIS 17 (Minn. Ct. App. Jan. 26, 2009)

Between 1994 and 2003, contractor Donnelly Brothers Construction Company performed stucco work on multiple residential homes that later suffered damage from water intrusion. Several homebuilders and a homeowner brought lawsuits against Donnelly claiming that its improper application of stucco was one of several construction and material defects that permitted the water intrusion.

Donnelly tendered defense of the litigation to five different insurers that provided occurrence-liability-insurance coverage to Donnelly at various times since 1994. Under the terms of State Auto Property and Casualty Insurance Company's policy, it agreed to pay the sums that Donnelly became legally obligated to pay because of property damage that occurred during the policy period, and it further obligated State Auto to defend Donnelly against suits seeking those damages. State Auto rejected Donnelly's tender of defense claiming that the water intrusion occurred prior to the commencement of its policy period in July 2004. Donnelly sought declaratory relief that State Auto was obligated to participate in its defense and subsequently appealed the trial court's order granting summary judgment in favor of State Auto.

Minnesota follows the actual-injury rule to determine whether insurance coverage is triggered by an occurrence. An occurrence is when the homeowner or homebuilder is actually damaged or injured not necessarily when the negligent work was performed. In situations where the origin of the injury can not be readily identified, Minnesota allows damages to be allocated among the insurers based on their time on the risk. However, damages are not supposed to be allocated among the different insurers when the injury, although continuous, resulted from a readily identifiable and discrete event.

In this case, water intrusion began before the 2004 effective date of the State Auto policy. However, State Auto conceded that the damage was continuous and ongoing. Additionally, the record demonstrated that some of the damage occurred in 2004 and within the timeframe of State Auto's policy.

As such, the court of appeals found that there was a presumption in favor of coverage. State Auto attempted to rebut this presumption arguing that the damage could still be traced to Donnelly's improper application of stucco which constituted a discrete identifiable event. The court of appeals rejected this argument explaining that the record did not indicate when the initial water intrusion resulted from Donnelly's allegedly defective work or when the water intrusion actually caused damage; that the date of the stucco work could not be substituted to identify the beginning of the water intrusion or resulting damage; and that genuine issues of material facts existed as to whether the alleged stucco defects were merely a contributing factor in the water intrusion and whether other alleged construction defects were responsible for the initial water intrusion. Therefore, the court of appeals held that State Auto had a duty to defend Donnelly.

31. ***Noack v. Colson Construction, Inc.*,** No. 27-CV-06-2314, 2009 LEXIS 166 (Minn. Ct. App. Feb. 10, 2009)

Homeowners sued Colson Construction alleging that the contractor negligently constructed their home and breached statutory warranties. Colson brought third-party claims seeking contribution and indemnity from several of its subcontractors. At trial, the homeowners presented evidence of various construction defects and violations of the 1994 Uniform Building Code including the failure to use two layers of grade D tar paper behind the stucco, failure to install appropriate flashing on the windows and doors, a failure to comply with minimum thickness requirements for application of the stucco. Through motions in limine, Colson prevented the homeowners from presenting evidence regarding similar construction practices and defects found in other homes built by Colson.

The homeowners' expert witness testified that a holistic repair effort was required because the construction defects caused structural damage to the home and the code violations were present throughout the entire home. Two estimates, one for $222,389.56 and another for $240,139.00, were provided for the cost of the holistic repairs which included removal and replacement of all the stucco, installation of new sheathing and insulation, and installation of new windows. In contrast, Colson argued that localized problems with the stucco were actually caused by the homeowners' own negligence in failing to patch holes in the stucco and that a limited repair effort would effectively remedy the most damaged area. Colson estimated that the cost to repair only the most seriously damaged area of the home with structural damage would be $23,000.

At the close of trial, the homeowners requested two jury instructions. First, that Colson's code violations constituted negligence per se. Second, that the jury could consider the damages available to the homeowners if repairs conducted on their home did not restore the home to the same condition as before the discovery of the defects. The trial court denied both requests.

The jury found that Colson was in breach of the statutory warranties. It also found that Colson was 65% negligent, the homeowners were 25% negligent, and the stucco subcontractor was 10% negligent. The homeowners were awarded $55,000 in damages. They appealed arguing that: (1) the damage award was unsupported by the evidence; (2) it was error for the trial judge to refuse the homeowners' introduction of evidence relating to Colson's construction practices in other homes; and (3) it was error for the trial judge to deny their requests for the above-noted jury instructions. The court of appeals upheld the trial court's decision on all three fronts.

Initially, addressing the amount of the jury award, the court of appeals acknowledged that the $55,000 award fell below the homeowners' holistic repair estimates. The court still found that the jury award was supported by the evidence because Colson proffered a repair estimate of $23,000 for localized repairs. Therefore, the actual award fell within the range of estimates with evidentiary support and the jury was permitted to determine the appropriate scope of repair.

Next, the court of appeals upheld the trial court's exclusion of the homeowners' evidence relating to the construction practices and defects found in other homes constructed by Colson. The homeowners contended that the prior practices and defects constituted evidence of Colson's habit or routine practice. Even if true, the trial court properly concluded that the evidence would likely confuse or mislead the jury and, therefore, was more prejudicial than probative. Under Rule 403 of the Minnesota Rules of Evidence, the trial court had the discretion to exclude such evidence.

Finally, the court of appeals affirmed the trial court's decision to deny the homeowners' requested jury instructions. The request for a negligence per se instruction was properly rejected because damages are a requisite part of any negligence claim. As such, the court explained that

the mere existence of code violations, without resulting damage, are not sufficient to establish a claim of negligence or support additional damages.

Likewise, the trial court properly refused the homeowners' request for a jury instruction that would have allowed the jury to consider whether repairs to the home were able to restore the home to its condition and value before the structural damage was discovered. Under the law of damages, homeowners suing for less than the total destruction of their home have the opportunity to choose the cost of repair or the difference in value of their home before and after the damages. If the homeowners' case-in-chief introduces evidence of repair costs, however, then the homeowners will be deemed to have elected to pursue damages for the cost of the repair. Here, the homeowners' requested instruction would have been improper because no repairs had actually been conducted on the house yet. Furthermore, by presenting evidence on the cost of repairs, the homeowners elected their damages remedy to be the cost of repairs rather than any potential lost value to their home.

Legislation:

2009 International Code Adoptions Delayed

1. On March 2nd, the MN Department of Labor and Industry informed the Code Officials, Design Professionals and other interested parties, due to slow down in the construction economy and state and local budget constraints, the Department of Labor and Industry and the Department of Public Safety have decided not to move forward with the adoptions of the 2009 International Building Code, International Residential Code, or International Fire Code.

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Mississippi

Legislation:

Mississippi Senate Bill 2988, the Mississippi Employment Protection Act ("Act"), was signed into law by Mississippi Governor Haley Barbour on March 17, 2008. Codified as Mississippi Code Annotated Sections 71-11-1 and 71-11-3, the Act mandates that all employers in Mississippi shall only hire employees who are legal citizens of the United States of America or are legal aliens. The employment eligibility of all new employees must be verified using E-Verify, an electronic database system administered by the United States Customs and Immigration and Immigration Services, a bureau of the Department of Homeland Security. An employer that violates provisions of the Act is subject to cancellation of any state or public contract, resulting in ineligibility for any state or public contract for up to three years. The violator may also be subject to the loss of any license, permit, certificate, or other document granted by any agency, department, or entity of the State of Mississippi for the right to do business for up to one year. It is a felony for any individual to accept or perform employment knowingly or in reckless disregard that the person is an unauthorized alien. Such employees, upon conviction, are subject to imprisonment for not less than one year and no more than five years. Employee violators are also subject to fines in the amount of at least $1,000 and not more than $10,000. A proposal to repeal the Act is currently pending in the Mississippi Legislature.

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Missouri

Case Law:

1. In ***George Weis Co. v. Stratum Design-Build, Inc.***, 227 S.W.3d 486 (Mo. 2007), the Court ruled that a subcontractor was not required to intervene in a pending mechanic's lien action in order to bring a contract claim against the project's owner. Applying a statute providing that "a contractor or supplier on a construction project cannot recover in a breach of contract suit if a mechanic's lien suit is filed by a different entity which did work on the same job, unless the breach of contract suit is joined with the mechanic's lien suit," Mo. Rev. Stat. § 429.300, the trial court dismissed the subcontractor's suit for lack of subject matter jurisdiction. But, on appeal the Court ruled that section 429.300 applies only to suits brought by mechanic's lien claimants, not other suits against project owners. Whereas claims against a property should be adjudicated together to prevent inconsistent judgments and races to foreclose, the Court explained, such policy concerns do not apply to suits against a project's owner. Thus, the subcontractor, which did not assert any claim on the property at issue, was not barred from proceeding independently of the mechanic's lien action. But, the Court emphasized that any other claims by a mechanic's lien claimant must be brought with its lien claim.

2. In ***Lobo Painting, Inc. v. Lamb Construction Co.***, 231 S.W.3d 256 (Mo. App. E.D. 2007), the court reversed a ruling denying a subcontractor's claim for unpaid retainage, concluding that the subcontract was ambiguous and that conflicting testimony about whether the parties intended to obligate the contractor to pay the retainage before the contractor had been paid by the project's owner required an assessment of the witnesses' credibility. The subcontract provided for payment to the subcontractor on demand if, "for any cause which is not the fault of the Subcontractor, a certificate for payment is not issued or the Contractor does not receive timely payment or does not pay the Subcontractor within three working days after receipt of payment from the Owner." The court held that it was unclear whether the phrase "for any cause which is not the fault of the Subcontractor" applied only to the phrase "a certificate for payment is not issued" or to all three of the events listed. Thus, it was unclear whether the project owner's failure to pay the contractor, which was not the subcontractor's fault, obligated the contractor to pay the subcontractor. Noting that the parties offered conflicting testimony about the intended meaning of the provision, the court ruled that the conflict must be resolved by evaluating the witnesses' credibility, which the trial court had not done. Thus, the case was remanded for a determination of that issue.

3. In ***County Asphalt Paving Co. v. Mosley Construction, Inc.***, 239 S.W.3d 704 (Mo. App. E.D. 2007), the court reversed a ruling in favor of a subcontractor on its quantum meruit claim, finding that the project owner paid for the materials provided by the subcontractor and thus was not unjustly enriched. After the subcontractor completed its obligations under its subcontract, the general contractor approved payment for the work. But, due to fraud committed by the principals of the title company holding the funds for the project in escrow, the subcontractor did not receive the payment. When the project owner refused to provide additional funds to pay for the work, the subcontractor filed suit, claiming that the project owner had been unjustly enriched because the work had been performed but the subcontractor had not been paid. The trial court agreed, but on appeal the court ruled that – even though the project owner had not pled payment as an affirmative defense – the subcontractor failed to plead that the project owner failed to pay for the work. Even if the subcontractor's pleadings were construed liberally, the court ruled, the project owner actually had paid for the work by obtaining a construction loan which was placed in escrow. Thus, while the subcontractor could bring claims against the title company and the general contractor, the subcontractor's claim against the project owner failed.

4. In ***Livers Bronze, Inc. v. Turner Construction Co.***, 264 S.W.3d 638 (Mo. App. W.D. 2008), the court reversed the dismissal of a suit by a subcontractor for lack of subject-matter jurisdiction, ruling that a general contract document containing a forum-selection clause was not adequately specified to be incorporated by reference into the subcontract. The subcontract at issue was for a construction project in Pennsylvania. The subcontract required the subcontractor to comply with the terms of a certain general contract that was not attached to the subcontract, but which was available for review at the general contractor's office. After a dispute arose and the subcontractor filed suit in Missouri, the general contractor moved to dismiss the action, claiming that under a different general contract, any disputes had to be resolved in Pennsylvania. Acknowledging that it was relying on a different general contract from the one identified in the subcontract, the general contractor provided an affidavit explaining that a clerical error was responsible for the reference in the subcontract, and that the parties intended to be bound by the other general contract. The trial court agreed, dismissing the suit for lack of subject matter jurisdiction. On appeal, the court held that the subcontract unambiguously identified a general contract, and thus extrinsic evidence of the clerical error was inadmissible. The court also ruled that even if the parties inadvertently identified the wrong general contract, the subcontract did not sufficiently describe the intended general contract to permit its identity to be determined. Thus, the suit was allowed to proceed.

5. In ***Missouri Land Development Specialties, LLC v. Concord Excavating Co., LLC***, 269 S.W.3d 489 (Mo. App. E.D. 2008), the court affirmed a judgment on a mechanic's lien filed by a subcontractor, ruling that the subcontractor substantially complied with Missouri's statutory requirement to file a "just and true account" of the amount due, even though the subcontractor (1) claimed slightly varying amounts due during the course of the litigation, as the result of errors in computation; and (2) unintentionally included non-lienable charges in the claim. Additionally, the court ruled that claims for costs of equipment that sat idle during periods of downtime were not lienable, as such costs do not constitute labor when no workers are present. Finally, the court held that an award of pre-judgment interest on the amount due was mandatory once the principal amount due on the claim was determined.

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Montana

Case Law:

1. In *Tin Cup County Water And/Or Sewer Dist. v. Garden City Plumbing & Heating, Inc.*, 2008 MT 434, 2008 WL 5264982, the Montana Supreme Court affirmed a trial court's entry of summary judgment against Tin Cup County Water and/or Sewer District ("Tin Cup"). The case arose out of the failure of an old earthen dam. The dam had been failing for several years, which precipitated the dam's owner, Tin Cup, to hire a local engineering company, Druyvestein Johnson & Anderson, Inc. ("DJA") to provide engineering design services for the replacement of the dam's outlet conduit pipe. After the design services were completed, Tin Cup hired Garden City Plumbing & Heating, Inc. ("Garden City") to perform the actual replacement services. Tin Cup had separate contracts with both DJA and Garden City.

The actual replacement process, which began in October of 1997, required Garden City to slip-line the old conduit pipe with a high density polyethylene pipe and then grout the annular space between the new pipe and the old conduit. During the grouting process, Garden City encountered unexpectedly large voids in the original masonry outlet and therefore ran out of grout prior to grouting the final eight to ten feet of the annulus. Approximately six months after the grouting operation was completed, Tin Cup officials visited the dam and noted seepage on the downstream side of the dam, which precipitated an investigation by the U.S. Forest Service.

During the Forest Service's investigation, divers discovered that the final eight to ten feet of the annulus were left ungrouted. This discovery was made in June of 1998. Due to the seepage discovery, the U.S. Forest Service performed emergency repairs to the dam at a cost to Tin Cup. Tin Cup eventually sued both DJA and Garden City on several grounds, most notably negligence and breach of contract, in September of 2005.

The district court dismissed both DJA and Garden City by way of summary judgment in October of 2007. The district court dismissed DJA on statute of limitations grounds, ruling that the three year statute of limitations for torts governed Tin Cup's claims against DJA. The court denied Garden City's motion for summary judgment on statute of limitations grounds, but granted Garden City summary judgment for Tin Cup's failure to prove causation. Tin Cup appealed both rulings.

On appeal, Tin Cup argued that its claims sounded in both tort and contract and as such, it was entitled to the benefit of the eight year statute of limitations for a breach of a written contract instead of the three-year tort limitation. In dismissing this argument, the Montana Supreme Court initially noted that it is the gravamen of the complaint, not the label given the claim, which controls the statute of limitations. The Court then held that in order for the contract statute of limitations to apply, there must be an allegation of a breach of a specific contract provision. A review of the record showed that none of Tin Cup's witnesses could identify a specific contract provision which DJA allegedly breached. In fact, one of Tin Cup's experts conceded that it was DJA's negligence which constituted Tin Cup's basic complaint against DJA. Because Tin Cup could not point to a specific contractual provision which DJA allegedly breached and because Tin Cup's claims sounded in negligence for failing to properly supervise, coordinate & inspect the grouting operation, the Montana Supreme Court upheld DJA's dismissal based on statute of limitations grounds.

The Montana Supreme Court also upheld the trial court's dismissal of Garden City for Tin Cup's insufficient proof of causation. During discovery, Garden City identified two experts who concluded that the unfinished grouting did not create the need for emergency repairs. DJA had also disclosed an expert with a similar opinion. Tin Cup, on the other hand, could not identify any experts who could testify that the unfinished grouting more likely than not caused the need for emergency repairs. As a result, Tin Cup argued that the facts clearly demonstrated that the grouting omission led to the emergency repairs and therefore no expert testimony was necessary. The Court disagreed and held that the issues presented in the case required an understanding of the dam's structural history, dam engineering, dam safety, and hydrology - areas of knowledge which are beyond the understanding of the trier of fact and therefore required expert testimony. Since Tin Cup did not disclose experts with knowledge of these areas, the Court affirmed Garden City's dismissal.

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Nebraska

Cases:

1. ***Skyline Woods Homeowners Association, Inc. v. Broekemeier****, 276 Neb. 792, 758 N.W.2d 376 (Neb. 2008).* The Supreme Court of Nebraska held that implied restrictive covenants may arise on land from the conduct of the parties or from language used in deeds, plats, maps, or general building development plans. In *Skyline*, a land developer purchased a golf course that was adjoined by several residential housing developments, all of which were once owned by the same entity. The original owner developed the golf course and abutting residential properties in a common scheme to increase the value of the residential properties. In

accordance with this scheme, the owner recorded easements and protective covenants imposing restrictions on the residential properties. Among other things, residential owners were required to install protective window coverings and were prohibited from installing fences on the portions of the property adjacent to the golf course. Furthermore, the easements provided that golf balls were allowed to go through and across the residential properties. However, no corresponding restrictions were recorded against the golf course property. The original owner separately conveyed the residential property to residential owners and the golf course property to the land developer. The court ruled that the restrictions on the residential properties placed implied restrictive covenants on the golf course properties, and that the land developer's knowledge of the implied covenants was sufficient to enforce the restrictions against such land developer.

2. ***Borrenpohl v. Dabeers Properties***, L.L.C., 276 Neb. 426, 755 N.W.2d 39 (Neb. 2008). The Supreme Court of Nebraska held that a deed of trust filed five minutes after a notice of commencement affecting the same property had priority over such notice of commencement. In *Borrenpohl*, the property owner and bank executed a notice of commencement and deed of trust to be filed with the county. The bank sent both documents to the register of deeds office in the same envelope, but did not enclose recording instructions. Upon receipt, the register of deeds recorded the notice of commencement first and the deed of trust second. Later, Borrenpohl made certain improvements on the property, filed a construction lien, and subsequently initiated a foreclosure action based on its lien. Borrenpohl claimed that its lien related back to the notice of commencement, which was recorded prior to the deed of trust, and therefore had priority over the deed of trust. However, the court held that because the deed of trust and notice of commencement were sent in the same envelope, the documents were presumed to be recorded simultaneously, and therefore the intention of the parties to the documents was controlling. Additionally, the court found that the parties intended for the deed of trust to have priority over the notice of commencement, and thus the construction lien was subordinate to the deed of trust.

Legislation:

1. **NEB. REV. STAT. § 79-2001 et seq. (2008 Neb. Laws LB 889).** In April 2008, the Nebraska Unicameral passed the Political Subdivisions Construction Alternatives Act (the "Act"), amending what was previously known as the Nebraska Schools Construction Alternatives Act. The Act gives all political subdivisions (including cities, villages, counties, school districts, community colleges, state colleges, public power districts, and natural resource districts) the authority to enter into qualification based design-build contracts and construction management at risk contracts. Prior to passage of the Act, political subdivisions were limited to the traditional design-bid-build approach for project delivery. Under the Act, political subdivisions now have the option to chose from three project delivery methods: design-bid-build; qualification based design-build; or qualification based construction management at risk. If selecting design-build or construction management at risk, the Act specifies step-by-step procedures for the project.

2. The Nebraska Legislature has enacted legislation authorizing the use of design-build and construction management at risk project delivery methods for most public projects. Under LB889, as passed, political subdivisions covered by the act include cities, villages, counties, school districts, community colleges, and state colleges. Projects on which design-build and construction management at risk may not be used include all projects for road, street, highway, water, wastewater, utility, or sewer construction (with a limited exception to the exclusion). The bill was passed and approved by the governor on April 11, 2008.

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Nevada

Case Law:

1. In a restated opinion withdrawing its earlier opinion in ***Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.***, 197 P.3d 1032 (Oct. 2008), the Nevada Supreme Court determined that pay-if-clauses are enforceable if they do not run afoul of Nevada's prompt payment statute contained in NRS 624. The October opinion was a significant restatement of the court's June opinion, which suggested that the court was unlikely to enforce a pay-if-paid clause in any circumstance. In addition, the court determined that a contractual prospective lien waiver was void against public policy.

2. ***City of Boulder City v. Boulder Excavating, Inc.***, 124 Nev. Adv. Op. 65 (Sept. 11, 2008). The Nevada Supreme Court held recently that a Boulder City engineer's requirement that a low-bidding general contractor replace a particular subcontractor before the City would accept the bid was an action falling under discretionary immunity and precluded liability against the City for tortious interference of the subcontractor's contract. Over a period of several years, Boulder Excavating, Inc. ("BEI"), as a general contractor, secured several accepted bids with Boulder City for public works projects. In 2000, however, a dispute between BEI and Boulder City over a road construction project occurred and was resolved by protracted arbitration proceedings, after which both parties claimed to have prevailed.

In late 2000 or early 2001, Boulder City solicited bids for the multimillion dollar Veteran's Memorial Park public works project. McComb Construction, a general contractor, submitted the lowest responsive and responsible bid. McComb's bid, however, included BEI as a subcontractor. Boulder City's engineer, Scott Hansen, requested that McComb seek permission to replace BEI with another subcontractor before accepting McComb's bid. McComb complied with the request, and the City awarded McComb the project.

BEI then brought suit against Boulder City and Hansen for, among other things: (1) intentionally interfering with the contractual relationship between McComb and BEI; (2) conspiring to evade the public bidding requirements of NRS Chapter 338; and (3) denying BEI of its rights to perform subcontract work. BEI's claims against Boulder City were based on Hansen's conduct as Boulder City's primary government actor. The district court found that Hansen was immune as a governmental actor under NRS 41.032(2). However, despite Hansen's immunity and that the claims against Boulder City were based on Hansen's actions, the court did not find Boulder City immune.

On appeal, the Nevada Supreme Court concluded that the district court erred. If Hansen was protected by NRS 41.032(2)'s discretionary immunity as a governmental actor, the agency for which he acted was also protected. Accordingly, the court held that Boulder City was also immune because "Hansen was engaged in discretionary acts as defined by NRS 41.032(2), and because he was acting pursuant to his statutory authority in selecting subcontractors under NRS 338.141."

In footnote 22, the court addresses an argument of BEI that immunity should not be extended to Boulder City on BEI's claim of intentional inference with contract because "governmental actors are not entitled to immunity for illegal intentional acts or acts taken in bad faith." In addressing this argument, the court concluded that because Boulder City had not accepted McComb's bid at the time of Hansen's actions, there was no contract with which to interfere. "[A] putative subcontractor named in a public works bid has no protected property interest in the public works contract because no cognizable claim to damages can arise before an award is made." In reaching this conclusion, the court rejected BEI's argument under *Clark Pacific v. Krump Constr., Inc.*, 942 F. Supp. 1324 (D. Nev. 1996).

In *Clark Pacific*, the Nevada Federal District Court concluded that a "psuedo contract" exists between the general contractor and a subcontractor *after* the public entity awards the project to the general but before a formal contract is signed between the general and the sub. As suggested by the Nevada Supreme Court, the *Clark Pacific* court did not address BEI's argument on the issue of whether some sort of contractual relationship exists between the general and the sub *before* the public entity awards the contract to the general.

3. In ***Carl B. Barney v. Mt. Rose Heating & Air Conditioning***, 124 Nev. Adv. Op. 71 (Sept. 18, 2008), the Nevada Supreme Court addressed, among other things: (1) whether NRS 108.237(1), which allows for recovery of attorney's fees in a mechanic's lien action, covers all fees incurred to enforce the mechanic's lien, including those post-judgment attorney fees incidental to the lien's enforcement through foreclosure; and (2) whether the district court erred in denying a post-judgment motion to enter satisfaction of the judgment because not all of the attorney fees were paid. Carl B. Barney ("*Barney*") contracted with Reno Construction, Inc. ("*RCI*") to renovate his house. RCI subcontracted with Mt. Rose Heating & Air Conditioning ("*Mt. Rose*") to provide equipment and services as part of the renovations. Barney refused to pay for the work, which he determined was defective, and RCI and Mt. Rose filed mechanic's liens against the property. Both RCI and Mt. Rose obtained judgments and decrees of foreclosure against Barney. Mt. Rose, prior to any foreclosure sale, garnished funds Barney held in a bank, and attempted to execute upon Barney's personal property. Barney filed and won a motion to exempt his bank account from execution and to quash the garnishment. Mt. Rose sought supplemental attorney fees and costs ("*First Mt. Rose Motion*"); the court granted their request. Later, Mt. Rose filed a supplemental motion ("*Second Mt. Rose Motion*"), seeking fees for post-judgment matters, including the judgment's execution, the garnishment, and the release of Barney's bank funds. While this supplemental motion was before the court, Barney paid Mt. Rose an amount to satisfy the judgment and the attorney fees and costs awarded in the First Mt. Rose Motion; however, Mt. Rose refused to recognize the judgment as fully satisfied. Barney moved the district court for an order directing the clerk to enter satisfaction of the judgment. Mt. Rose opposed the motion, asserting it was willing to provide a partial satisfaction, but was entitled to additional awards of attorney fees (requested in the Second Mt. Rose Motion), and the court denied the motion. Just over three (3) weeks after denying Barney's motion, the court granted the Second Mt. Rose Motion for fees and costs. Barney appealed the post-judgment orders, arguing that the court was not authorized to award attorney fees incurred after the original judgment, and, even if authorized, the fees were unreasonable. Barney also argued the district court should have directed the clerk to enter the judgment's satisfaction. The court held that NRS 108.237(1) covers not only pre-judgment fees and costs, but also costs and fees that are incidental to the lien's enforcement. Since the enforcement action ends only when the property is sold and the proceeds are distributed (or otherwise paid) and the lien is discharged or released, costs and fees up to this point are properly awarded (so long as they are incidental to the lien's enforcement). Additionally, the court held that since Mt. Rose had a motion for attorney fees pending at the time Barney tendered payment for the judgment, Barney was only entitled to partial satisfaction of judgment, and affirmed the finding of the district court.

4. In ***ANSE, Inc., d/b/a Nevada State Plastering v. The Eighth Judicial District Court***, 124 Nev. Adv. Op. 74 (Sept. 25, 2008), the Nevada Supreme Court clarified whether their definition of a "new residence", as decided in *Westpark Owners' Ass'n v. District Court*, 167 P.3d 421 (Nev. 2007), precluded a homeowner who is not the home's first purchaser from seeking remedies available under NRS Chapter 40 for constructional defects. In *Westpark*, the Court interpreted "new residence" as a product of original construction that has been unoccupied as a dwelling from the completion its construction until its sale. In this case, approximately 700 of the residences at issue in the constructional defect case were occupied as dwellings before the residences' subsequent owners obtained title to the homes. Relying on *Westpark*, petitioners sought summary judgment as to their NRS Chapter 40 liability on claims related to those residences. The Court found that petitioner's expansion of "new residence" in *Westpark* as precluding a homeowner who is not the home's original purchaser from obtaining remedies available under NRS Chapter 40 violates that chapter's spirit, leads to unreasonable and absurd

results, and ignores *Westpark's* unique factual background. While rejecting petitioner's claim, the Court recognized it needed to better clarify the definition of "new residence". The Court indicated a "new residence" under NRS 40.615 is one that has remained unoccupied as a dwelling from the completion of its construction to the point of its first sale. Thereafter, subsequent owners of that residence, as claimants, may seek NRS Chapter 40's residential constructional defect remedies, so long as the action is instituted within the applicable statute of repose.

5. In ***M.C. Multi-Family Dev. v. Crestdale Assoc.***, 124 Nev. Adv. Op. No. 77 (Oct. 2, 2008), the Nevada Supreme Court concluded that a contractor's license is the personal property of the entity or individual named on the license. Therefore, it is subject to a claim of conversion if another entity or individual exercises "wrongful dominion" over the license. The qualifying employee of Walter Homes, Ltd. used Walter Homes' contractor's license to develop real property under a separate company, Crestdale Associates, Ltd., without the permission of the majority interest owners of Walter Homes. During trial, after the plaintiff's case in chief, the district court entered a directed verdict against the plaintiff's conversion claim. The district court found that Crestdale Associates had not "taken" the license. On appeal, the Nevada Supreme Court determined first that a contractor's license embodies the intangible rights of the entity or person named on the license, and it is therefore intangible personal property subject to a conversion claim under Nevada law. Second, the court concluded that a claimant for conversion of a contractor's license need not establish a physical "taking" of the license. "While the unauthorized use of a contractor's license does not involve an actual physical appropriation or 'taking' as the district court concluded, it nonetheless may constitute an act inconsistent with the rights of the titleholder. . . ." Accordingly, the court reversed the district court's directed verdict and remanded the case for a jury trial on the conversion claim.

6. In ***Terracon Consultants Western, Inc. v. Mandalay Resort Group***, 125 Nev. Adv. Op. No. 8 (Mar. 26, 2009), the Nevada Supreme Court established a new legal rule in Nevada that design professionals cannot be sued in tort for purely economic damages arising from errors or omissions in the design professional's services. This rule may also extend to defects in the work of commercial construction contractors.

In the case, Mandalay claimed it suffered damages because Terracon's geotechnical engineering services for the Mandalay Bay project were allegedly deficient. Specifically, Mandalay claimed that settlement of the soils under the foundation exceeded amounts predicted by Terracon and, as a result, Clark County required Mandalay to repair and reinforce the foundation before proceeding with construction. The United States District Court of Nevada, where the case was filed, certified to the Nevada Supreme Court the question of whether Nevada's economic loss doctrine precludes tort-based claims against engineers, architects, and other design professionals in construction defect cases involving commercial property. The federal court had already determined Mandalay's damages were purely economic, as opposed to damages for personal injury or property damage.

In its decision, the Nevada Supreme Court stated that "cutting off tort liability at the point where only economic loss is at stake without accompanying physical injury or property damage 'provides . . . incentives and disincentives to engage in economic activity or to make it safer.'" The court determined that the fact that the damages arising from Terracon's services were foreseeable did not impact its decision. Nevada courts have made exceptions to this rule for intentional acts and professional negligence claims against attorneys, accountants, real estate professionals, and insurance brokers. The court expressly refused to create a similar exception to allow tort claims for economic loss against design professionals. The court indicated that when the quality of either work provided by a construction contractor or services provided by a design professional is at issue, remedies are properly addressed through contract law – not tort law. In the opinion, the court specifically stated it was not addressing Nevada's Chapter 40 laws governing residential construction defects.

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New Hampshire

Case Law

1. In ***McNeal v. Lebel***, 157 N.H. 458, 953 A.2d 396 (2008) the New Hampshire Supreme Court held that held that homeowner's refusal to disburse funds to contractor amounted to anticipatory breach of contract and accordingly contractor's refusal to complete work in absence of assurance of future funding did not amount to breach of contract. The Court further held that dispute between contractor and homeowner involved routine contract and negligence issues and therefore did not present occasion for remedies under Consumer Protection Act which provides for attorneys fees and enhanced damages.

2. In ***Lassonde v. Stanton****,157* N.H. 582, 956 A.2d 332 (2008), The New Hampshire Supreme Court held that a contract clause which provided that contractor "reserves the right to file a [Mechanics Lien], plus collection costs, interest and attorney's fees" entitled contractor to recover its fees and costs since it was the prevailing party.

3. In ***Guyotte v. O'Neill****,* 157 N.H. 616, 958 A.2d 939 (2008), the New Hamsphire Supreme Court ruled that that lien waivers did not constitute a general release as extra-contractual work was not due and owing at time waivers were executed. Moreover, Court held that lien waivers were only effective at best in waiving ability to assert lien and did not amount to waiver of right to claim payment.

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New Jersey

Case Law:

1. In ***Dugan Construction Company, Inc. v. New Jersey Turnpike Authority****, 398 N.J. Super. 229, 941 A.2d 622 (N.J. Super. Ct. App. Div. 2008),* plaintiff contracted with the owner to excavate and remove contaminated soil, and to remove and/or remediate polluted groundwater. The invitation to bid required bidders to submit unit prices for a variety of scheduled items of work, including disposing of 55 gallons of non-hazardous wastewater, for which plaintiff bid $50 per gallon, and disposing of 2,200 gallons of hazardous wastewater, for which plaintiff bid $4 per gallon. Shortly after being awarded the contract, plaintiff obtained a subcontractor bid for the groundwater removal portion of the work, and the subcontractor's bid presented alternate methods of removing the non-hazardous wastewater under which either 42,840 or 255,680 gallons of groundwater would need to be removed, not the estimated 55 gallons stated in the bid documents. Ultimately, plaintiff disposed of approximately 200,000 gallons of non-hazardous wastewater, for which it paid its subcontractor $57,000. Even though the extra work cost plaintiff only $57,000, Plaintiff asserted a $9.5 million claim for this work and filed suit, based on the contractual unit price of $50 per gallon.

Noting the contract required bidders to review the bid documents and bring to the owner's attention any ambiguities or errors, the owner filed a motion for summary judgment arguing plaintiff was aware of the error in the estimated gallons of non-hazardous wastewater to be

removed, and failed to report the error in accordance with the contract. The owner's expert opined that plaintiff, knowing that removal of additional wastewater would be necessary, intentionally unbalanced its bid in an effort to obtain unreasonable profits, *i.e.*, bid a unit price of $50 per gallon for removing the wastewater whose volume it knew was underestimated, while bidding only $4 per gallon to remove hazardous wastewater. The trial court granted the owner's motion for summary judgment, finding the bid documents contained a patent ambiguity, and that plaintiff's failure to inquire about the estimated 55 gallons of non-hazardous precluded its claim.

On appeal, the Appellate Division affirmed the trial court's rejection of plaintiff's $9.5 million claim, but held the contract should be reformed. Because the work had been performed, the mistake in the bid documents warranted reformation of the contract, not rescission, the Appellate Division held, but plaintiff was permitted to recoup only the actual value of the work performed. The Appellate Division agreed with the trial court's findings that an error existed in the estimated quantities for non-hazardous wastewater, that plaintiff knew of the error and did not bring it to the owner's attention, and that plaintiff intentionally provided an unbalanced bid in order to increase its profits. Reformation was necessary to prevent an unconscionable contract, but the Appellate Division permitted plaintiff to recover a fair price for the work, *i.e.*, $52,300, the cost to plaintiff of the services furnished by plaintiff's subcontractor.

2. In ***CZAR, Inc. v. Heath****, 398 N.J. Super. 133, 939 A.2d 837 (App. Div. 2008),* the Appellate Division reversed the trial court's decision that plaintiff, a custom kitchen contractor, was not subject to suit under the New Jersey's Consumer Fraud Act's ("CFA") home improvement practice regulations, *i.e.*, N.J.A.C. 13:45A-16.1 to 16.2. During construction of a new home, the defendant homeowner hired a general contractor, but also contracted directly with plaintiff for the installation of custom kitchen cabinets, interior doors, a front door, and certain moldings. The trial concluded that the home improvement practice regulations were not applicable to plaintiff, because the work was part of the construction of a new residence, and, therefore, was not a "home improvement" as that term is defined in the regulation. Thus, the trial court dismissed the homeowner's counterclaim asserted under the Consumer Fraud Act.

Reversing the trial court, the Appellate Division held the plaintiff's services did fall within the definition of "home improvement," because the homeowner contracted directly with plaintiff for the custom kitchen work, and plaintiff did not construct the new home. As such, plaintiff was not a "new home builder" and was subject to the Consumer Fraud Act and the home improvement practice regulations.

3. In ***Eastern Concrete Materials, Inc. v. Tarragon Edgewater Associates, LLC***, 402 N.J. Super. 583, 955 A.2d 962 (App. Div. 2008), the Appellate Division rejected a material supplier's effort to assert a lien claim under the Construction Lien Law, N.J.S.A. 2A:44A:1 *et seq.* ("CLL"). Plaintiff admittedly supplied materials for the building's cast-in-place foundation and slabs to a sub-subcontractor, Nigo Construction Corp. ("Nigo"). Citing the plain meaning of the CLL, the Appellate Division noted the CLL's "three-tier rule," pursuant to which a supplier has lien rights only where it contracted with either the owner, general contractor, or a subcontractor. The Appellate Division rejected plaintiff's argument that Nigo should be considered a subcontractor, because the party with which Nigo contracted was actually an alter ego of the general contractor. Such arguments, the Appellate Division held, do not negate the relationships in the contractual chain, and, thus, plaintiff had no right to file a lien.

4. In ***New Jersey Shore Builders Association v. Township of Jackson****,* 401 N.J. Super. 152, 949 A.2d 312 (App. Div. 2008), *certif. granted*, 2008 N.J. LEXIS 1725 (N.J., November 12, 2008), the Appellate Division considered the consolidated appeals of two builders associations, who challenged local ordinances amending the building codes in two municipalities. The challenged local ordinances required developers, as a condition for development approvals, to set aside land to be used as common open space or recreational areas or, in the alternative, to pay an assessment in lieu of the set-aside. In the trial court decision concerning one of the ordinances, the court held that the municipality's authority to condition the issuance of approvals

in this way was limited to "planned developments" as defined in the New Jersey Municipal Land Use Law, N.J.S.A. 40:55D-1, et seq. ("MLUL"). In the other trial court decision, the court found the municipality's exactions were justified in other than "planned developments."

The Appellate Division found both ordinances to be invalid, finding a municipality cannot restrict development, or impose conditions on development, unless expressly permitted by the MLUL. The municipalities lacked authority to adopt the ordinances at issue, because the MLUL limits to "planned developments" a local government's right to require a developer to set aside open space, and the right to require contributions in lieu of such set asides is limited certain off-site improvements enumerated in the MLUL. The New Jersey Supreme Court has granted certification, and will apparently consider these issues in 2009.

5. In ***D.A. Nolt, Inc. v. Camden County Coll.***, 2008 WL 2277095 (N.J. Super. Ct. App. Div. June 5, 2008), the plaintiff contractor sued the owner seeking a declaratory judgment and damages, asserting breach of contract respecting its right to self-perform certain masonry work. Bidding and award of the contract were governed by the New Jersey County College Contracts Law ("CCCL"), N.J.S.A. 18A:64A-25.25, which requires all bid submissions to include names of all subcontractors to whom the bidder will subcontract work. In its bid, the contractor represented the masonry work would be performed by a particular subcontractor, Palmer, for $428,000. After the contract was awarded and signed, however, plaintiff informed the owner it intended to self-perform the masonry work, instead of using Palmer. The owner refused to permit plaintiff to substitute itself for Palmer, and plaintiff contracted with Palmer under protest. Plaintiff then filed suit, claiming it could have made an additional profit of $150,000, had it been permitted to self-perform the masonry work. The trial court granted summary judgment in favor of the owner, and dismissed the complaint. On appeal, the trial court's ruling was affirmed. The Appellate Division agreed with the trial court's finding that, under the circumstances, self-performance was equivalent to substituting another subcontractor for Palmer, which would be prohibited by the CCCL. If self performance was permitted after the contractor named a subcontractor in its bid, the court noted, such self-performance would thwart CCCL's aim of fostering competitive bids and preventing bid shopping.

6. In ***Atlantic City Associates LLC v. Carter & Burgess Consultants, Inc.*** 2008 U.S. Dist. LEXIS 93684 (D.N.J. Nov. 13, 2008), the court addressed the seemingly conflicting provisions in an owner/architect contract that simultaneously: a) called for a mutual waiver of consequential damages; and b) required the architect to indemnify the owner against <u>all</u> damages caused by the architect's errors and omissions. The plaintiff owner alleged the architect's negligence delayed the project, resulting in significant damages, some of which were consequential.

On cross-motions for summary judgment, the architect argued its liability to the owner was limited by the contractual waiver of consequential damages, and also as a consequence of a damages cap contained in the architect's proposal, which stated the owner's damages in any claim against the architect were capped at the amount of compensation paid by the owner to the architect. The owner/architect contract incorporated the architect's proposal by reference, but only to the extent the terms of the proposal did not conflict with the terms of the contract. The architect also argued the indemnification provision should be construed to apply only to claims of third parties, and not to the owner's first party claims against the architect. The owner argued against any such limitations on its right to recovery, citing the indemnification provision, which was contained in the contract's "modifications" section, and which required the architect to indemnify the owner for "any and all" damages resulting from the architect's negligent acts, errors or omissions. The owner argued the proposal's damages cap was inconsistent with the indemnification provision, and, thus, should not be deemed incorporated into the contract, and that the indemnification provision and waiver of consequential damages should be harmonized so as to allow the owner to recover all damages caused by the architect's errors and omissions, while precluding consequential damages caused by all other types of breaches by the architect.

The Court concluded the waiver of consequential damages was enforceable, and rejected the argument that the indemnification provision applied only to third-party claims. Thus, the architect was required to indemnify the owner for all direct damages caused by the architect's negligence. The court also held the cap on damages contained in the architect's proposal conflicted with the contract's indemnification provision. Thus, given the contract's requirement that the proposal was incorporated only to the extent it did not conflict with the contract, the court found the indemnification provision controlled, and the architect's liability was not capped at the amount of compensation received by the architect

7. In ***Atlantic City Associates LLC v. Carter & Burgess Consultants, Inc.***, 2008 U.S. Dist. LEXIS 25144 (D.N.J. Mar. 27, 2008), a general contractor set off potential claims against its roofing subcontractor on a private project against amounts it owed to the same subcontractor on a public project. On both projects, the subcontracts contained a setoff provision, which permitted the contractor to "set off against any money due [the subcontractor] under this Subcontract any claim or claims against [the subcontractor], whether arising under this Subcontract, or any other Subcontract or Subcontracts between the parties[.]". The contractor was paid in full for the public project, but withheld $184,649.55 from the subcontractor, claiming it was entitled to withhold payment under the setoff provisions, because the subcontractor had allegedly breached the subcontract pertaining to the private project. The subcontractor challenged the setoff, arguing it violated New Jersey's Public Works Bond Act, N.J.S.A. 2A:44-143 to 147 ("Bond Act") and Trust Fund Act, N.J.S.A. 2A:44-148, and moved for summary judgment on its claims that the contractor violated both Acts. On the subcontractor's motion for summary judgment, the court concluded the set off was improper, because the setoff provision was insufficient to rise to the level of a waiver of the subcontractor's rights under the Acts. Pursuant to the Trust Fund Act, payments to a contractor on a public project are deemed a trust fund for subcontractors and suppliers, and the court noted such a trust is created to prevent the contractor from diverting funds for purposes unrelated to the public project. Given the lack of express reference in the subcontract to the fact that the subcontractor was waiving its rights under either Act, the court concluded that "clear and unmistakable" evidence was lacking to justify a finding of a waiver, and granted the subcontractor's claim for the amount withheld.

8. In ***Titan Stone, Tile & Masonry, Inc. v. Hunt Constr. Group, Inc.***, 2008 WL 2038857 (D.N.J. May 12, 2008), the defendant contractor sought reconsideration of the court's finding, made at the conclusion of a bench trial, that the plaintiff subcontractor, but not the subcontractor's surety, was contractually obligated to pay the contractor's attorneys fees. The court noted a surety can be held liable only in accordance with the strict terms of its undertaking, and found that the performance bond in this case did not specifically provide for reimbursement of counsel fees. The court rejected the contractor's argument that the obligation of the surety under the performance bond should be coextensive with those of the subcontractor under the subcontract. The purpose of a performance bond, the court noted, is to provide the contractor with the funds necessary to complete the project upon the default of the subcontractor, not to make the contractor whole. Thus, the court declined to reconsider its prior ruling that the award of counsel fees did not obligate the surety.

Legislation:

1. **N.J.S.A. 2A:32C-1, *et seq*., New Jersey False Claims Act.** The New Jersey False Claims Act ("NJFCA") went into effect on March 13, 2008. The NJFCA permits the Attorney General and/or private citizen whistleblowers to bring suit on behalf of any agency or independent authority of the State against any contractor, grantee or other recipient of state funds to recover monies paid in connection with false or fraudulent claims. The NJFCA is the New Jersey State analog to the Federal Civil False Claims Act.

The NJFCA provides for an award of damages in the amount of three-times the cost of any losses the public entity would have sustained because of the false claim, plus civil penalties, between $5,000 and $10,000 for each verified count of a false claim. Any person is liable if he or

she submits or causes the submission of claims to the State for government funds or property knowing those claims are false or fraudulent, or for acting with reckless disregard or deliberate ignorance of the truth or falsity of such claims. "Innocent mistakes" and "mere negligence" are expressly defenses to a claim.

Under the NJFCA's *qui tam* provisions, a whistleblower's suit must initially be filed under seal, to allow the Attorney General to determine whether to intervene. The whistleblower's share of a successful claim is 15-25% (the court determines the exact percentage) if the Attorney General intervenes, and 25-30% if the whistleblower prevails alone. A whistleblower's attorney's fees are recoverable in a successful claim, as are a defendant's if the court finds the claim was frivolous.

2. **P.L. 2008, Chapter 39 (Funding For School Facilities Projects).** This act authorizes $3.9 billion in additional funding for the New Jersey Schools Development Authority (SDA), an independent State authority that administers school construction projects. The act allocates $2.9 billion for projects in 31 special-needs districts, which are now known as SDA Districts, and were formerly known as *Abbott* districts. The SDA manages and funds 100 percent of eligible project costs in the former *Abbott* districts. The legislation also allocates $1 billion to leverage construction in New Jersey's Regular Operating Districts (RODs) through SDA-administered grants to RODs.

3. **N.J.S.A. 40:55D-136.1, et seq., "Permit Extension Act of 2008."** Considering the number of projects delayed due to the economic downturn, the Permit Extension Act extends a wide variety of development-related State and local permits and approvals that have been issued. Essentially, all State, county, regional and municipal permits and approvals are extended (but not federal permits), unless excluded by language in the act. The PEA provides that permits that lapsed on or after January 1, 2007 are extended through at least July 1, 2010, with the possibility of an additional six-month phase in period thereafter.

4. **P.L. 2008, Chapter 46 (Revisions To Affordable Housing Laws).** This wide-ranging act amended various laws relating to New Jersey's requirement that all towns build affordable housing. Most notably, the act bans in all but limited circumstances the longstanding practice of utilizing regional contribution agreements ("RCAs") to allow the wealthiest suburban towns to satisfy their affordable housing obligation by paying poorer urban areas to build their affordable housing units for them. This act disallows RCAs as a means to acquire credits toward municipal fair share housing obligations. Another notable, and controversial, provision of the act requires developers to pay a fee in an amount equal to 2.5% of the equalized assessed value of all new non-residential development projects, with such funds being used to assist in funding affordable housing. With the economic downturn, however, the fee has generated very little affordable housing funding, and is now viewed as a drag on development that has contributed to New Jersey's economic problems. Governor Corzine called for a moratorium on fee payments, and, on January 26, 2009, a Committee of the New Jersey Senate approved an 18-month temporary moratorium on payments of such fees made by commercial and industrial developers to municipalities.

5. **New Jersey Law Revision Commission, Tentative Report Relating To Construction Lien Law.** The New Jersey Law Revision Commission ("NJLRC"), a non-partisan panel of attorneys, scholars and former judges that identifies areas of the State's law that require revision, issued a Tentative Report in which NJLRC proposes a variety of revisions to the Construction Lien Law, N.J.S.A. 2A:44A-1, *et seq*. ("CLL"). The revisions are necessary, according to NJLRC, due to confusion and litigation concerning the meaning and application of some of the CLL's key concepts, *e.g.*, the lien fund, the lien claim itself, and the definition, or lack thereof, of "residential construction."

The proposed revisions aim to address a variety of concerns regarding the CLL by: a) clarifying and adding defined terms, especially pertaining to the meaning of "residential"; b)

clarifying provisions for the filing and amending of the lien claim and for the calculation, distribution and enforcement of the lien fund; c) creating a summary proceeding for discharging a satisfied lien claim; d) adopting case law interpretations of the concepts contract price, lien fund, and lien claim; e) further defining the arbitrator's role in residential lien claims; and f) modifying and adding to the time limits for filing and perfecting residential lien claims. A new lien claim form is also proposed, which is designed to be easier for contractors to understand, more relevant to industry practice, and more useful for its intended purpose.

Action by the Legislature is expected in 2009. NJLRC's Tentative Report is available online at *http://lawrev.state.nj.us/constrlienlaw/cllTR122208.pdf.*

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New Mexico

Case Law:

1. ***Tafoya v. Rael,*** *2008-NMSC-57; 193 P.3d 551*

This case concerned a general contractor's obligation when subcontracting work to an unlicensed subcontractor to ensure that the unlicensed subcontractor performs the work in a safe manner.

The contractor, Thomas Tafoya dba Chuby's Construction, was hired by his sister-in-law to renovate a portion of her residence. As part of the renovation, the building permit required that the renovated premises be tied into the main sewer line located adjacent to the property. The contractor hired Phillip Tafoya, Jr., possibly related, an unlicensed contractor, to perform the trenching and sewer line tie-in, work for which a license was required. In performing the excavation work, Phillip Tafoya, Jr. violated various OSHA regulations, including failing to provide the requisite slope for the excavation, failing to brace the sides of the trench and failing to put the spoils at least two feet away from the trench. The trench collapsed burying Phillip Tafoya and causing his death by asphyxiation.

The Court held that the public policy behind the New Mexico Construction Industries Licensing Act was better protected by imposing on general contractors an affirmative duty not to hire unlicensed contractors and to make the general contractor liable to both the independent contractor and to any injured parties for the negligent hiring of an unlicensed contractor.

2. ***Reule Sun Corporation v. Valles,*** *2008-NMCA-115; 191 P.3d 1197*

This case concerned the distinction between independent contractors and employees and whether a contractor could recover for work performed by an unlicensed independent contractor.

The contractor, Reule Sun Corporation, a duly licensed general contractor, contracted to stucco and to perform related repair work on a residence owned by the Defendant. Reule Sun employed Perez and his crew to perform the work on the Defendant's residence. When the Defendant refused to pay as a result of defects in the work, Reule Sun commenced suit to collect the balance of the contract. Defendant, shortly before trial, realized that Perez was not licensed and alleged that Reule Sun could not bring a lawsuit for collection of amounts due for work performed by its unlicensed subcontractor pursuant to the New Mexico Construction Industries Licensing Act.

The Court noted that in construction cases the principal test to determine whether one is an employee is whether the employer has control over the manner in which the details of the work are accomplished. The Court also reiterated an eight factor test derived from the Restatement (Second) of Agency to determine whether an individual was an employee or an independent contractor. In this case, Reule Sun entered into a work order agreement with Perez that identified the work to be performed. Reule Sun also generally supervised the application of the stucco by having one of its employees visit the site at various occasions. While Perez maintained his own business as Perez Plastering and had his own tax id number, he did not advertise, did not have a business listing and performed no work other than for Reule Sun. Reule Sun also supplied Perez with all of the major equipment and materials for the work to be performed, including Reule Sun uniforms. Reule Sun additionally provided worker's compensation, general liability and completed operations insurance coverage for Perez. Perez was also paid on a piece basis rather then hourly.

Given the evidence both in favor of Perez being an employee and in favor of his being an independent contractor, the Court found that there was substantial evidence upon which the trial court could have based a finding that Perez was an employee, rather then an independent contractor. The Court specifically refused to address the further question as to whether a general contractor could sue to recover for work performed by an unlicensed contractor as in this instance, it held that Perez was an employee not required to be separately licensed.

3. ***J.R. Hale Contracting Co., Inc. v. Union Pacific Railroad,*** *2008-NMCA-37.*

In an unusually lengthy opinion, the New Mexico Court of Appeals considered the effect of release where the parties had previously acknowledged that additional work was being performed. The Court of Appeals decision also contains the first, and probably only, interpretation of the New Mexico Retainage Act, since repealed in part.

This case involved a dispute between the dirt work subcontractor and the contractor and owner over additional materials allegedly provided by the subcontractor. Union Pacific requested unit price bids for the placement and compaction of railroad ballast based on estimated square yard quantities at specified depths, i.e., 9,000 s.y. of 12" ballast. J.R. Hale Contracting bid and was awarded the contract for the placement of the sub-ballast, but made an error in calculating their bid in translating the tonnage of sub-ballast material necessary for the project from tons to square yards.

Within weeks of commencing work on the project, J.R. Hale Contracting notified the contractor of oversaturated subsurface conditions. Union Pacific hired a geotechnical engineer to evaluate the soil conditions, and the geotechnical report came back with a recommendation that the contractor place two feet of ballast material to bridge the oversaturated soils. The general contractor notified J.R. Hale Contracting to proceed with placing the ballast material as required by the geotechnical report and to "keep the delivery tickets for the ballast material placed at the site for billing purposes." J.R. Hale Contracting proceeded to perform the work, including the placement of the ballast material, over the course of the next several months.

On December 27, 2002, J.R. Hale submitted its payment application for December, which identified the placement of all ballast material as nearly 100% complete. On January 28, 2003, J.R. Hale Contracting notified the general contractor of its claim for additional ballast material. Subsequently, on February 4, 2003, the general contractor presented, and J.R. Hale Contracting executed, a release releasing all claims for work performed prior to December 20, 2002, the cut off date for the December 27, 2002 payment application. The release was accompanied by a check in the amount of the December payment application, less retainage at ten percent. Subsequent to the February 4, 2003 release, the parties executed a separate change order to memorialize miscellaneous additional time and materials work performed by J.R. Hale Contracting prior to December 27, 2002, but not including the placement of the ballast material. The general contractor thereafter refused to pay for the placement of the ballast material based

upon the February 4, 2003 release, and a lien was filed upon the property by J.R. Hale Contracting.

Prior to trial, Union Pacific and the general contractor sought summary judgment, which was granted, on the basis that the February 4, 2003 release was effective to disclaim all claims of J.R. Hale Contracting, with the exception of the payment of outstanding retained funds. J.R. Hale appealed the granting of summary judgment on the basis that the release was only as to the liquidated December payment application and was ineffective as to the unliquidated ballast material claim; the release was not supported by consideration as it constituted payment only of undisputed amounts; the parties did not intend the release to be effective as to the ballast claims; and the parties' prior conduct reflected an intent to pay for the ballast material. J.R. Hale Contracting also appealed the judgment as to Union Pacific, on the basis that Union Pacific had not acted in reliance on the release since the general contractor had billed and released Union Pacific for the ballast material a month prior to J.R. Hale submitting its December payment application.

The Court of Appeals found that, although the release was not necessarily on its face ambiguous and J.R. Hale Contracting had not claimed that the release was specifically ambiguous, J.R. Hale Contracting's arguments with respect to the parties' intent in entering into the release and the parties' course of conduct generally as to the release combined to show a lack of clarity as to the coverage of the release. Accordingly, J.R. Hale Contracting was entitled to a trial as to its interpretation of the release.

The Court of Appeals also for the first, and probably last, time addressed recovery under the now partially repealed Retainage Act. The issue before the Court was whether a contractor, when withholding retainage, was required to deposit the retained funds into an escrow account, or whether that requirement and the remedy of an interest penalty applied only to project owners. The Court of Appeals held that, as the Retainage Act generally forbade the withholding of retainage on any construction contract without the use of an escrow account, the interest penalty must apply to contractors as well.

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North Carolina

Case Law:

1. ***Blaylock Grading Co., LLP v. Smith***, 658 S.E.2d 680 (N.C.App. 2008). In *Blaylock*, the North Carolina Court of Appeals held that a land surveyor's limitation of liability clause in its services contract with a contractor was not rendered unenforceable by North Carolina's construction anti-indemnity statute (N.C.G.S. § 22B-1). The contract's risk allocation clause stated that the surveyor's liability to the contractor was limited to no more than $50,000. A trial court had found the clause to be an attempt to indemnify the surveyor for its own negligence. Such indemnification is unenforceable. The Court of Appeals reversed and held that a contract clause limiting one's liability to another party to the contract was not an indemnity agreement. Therefore, the anti-indemnity statute did not apply. The court further stated that the parties' contractual freedom to allocate risk and limit their respective liability to one another was not restricted by this statute.

2. ***Carolina Building Services' Windows & Doors, Inc. v. Boardwalk, LLC***, 658 S.E.2d 924 (N.C. 2008). In this case, the North Carolina Supreme Court held that a subcontractor's lien on an owner's improved real property was not extinguished by a default judgment entered in favor of the owner against the general contractor. Although the

subcontractor's lien on the real property was through subrogation to the general contractor's lien, the general contractor's default on the owner's claim against it arising on the same project was not a bar to the subcontractor's claim. The lien statute (N.C.G.S. § 44A-23) provides that following a subcontractor's commencement of its lien enforcement action, "no action by the contractor shall be effective to prejudice the rights of the subcontractor." The Court held that the general contractor's choice not to defend against the owner's claims was an "action" that would otherwise prejudice the subcontractor's lien rights.

3. ***Schenkel & Shultz, Inc. v. Hermon F. Fox & Associates, P.C.***, 658 S.E.2d 918 (N.C. 2008). The North Carolina Supreme Court held that a contractual flow-down provision in a consulting contract (AIA Doc. C141 (1987)) between an architect and a structural engineer was ambiguous with regard to whether the engineer was contractually obligated to indemnify the architect. The consulting contract did not contain an express indemnity agreement. The prime contract between the owner and the architect did, however, contain an indemnity agreement requiring the architect to indemnify the owner. The consulting contract required the engineer to perform its services "in the same manner and to the same extent" that the architect was bound in its contract with the project owner. The Court held that this flow-down provision was ambiguous. One interpretation was that it merely required the engineer to perform its engineering services in the same manner as the architect performed its services to the owner. The interpretation put forth by the architect was that this typical flow-down provision imposed on the engineer all of the duties and obligations the architect owed to the owner – and one such obligation was the obligation to indemnify. The architect argued that the engineer was contractually required to indemnify the architect in the same manner and to the same extent that the architect was required to indemnify the owner. The Court reversed the trial court's order of summary judgment in favor of the engineer and remanded the case.

Legislation

Senate Bill 1245 (ratified as Session Law 2007-365; N.C.G.S. § 143-134.1) An Act Amending the Laws Related to Retainage Payments on Public Construction Contracts.

This 2007 legislation regulates retainage on public projects. Highlights:

- Applies to contracts entered into on or after January 1, 2008
- Limits retainage to no more than 5%
- At 50% project completion, no additional retainage can be withheld (subject to limited exceptions)
- Owner may withhold additional retainage from later pay applications after the project is more than 50% complete, but not to exceed 5%, to allow owner to retain 2.5% total retainage through completion of the project
- Limits GC's withholding of retainage from subcontractors to same percentage withheld by owner
- Interest due on wrongfully held retainage is 1% per month
- Line item release of all retainage for certain trades who are 100% complete by or before 50% project completion

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Oklahoma

Case Law:

1. In ***Consolidated Grain & Barge Co. v. Structural Systems****, Inc.*, 2009 OK 14, __ P.3d __ (2009), the Oklahoma Supreme Court held that Oklahoma's statute of limitations "borrowing" statute does not apply to Oklahoma's 10-year statute of repose for construction torts (12 Okla. Stat. §109). Unlike most states, Oklahoma's "borrowing" statute (*id*. §105) adopts the *longer* limitation period between Oklahoma's statute and the statute of the foreign state where the claim arose. The underlying case arose in Arkansas after a building caught fire. The owner's insurer brought a subrogation action for negligence against the constructor. The insurer initially sued in Arkansas, but dismissed without prejudice after the constructor moved to dismiss because of Arkansas's 5-year statute of repose. The suit was then re-filed in Oklahoma. The Oklahoma Supreme Court noted that a statute of repose is "substantive" law because it extinguishes a cause of action, while a statute of limitations is "procedural" because is bars the right to bring an otherwise valid claim. Reviewing the legislative history of the "borrowing" statute, the Court concluded that it applies only to statutes of limitations as a procedural matter. Accordingly, the Court determined that the Arkansas 5-year statute of repose, not Oklahoma's 10-year statute, applied under ordinary choice of law analysis, which barred the insurer's claim in Oklahoma courts as well.

2. In ***Hirsch Holdings, LLC v. Hannagan-Tobey, LLC***, 2008 OK CIV APP 79, __ P.3d __ (2008), the Court of Civil Appeals held that arbitration provisions are contract-specific and, therefore, when multiple contracts exist between the parties, arbitration agreements are only enforceable as to transactions resulting from the contract containing an arbitration clause. The case before the Court involved two agreements, a purchasing agreement with a litigation clause and a related patent licensing agreement with an arbitration clause. The plaintiff sued in court alleging a breach of the purchasing agreement and related torts. The trial court granted the defendants' motion to compel arbitration based on the interrelatedness of the purchasing agreement to the patent (arbitration) agreement. On appeal, the Court of Civil Appeals noted that "courts will not impose arbitration upon parties where they have not agreed to do so." The Court rejected a line of cases from other jurisdictions requiring arbitration where multiple contracts existed as to the same transaction when those contracts differed on requiring arbitration. As a result, the Court reversed the trial court's decision to compel arbitration.

Legislation:

1. **S.B. 573, Release of Retainage Bonds:** This legislation would allow contractors and subcontractors on public projects to post a retainage bond of 10% of the contract amount in lieu of withholding retainage during the project. As of this writing, this measure has passed the Senate and is in committee with the House. (Prediction is likely passage and signing by the Governor.)

2. **S.B. 1012, Private Construction Prompt Payment Act:** This legislation would impose prompt payment requirements (within 21 days to general contractors followed by 7 days to subcontractors) on private projects, except certain residential projects, with a right to terminate a contract, if violated. As of this writing, this measure has passed the Senate and is in committee with the House. (Prediction is likely passage and signing by the Governor.)

3. **H.B. 1603, "Tort Reform" Act:** As relevant to the construction industry, this bill would require an expert affidavit of merit within 60 days of filing any tort claim that requires an expert opinion, which would presumably include malpractice claims against design professionals and, in some cases, constructors. As of this writing, this measure has passed the House and is

in committee with the Senate. (Prediction is certain passage, Governor will veto and override will fail.)

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Pennsylvania

Case Law:

1. In ***James Corp. v. North Allegheny School Dist.***, 938 A.2d 474 (Pa. Commw. Ct. 2008), the Pennsylvania Commonwealth Court addressed several significant issues of Pennsylvania construction law. First, *James* is the first Pennsylvania case approving the use of the "measured mile" as a reasonable measure of damages. Second, the court confirmed that strict compliance with contractual notice provisions on a public project was not required when the owner has actual knowledge of the claims and suffers no prejudice. Third, the court re-affirmed other Pennsylvania precedents invalidating "no damages for delay" clauses when the owner actively interferes with the contractor's work or fails to act in some essential manner. Fourth, the court upheld the trial court's factual determination that the defendant/school district acted in bad faith by refusing to pay for approved change orders and by arbitrarily inflating the value of punch list work by 50%, such that the plaintiff/contractor was entitled to an award of attorney fees under the prompt payment provisions of the Commonwealth Procurement Code. Fifth, and even though affirming the finding of bad faith, the court reversed the trial court's award of expert witness fees, finding that such fees were incurred only with regard to the calculation of acceleration damages, and not necessarily in seeking to recover payment from the school district.

2. In ***Stivason v. Timberline Post and Beam Structures Co.*****,** 947 A.2d 1279 (Pa. Super. Ct. 2008), the Pennsylvania Superior Court held that a forum selection clause in a general contract was enforceable despite language in Section 514 of the Contractor and Subcontractor Payment Act stating that "[m]aking a contract subject to the laws of another state or requiring that any litigation, arbitration or other dispute resolution process on the contract occur in another state, shall be unenforceable." 73 P.S. § 514. The plaintiff/owner brought suit against the general contractor for breach of warranty and unfair trade practices in Pennsylvania state court despite a forum selection clause in the general contract which required that any lawsuit filed under the contract had to be venued in Ohio. The trial court dismissed the action without prejudice to file in Ohio, and the plaintiff/owner appealed. The appellate court acknowledged that Section 514 of the Payment Act appeared to invalidate foreign forum selection clauses. Reading Section 514 in the context of the Payment Act as a whole, however, the Superior Court found that Section 514 would apply only to invalidate a foreign forum selection clause in a suit for non-payment under the Act. The court concluded that because the action did not involve a claim for non-payment, Section 514 did not apply, and the dismissal was affirmed.

3. In ***Dept. of Gen'l Svcs. v. Pittsburgh Building Co.***, 920 A.2d 973 (Pa. Commw. Ct. 2007), the Pennsylvania Commonwealth Court reversed the Pennsylvania Board of Claims order denying penalty interest and attorney fees under Section 3935 of the Commonwealth Procurement Code, and remanded for a proper determination of penalty interest and attorney fees. Following two earlier precedents construing Section 3935 of the Code that allowed contractors to recovery penalty interest equal to 1% per month and reasonable attorney fees, the Commonwealth Court found that the defendant/Dept. of General Services engaged in "vexatious" conduct. As a result, the court found that the plaintiff/contractor was entitled to an award of penalty interest and attorney fees for several reasons, including the fact that the Department was aware of unsuitable soil conditions before letting the contract, but directed the plaintiff/contractor to work through the conditions without payment. The court also noted that the prompt pay remedies of Section 3935 were not limited to untimely progress payments.

Legislation:

1. **Mechanics' Lien Law, 49 P.S. § 1101, *et seq.*** – Act 52 of 2006, enacted several significant changes to Pennsylvania's Mechanics' Lien Law, effective as of January 1, 2007. First, the Act expanded the scope of lien rights to second tier subcontractors and even second tier suppliers who have a direct contract with a first tier subcontractor. Second, the Act extended the time for filing a lien to six (6) months from completing work. Third, the Act eliminated the requirement for subcontractors to serve preliminary notice of intent to lien even before work was complete on "alteration and repair" projects. Fourth, and perhaps most significantly, the Act limited the circumstances in which lien rights could be waived. Prior to the effective date of Act 52, an owner and general contractor could effectively waive the lien rights of all subcontractors and suppliers by filing a "no-lien" agreement with the prothonotary before the commencement of work. The filing of the no-lien agreement was considered constructive notice to all parties. With regard to residential projects of less than $1 million, this practice is still valid. With regard to larger residential projects and all other private jobs, however, the amendments included in Act 52 render no-lien agreements invalid and unenforceable unless the general contractor has posted a labor and material payment bond.

2. **Underground Utility Line Protection Law, 73 P.S. § 176, *et seq*.** – Act 181 of 2006, effective on March 29, 2007, amended what is commonly referred to as Pennsylvania's "One Call Act." First, Act 181 now imposes duties on a "project owner." Any project owner who will engage in excavation or demolition is required to use "sufficient quality levels of subsurface utility engineering" to locate underground lines on complex projects estimated to cost $400,000 or more. "Subsurface Utility Engineering" is defined to be those techniques set forth in the American Society of Civil Engineers standard CI/ASCE 39-02. Second, fines for violation of the Act were increased to as much as $50,000. Third, the Act now requires "best efforts" to comply with the Common Ground Alliance Best Practices.

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RHODE ISLAND

Case Law:

1. In ***Alpha Omega Construction, Inc. v. The Proprietors of Swan Point Cemetery***, 2008 WL 5264360 (R.I. 2008), a late 2008 decision, the Rhode Island Supreme Court clarified the process of challenging a mechanics' lien under a "show cause" hearing prescribed by the two year old R.I. G.L. 34-28-17.1. The Supreme Court implicitly endorsed the method employed by the general contractor lien-opponent in *Alpha Omega* in bringing a "show cause" challenge against its sub-subcontractor's mechanics' lien: file a new Verified Complaint and demand an evidentiary hearing forthwith. In the underlying Superior Court case, the trial justice ruled after the "show cause" evidentiary hearing that the mechanics' lien filed by the sub-subcontractor was void because: (1) a provision in the general contractor / subcontractor agreement prohibited the subcontracting of any work without prior general contractor approval, and (2) a lack of evidence demonstrating that the sub-subcontractor actually performed any work on the subject project. The Supreme Court affirmed the Superior Court's decision in favor of the general contractor and the dismissal of the lien.

Further, in dicta, the Supreme Court reinforced that under the Rhode Island mechanics' lien law, a subcontractor need not be in privity with the owner to assert a mechanics' lien, and that payment from the owner to the general contractor is not a bar to a subcontractor's ability to assert a mechanics' lien.

Finally, it should be noted that the general contractor was able to obtain an award for its attorneys fees in the underlying action, pursuant to R.I. G.L. § 34-28-19.

2. In ***Thomas Lonardo & Associates, Inc. v. Rhode Island Construction Services, Inc.***, No. 07-1025 (R.I. Super. 2008) (Lanphear, J.) a late 2008 Superior Court interlocutory decision, Rhode Island precedent gained another opinion addressing its mechanics' lien statute. In *Lonardo*, the court applied Superior Court Rule of Civil Procedure 60 and R.I. G.L. § 34-28-16 to excuse a mortgage-holder from the requirement to timely file an entry of appearance and statement of claim in an action filed by a lienor to enforce its lien against the mortgaged property. The assignee did not immediately have notice of the subject lien thanks to the assignor's neglect, and only discovered it later through a title search.

Because the time requirements controlling a mechanics' lien action in Rhode Island are short and strict, the mortgage-holder was already out of time at the moment that it detected the lien, and would have had its mortgage subordinated behind that of the subject mechanics' lien were it not for the court's discretion. *See* R.I. G.L. § 34-28-26.

The *Lonardo* court held that "any neglect of [the mortgage-holder] was excusable," and that it "acted with care and vigilance." Conversely, the court held that the plaintiff-lienor always knew that the mortgage existed against the subject property, and that it was merely trying to gain a "tactical advantage by rushing to the court." As a result, the motion of the mortgage holder to file its answer and statement of claim out of time was granted.

3. In dual interlocutory decisions from ***Stock Building Supply, Inv. v. Freedom Bay Cottages, LLC***, No. 2006-0495, (R.I. 2008) announced on the same day (March 28, 2008), the Superior Court addressed several aspects of the Rhode Island mechanics' lien law. Most notable is that for the first time a court interpreted the language from R.I. G.L. § 34-28-34(b) defining "mortgage" as "construction mortgages . . . given to secure the payment of a sum certain which is to be advanced at stated times or intervals." The *Stock Building* court held that even though a mortgage against a liened property is not styled or structured as a "construction mortgage," it can still be subordinated if its holder does not comply with the time standards articulated in § 34-28-16, which requires the entry of an appearance and statement of claim in a lien action against the mortgaged property. Further, the *Stock Building* court also held that a Motion to Intervene filed by a mortgage-holder is insufficient to constitute the filing of an entrance of appearance and assertion of a claim under R.I. G.L. 34-28-16, and therefore fails to maintain the priority of the mortgage.

Finally, the *Stock Building* court also addressed the recently-conceived theory of "piggybacking" under the mechanics' lien law, meaning that a party with a lien on land that is also liened by others could maintain the enforcement of its lien if it simply entered an appearance and asserted a claim in another action enforcing a lien against the same land, in compliance with R.I. G.L. § 34-28-16, without actually filing its own complaint to enforce its lien. The *Stock Building* court deemed the "piggybacking" technique as "fictional" and ineffective in avoiding the clear requirement of R.I. G.L. § 34-28-10 that each lienholder must file a notice of lis pendens and complaint to enforce its own lien. Therefore, in *Stock Building*, each lienor who attempted to adopt the "piggybacking" technique had its lien wholly voided.

4. In *WM* ***Hotel Group, LLC v. Pride Construction, Inc.***, 2008 WL 914372 (2008) (Ragosta, J), the Superior Court cited heavily to *Employer Mutual v. Pires*, 723 A.2d 295 (R.I. 1999) in denying a general liability insurer's motion for summary judgment. The plaintiff in *WM*, a hotel owner, succeeded in arguing that damage to the hotel building during the removal and replacement of defective bath tubs, such as to the walls and tilework, is not excluded under the "your work" / "your product" / "impaired property" policy exclusion. Those areas were not within the insured subcontractor's scope of work.

The *WM* court held that where a plumbing subcontractor installed bathtubs in a hotel, and where the hotel incurred various forms of damages because of those tubs' failures, the subject CGL policy did not exclude the categories of damage incurred by the hotel's building that were outside of the immediate work area of the tub subcontractor. Therefore, the Court denied the insurer's summary judgment motion. The Court held that damaged property other than what the subcontractor directly performed work on, but was nevertheless damaged by the tubs' failures, could not be excluded from the general liability policy's coverage.

5. In ***A.F. Lusi Construction Company, Inc. v. Rhode Island Department of Administration*****,** No. 07-1025 (R.I. Super. 2008) (Lanphear, J.), the plaintiff challenged state Emergency Procurement Regulation 8.11.2 as being invalid. With 8.11.2 invalid, contracts that would have been awarded under that regulation are now awarded on a competitive seal basis. Regulation 8.11.2 set forth eight "criteria" for the purchasing agent to use in determining which method of construction management is to be used for a particular project. The *A.F. Lusi* court held that 8.11.2 was in violation of R.I. G.L. 37-2-39, which directs the state's chief purchasing officer to select as many alternative methods of construction as is feasible. As grounds for its holding, the court stated that the set of "criteria" in regulation 8.11.2 "fails to provide a 'standard on which a judgment or decision may be based,'" citing *A.F. Lusi Const. Co.*, 2007 R.I. Super. LEXIS 66 at *2. The court explained that the subject regulation "merely provides the values to be plugged into the equation, rather than the yardstick upon which they should be measured as is required by § 37-2-39," and provides "factors" but not "standards" to guide the discretion of the purchasing agent.

6. In ***State of Rhode Island v. SJV Electric, Inc.***, No. 07-1104 (R.I. Super. 2008) (Silverstein, J.), the Superior Court issued a decision in favor of the defendant subcontractor against all claims asserted by the project owner, the State of Rhode Island, and also held the owner liable on the subcontractor's counterclaim, awarding the subcontractor attorneys' fees in the process. The owner demanded that the project's electrical subcontractor perform certain tasks that were in clear violation of industry code and standard. When the subcontractor refused to violate industry code and standard (articulated in the National Electric Code), the project's electrical trade work came to a stalemate. Even when the subcontractor brought the non-compliant project plans to the owner's attention, the owner instructed the subcontractor to continue working, and expedite the project to completion regardless of the code and standard infringements. Once the stalemate occurred, the owner cited the need to get the project completed in a timely manner, and terminated the subcontractor, triggering the surety's obligation under a performance bond. Ironically, the replacement contractor received a different set of drawings and instructions that did not infringe upon industry code and standard, thus giving more credence to the original subcontractor's position, and ultimately assisting the subcontractor in winning the day at trial.

Not only was the basis for the subcontractor's termination improper, but the owner also failed to follow the termination procedures outlined in the applicable subcontract.

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South Dakota

Case Law:

1. In ***Clark County v. Sioux Equipment Corp.***, 753 N.W.2d 406 (S.D. 2008), the South Dakota Supreme Court considered (1) whether the installation of a fuel storage and dispensing system was an "improvement" to property, thus triggering the statute of repose, and

(2) whether the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") preempted the state statute of repose.

In that case, Clark County and the state Petroleum Release Compensation Fund brought suit against the company that installed a fuel storage and dispensing system on property owned by the county. The county alleged negligence and breach of warranty after a fuel leak on the property. The defendant moved for summary judgment, arguing the applicable statute of repose had expired prior to the county bringing suit. The county argued the system was not an improvement, but a mere replacement of the previous underground storage tanks. The trial court granted the motion for summary judgment and the South Dakota Supreme Court affirmed, concluding construction of the fuel and storage dispensing system was an "improvement" and the 10-year statute of repose applied.

Under South Dakota's statute of repose, SDCL § 15-2A-3, an action to recover damages for injury to real property arising out of construction of an improvement to real property, must be brought within 10 years after substantial completion of such construction. The South Dakota Supreme Court noted that most courts considering the definition of "improvement to real property" use a "common sense approach." The court in *Clark County* noted that the Iowa, Minnesota and Wisconsin Supreme Courts define the term as:

> A permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.

Clark County, 753 N.W.2d at 410-11 (quotations omitted*)*. Based on that definition, the court in determined the fuel system was an improvement, noting the "fuel system clearly enhanced the use of the property" and the "fuel system added value to County's property, as a county highway shop with a fuel dispensing system is worth more than one without such a system." *Id.* at 411. The court rejected the argument that the replacement of a fuel system cannot qualify as an improvement, stating "'whether there was a previously existing . . . service is unimportant, so long as the additions improved the realty.'" *Id.* (quotations omitted*)*

The court also rejected the argument that the state statute of repose was preempted by CERCLA, 42 U.S.C. § 9658, which provides that the time for bringing an action does not start to run until the plaintiff knew or reasonably should have know that damages were caused by the hazardous substance. Relying in part on the Fifth Circuit's opinion in *Burlington N. & Sante Fe Ry. Co. v. Poole Chemical Co., Inc.*, 419 F.3d 355, 363 (5th Cir. 2005), the court in Clark County held CERCLA did not preempt the state statute of repose, finding it preempts only statutes of limitations, but not statutes of repose. In so holding, the Fifth Circuit found the difference between statutes of limitations, which extinguish the right to sue after a period of time, and statutes of repose, which limit the time during which a cause of action can arise, is substantive and not a matter of semantics. Id. In addition, the Fifth Circuit held its conclusion was supported by the plain language of the federal statute, which states that it only preempts state statute of limitations and refers to a "commencement date." Id. Accordingly, the South Dakota Supreme Court held CERCLA did not preempt SDCL § 15-2A-3, which limited the time for bringing suit to ten years after completion of the improvement to the property.

2. In ***Gettysburg School Dist. 53-1 v. Helms and Associates, et. al.***, 751 N.W.2d 266 (S.D. 2008), the Gettysburg School District brought suit for breach of contract and negligence against the contractor and engineer hired to construct an outdoor track. The jury found in favor of the School District, awarding it $215,500, along with prejudgment interest, costs and attorneys' fees. On appeal, the defendant argued the School District failed to give proper notice of defects. The court disagreed, finding it was provided notice of the known defects and the opportunity to correct them. In addition, it held the School District was not required to amend its notice of defects when additional defects became known.

The court rejected the defendants' argument that the School District failed to seek an engineer's decision or wait for substantial completion before filing suit, as required under the contract. It found the contract allowed the School District to sue on the contract after it lost confidence in defendants' work when their attempts to repair the defects failed. The court held the "contract did not contemplate infinite opportunities to repair a structurally defective project that was scheduled for completion almost two years earlier. Nor did the contract require the District to submit its dispute to the engineer, who was also alleged to have breached the contract."

The court further held the School District was not required to obtain a certificate of completion from the engineer as a condition precedent to pursuing legal action. The court found the subcontractor, not the School District, was charged with the responsibility of requesting a certificate of substantial completion. In addition, the court again noted the defendants were provided ample opportunity to cure the defects.

Among other issues, the court in this case also considered whether prejudgment interest should have been awarded. The defendants argued any damages sustained were "future damages" not subject to prejudgment interest because the School District had not expended funds to replace the defective track. The court disagreed, stating prejudgment interest begins "from the day that the loss or damage occurred," and that the "loss or damage occurred when the District received the faulty track." *Id.* at 275-76.

The court also affirmed the award of attorneys' fees, finding the contract specifically allowed for the recovery of all costs and disbursement, including attorneys' fees, if the subcontractor's work was found to be defective.

3. In ***S.J. Louis Construction, Inc. v. Lewis & Clark Regional Water System***, 585 F.Supp.2d 1139 (D.S.D. 2008), an unsuccessful bidder for a construction project brought suit against Lewis & Clark, a private corporation, alleging it failed to comply with South Dakota's competitive bidding laws. The District Court considered whether a corporation such as Lewis & Clark is required to comply with the state's competitive bidding laws. It held it is not. The court noted that to be subject to the competitive bidding laws, an entity must be a "public corporation." The court found Lewis & Clark was a nonprofit corporation engaged in a commercial purpose, which "'is not an inherently governmental activity.'" In so finding, the court noted it "does not have the power of taxation and its directors are not publicly elected. No South Dakota member governmental unit is liable for the payment of principal or interest on any of Lewis and Clark's obligations. . . . Although Lewis & Clark receives a substantial amount of public funding and must follow procurement requirements, it lacks the requisite governmental control to be classified as a public corporation under South Dakota law." Since Lewis & Clark was not considered to be a public corporation, the court held it was not subject to South Dakota's competitive bidding laws.

The court also rejected the plaintiff's view that the Grant Agreement with the South Dakota Conservancy District, which applied $6,400,000 to the construction project, required that Lewis & Clark comply with those laws. The court found the plaintiff was not a party to the Grant Agreement, and therefore, had no standing to challenge the bidding procedures based on that Agreement.

4. In ***American Prairie Construction Co. v. Tri-State Financial, LLC***, 529 F.Supp.2d 1061, 1065 (D.S.D. 2007), the district court considered a number of issues, dealing mostly with settlement matters. However, it also reiterated the "well known principle of law that a mechanic's lien, even though filed later, attaches as of the date the contractor furnishes the first item of labor or materials."

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Tennessee

Legislation:

1. **Tennessee Code Annotated §§ 66-34-103 & -104, Prompt Pay Act/Withholding of Retainage in Separate Account.** Former § 66-11-144 made it mandatory for any retainage withheld to be deposited into a separate, interest bearing escrow account. This provision, which was inexplicably included in the mechanic's lien statutes, was moved to § 66-34-104 of the Prompt Pay Act and was clarified to state that it applies to all contracts (including subcontracts) if the amount of the prime contract is $500,000 or greater. More importantly, § 66-34-103 was amended to make it a Class A misdemeanor for a person, firm or corporation to fail to comply with the requirement to deposit retainage into a separate, interest bearing escrow account, subject to a fine of $3,000 per day. These amendments apply to construction contracts entered into on or after July 1, 2008.

2. **H.B. 3654/S.B. 2851, Wrongful Lien Injunction Act.** A bill pending in the Tennessee legislature would create a summary procedure for property owners to discharge wrongful and improper liens against real property by seeking a Civil Wrongful Lien Injunction. The bill would also entitle owners to recover attorney fees if a lien claimant refuses to release a lien that is ultimately ajudged to be "wrongful." Proposed amendments to the statute would remove the summary aspect of the proceeding, essentially creating a new cause of action, but would retain the owner's ability to recover attorney fees. In April, the Senate Judiciary Committee recommended the bill for passage on a 9-0 vote.

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Texas

Case Law:

1. In ***Lamar Homes, Inc. v. Mid-Continent Casualty Company****, 2007 WL 2459193 (Tex. Aug. 31, 2007)* the Texas Supreme Court ruled that an insurer has a duty to defend an insured homebuilder against a homebuyer's claim of defective construction under a Commercial General Liability policy. In support of its ruling, the court additionally found that allegations of unintended construction defects may constitute an accident or occurrence under a CGL policy, and that allegations of damage to or loss of use of the home built may constitute property damage under the CGL policy.

In *Lamar Homes,* the DiMares purchased a new home build by Lamar Homes, Inc. and several years later encountered problems that they claimed were due to foundation defects. The DiMares sued Lamar Homes and its subcontractor, claiming that Lamar was negligent and had failed to design and/or construct the foundation in a good and workmanlike manner. Lamar forwarded the lawsuit to its insurer, Mid-Continent Casualty Co., requesting a defense and indemnification under its standard form CGL policy developed by Insurance Services Office, Inc., and Mid-Continent denied coverage. Lamar Homes filed suit in Texas state court seeking a declaration that Mid-Continent had a duty to defend it, but Mid-Continent removed the case to federal court and the Western District granted it summary judgment relying heavily on the economic loss rule. Lamar Homes appealed to the Fifth Circuit, who, noting disagreement among Texas courts about the issues, certified three questions to the Texas Supreme Court, resulting in the above described rulings.

Of special note to those in the construction industry, the Court acknowledged the following circumstances under which a CGL policy would not cover faulty workmanship:

- Actual intentional conduct on the part of an insured.
- Faulty workmanship that merely diminishes the value of the home without causing physical injury or loss of use.
- Specific exclusions of faulty workmanship coverage in CGL policies applied.

2. In ***TX. C.C., Inc. v. Wilson/Barnes General Contractors, Inc.****, 233 S.W.3d 562 (Tex. App.—Dallas 2007, pet. denied)* the Dallas Court of Appeals, as a matter of first impression, found that a subrogation waiver extended beyond the construction period and applied to an additional insurance policy not in place during construction, nor required by or procured under the contract containing the subrogation waiver.

In *TX. C.C., Inc.*, an insurance company brought a subrogated claim, on behalf of the owner, against the general contractor and the subcontractor that constructed a restaurant pursuant to an AIA A101-1987 contract that incorporated A201-1987, which contained a standard subrogation waiver. The restaurant was completed in 1997 and destroyed in 2000 due to a faulty fireplace installed by a subcontractor. The owner purchased the insurance policy that covered the incident in 1999.

The subrogation waiver stated that the parties waived rights against each other to the extent that damages caused by a fire were covered by property insurance obtained pursuant to the contract, or covered by "other property insurance applicable to the Work." The Court found that the unambiguous meaning of that statement, when combined with another reference to the rights being waived "after final payment," was that the waiver would apply to a later purchased fire insurance policy that covered the property regardless of whether it was required by or procured under the contract.

3. In ***Entergy Gulf States, Inc. v. Summers****, 2007 WL 2458027(Tex. Aug. 31, 2007)* the Texas Supreme Court ruled that a property owner could also be a "general" contractor entitled to the Labor Code's exclusive remedy defense. John Summers sued Entergy Gulf States, Inc. for injuries he sustained while working at Entergy's Sabine Station plant as an employee of International Maintenance Corp. ("IMC"). IMC had contracted with Entergy to perform construction and maintenance on Entergy's premises and Entergy had purchased worker's compensation insurance to cover IMC's Sabine plant employees. Summers was injured while the policy was in effect; he applied for and received benefits under the policy, then sued Entergy for negligence.

Under the Code, a "general contractor" is defined as one who "undertakes to procure the performance of work or a service," and a "subcontractor" is defined as "a person who contracts with a general contractor to perform all or part of the work or services that the general contractor has undertaken to perform." The Court applied these definitions and found that Entergy took on the task of procuring the performance of work from IMC, thus qualifying as a general contractor entitled to the exclusive remedies defense. The court barred Summer's torts claims against Entergy because he had also made a claim under the worker's compensation insurance.

4. In ***Suretec Insurance Company v. Myrex Industries****, 232 S.W.3d 811 (Tex. App.—Beaumont 2007, pet. denied)* the Beaumont Court of Appeals found a bond notice to be sent too late when it was mailed on Monday, May 16th, but was required to be sent by the 15th day of the month. In this case, May 15th fell on a Sunday and the Court declined to apply the Code Construction Act, which provides an extension when a deadline falls on a weekend or holiday. The Court reasoned that the Code Construction Act applied to the calculation of deadlines (i.e. 30 days after filing) but not to a firm deadline (i.e. the 15th day of the month). Thus, to be timely, this bond notice needed to have been mailed by Friday, May 13th.

Legislation:

1. The Texas Legislature only meets every other year. The last legislative session was in 2007, and the next legislative session will begin on January 13, 2009.

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Utah

Case Law:

1. In ***Encon Utah, LLC v. Fluor Ames Kraemer, LLC*** (Utah Jan. 27, 2009), the Utah Supreme Court required a general contractor to pay a subcontractor in excess of $1.6 million in termination for convenience damages under the terms of the subcontract. Even though the subcontract incorporated the terms of the prime contract, which had priority in the event of a conflict, the court found no conflict because the prime contract only applied to a termination of the contractor by the UDOT. The case serves as a warning to contractors that broad incorporation by reference provisions with order of precedence clauses do not avoid the need for thoughtful subcontract drafting.

2. In ***Miller Family Real Estate, LLC v. Hajzaden*** (Utah App. Dec. 26, 2008), the Utah Court of Appeals determined that a mandatory mediation provision was merely a promissory provision and not a condition precedent to a party's ability to litigate a dispute. The court suggested that unless a mediation provision expressly indicated that failure to mediate barred a subsequent litigation, failure to follow the mediation provision did not cause a party to forfeit its ability to litigate substantive claims. The decision indicates that a party to a contract with a mediation provision can likely proceed directly to litigation without waiving its rights.

Legislation:

1. Mechanic's Lien Amendments (HB 154 & SB 230)

HB 154 clarifies various aspects of the lien law that were ambiguous under the prior version of the lien statute. It changed the law to clarify that the filing of a Notice of Completion may not extend the time to file a lien beyond 180 days after Final Completion. It (1) clarifies the definition of "Final Completion" when a prime contract is terminated and no certificate of occupancy is issued; (2) provides that an owner may file a Notice of Commencement with the SCR; (3) requires municipalities issuing building permits to use a standardized numbering system exclusively; (4) clarifies that, if a subcontractor begins work before a notice of commencement is filed with the SCR, it has 20 days thereafter to file its preliminary notice; and (5) provides that if a preliminary notice attaches to an untimely notice of commencement, and a different notice of commencement is timely, the subcontractor's preliminary notice attaches to the timely notice of commencement.

SB 230 provides additional protection to subcontractors when an owner does not require its general contractor to obtain a payment bond.

IF:

- A project is scheduled for longer than 120 days and has a value greater than $500,000,
- Neither the owner nor the general contractor obtained a payment bond,
- There is a valid notice of commencement for the project, and
- The owner intends to file a notice of completion on the project;

THEN:

The owner or the general contractor must file with the SCR a notice of intent to file the notice of completion 45 days before filing the notice.

THEN:

The subcontractor must amend its preliminary notice to provide:

- Its cost to complete,
- Identify downstream subcontractors,
- A statement of all work in dispute,
- within 20 days.

THEN:

The subcontractor may:

Demand a statement of adequate assurance of performance from the party with which it is in privity of contract within 10 days.

The subcontractor may challenge the adequacy of the assurances of performance.

IF:

The court agrees with the subcontractor that the assurances are not adequate, the court may require further collateral to support payment to the subcontractor, including a broad array of types of further assurances.

2. Illegal Immigration Takes Effect (SB 81 from 2008)

Efforts to post-pone the effective date of the illegal immigration bill passed during the 2008 session failed. As a result, 2008's SB 81 takes effect July 1, 2009. Under the bill, contractors on public jobs must electronically verify the immigration status of their workers using the federal E-Verify system. This provision apples to all contracts with public entities for "the physical performance of services within the state." "Contractors" include subcontractors, contract employees, staffing agencies, trade unions, or any contractors regardless of tier. It is does not appear that suppliers are to be included in this definition.

S.B. 81 does not require contractors to verify all workers, but does require verification of workers who meet the follow three conditions:

1. new employees hired on or after July 1, 2009;
2. who are employed in the state of Utah; and
3. who work under contractor's supervision and direction

A contractor is only required to verify its own workers. Each subcontractor must certify its own verification by affidavit.

S.B. 81 makes it unlawful for an employer to terminate a legal resident and replace him with or have his duties assumed by a worker who:

1. the employer knows or should know is an illegal worked hired on or after July 1, 2009; and
2. is working in Utah in a similar job category with similar skill and requirements. Employers who use the Status Verification System are exempt from civil liability for a violation of these provisions.

The bill makes it a Class A misdemeanor to transport an illegal alien for over 100 miles for commercial advantage (with knowledge of in disregard of the alien's status) or to knowingly conceal, harbor, or shelter an alien for commercial advantage.

3. Contractors Required to Provide Health Insurance (HB 331)

HB 331 requires contractors and subcontractor who work on state contracts to offer employees qualified health insurance. The bill applies to all design and construction contract issued after July 1, 2009 that exceed $1,500,000, for the prime contract, or $750,000 for the subcontract.

An "employee" is defined as a worker who works 30 hours per calendar week and meets the employer's minimum insurance waiting period (a maximum of 90 days). The bill sets forth the requirements for a health plan to be "qualified."

The requirement does not apply if application would jeopardize receipt of federal funds, to sole source contracts, to emergency procurements, or to contract when change orders raise the contract price above the threshold requirement. A contractor is not subject to penalty for the failure of its subcontractors to comply with the health insurance requirements.

4. Other Bills of Interest

HB 206 regulates the information that employers can request from applicants and the length of time it can retain such information (specifically social security numbers, birth dates, and drivers license numbers).

SB 94 imposes requirements concerning the location of sewer laterals and information regarding location of laterals.

HJR 8 seeks to amend the provisions of the Utah Constitution to extend secret ballot requirements to elections regarding employee representatives.

HB 290 prohibits the use of wireless devices while driving and imposes penalties for violations.

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Virginia

Case Law:

1. In ***MasTec North America, Inc. v. NextiraOne Federal, LLC***, 267 Fed. Appx. 254 (4th Cir. 2008), a subcontractor brought an action against the general contractor alleging breach of a construction contract after the general contractor terminated the contract. The general contractor counterclaimed for breach of the same contract. The trial court rejected the subcontractor's argument that it had not received notice and an opportunity to cure its work as required by the contract, and ruled that the general contractor had rightfully terminated the subcontractor. The trial court held that the subcontractor was "apprised periodically, and at times almost daily, of the chronic and constant difficulties" on the project. The subcontractor was "well-aware" of the general contractor's concerns, satisfying the notice requirement. However, because neither party had proven by a preponderance of the evidence that it was entitled to any

compensation, no damages were awarded. The Fourth Circuit affirmed the district court's decision.

2. In ***St. Paul Fire & Marine Ins. Co. v. Wittman Mech. Contractors, Inc.***, 263 Fed. Appx. 290 (4th Cir. 2008), after paying a claim filed by the insured homeowner in connection with a propane explosion that destroyed the insured's house, the homeowner's insurer filed a subrogation claim against the contractor who had installed a new furnace in the house prior to the explosion, and had activated the gas pipeline system. The insurer argued that the contractor failed to perform gas leak tests prior to activating the system though, under its contract, the contractor was not responsible for installing or testing the gas pipeline system. However, the contractor was required to perform a "soap and water" leak test on the connection of the furnace to the gas line. Despite the "soap and water" leak test requirement, the jury found in favor of the contractor on the insurer's breach of warranty and negligence claims. The trial court then granted the insurer's motion for judgment notwithstanding the verdict, concluding that contractor breached its express warranty by failing to perform a pressure test for the leaks. In reversing and remanding the case with instructions to reinstate the jury's verdict, the Fourth Circuit concluded that the contractor was responsible only for a breach of warranty given in connection with the insulation of the furnace, and was not required to perform a pressure test on the entire gas pipeline system. Because the jury could have based its verdict on the evidence that the failure to perform a soap and water test was not the cause of the explosion, the district court erred in setting aside the verdict.

3. In ***Stanley Martin Co., Inc. v. Ohio Cas. Group***, 2009 WL 367589 (4th Cir. Feb. 12, 2009) (unpublished) (appeal from U.S. District Court for the Eastern District of Virginia), the court considered whether the damage caused to a general contractor's nondefective work by a subcontractor's defective work constituted an "occurrence" under a CGL policy. The court analyzed whether mold that had spread from the subcontractor's defective work to the general contractor's components satisfied the "accident" requirement for an occurrence under the policy. Because the court ruled that the spread of mold to the defect-free components was unexpected, and thus an accident, the mold constituted an "occurrence" necessary to trigger coverage under the CGL policy.

4. In ***Datastaff Tech. Group, Inc. v. Centex Constr. Co.***, 528 F. Supp. 2d 587 (E.D.Va. 2008), a second-tier subcontractor filed suit to recover for work performed on a federal project under the Miller Act project pursuant to a contract with a defaulting first-tier subcontractor. The general contractor had assured the second-tier subcontractor that it would be compensated after the first-tier subcontractor had defaulted, and as a result, the second-tier subcontractor completed performance on the contract. The second-tier subcontractor submitted a claim for payment to the general contractor's surety, but was denied because of erroneous information provided by the general contractor regarding whether it was a second-tier or third-tier subcontractor. After receiving a judgment against the first-tier subcontractor, the second-tier subcontractor finally realized that it was a second-tier subcontractor and filed suit against general contractor and its surety.

The court rejected the second-tier subcontractor's claim against the surety because it was not timely filed, despite arguments that of fraud and equitable estoppel stemming from the erroneous statements by the general contractor and its surety that the subcontractor was actually a third-tier subcontractor. The court held not only that second-tier subcontractor failed to meet its burden of proving false representations necessary to support its claims, but that its reliance on statements as to its status as a third-tier subcontractor was unreasonable as a matter of law.

5. In ***Penn. Elec. Coil, Ltd. v. City of Danville,*** 2008 WL 919534 (W.D. Va. March 31, 2008), a contractor had agreed to rehabilitate three hydroelectric generating units for the city. The contract provided for a firm, fixed-price payment to the contractor for the work, as well as that all change orders were required to be in writing and that written notice was required for any claims for additional compensation. The contractor sued the city seeking more than $200,000 for

various alleged modifications to the contract. The city moved for summary judgment alleging that the contractor failed to provide notice of a claim at the beginning of the changed work, and that there were no written change orders from the city, as required by the contract. The court rejected the contractor's argument that the public entity had waived this requirement through its course of dealing. The court also dismissed the contractors's quantum meruit claim, finding that it did not reasonably notify the city that, in performing the work, it expected to be paid and that the extra work did not fall "sufficiently outside of the contract" to put the defendant on reasonable notice. The court granted summary judgment to the city on the majority of the contractor's claims.

6. In ***Link v. Bakshi***, 539 F. Supp. 2d 846 (W.D. Va. 2008), a motel guest fell down steps at the motel that were allegedly out of compliance with the building code. The guest claimed damages for injuries suffered in the fall, and asserted that the hotel owners and franchisor knew or should have known that the steps were not in compliance with the building code both at the time the property was constructed and at the time of the fall. The franchisor moved to dismiss on the ground that the action against it was barred by the Virginia statute of repose, which prohibits recovery against a party that constructed an improvement of real property if the action occurred more than five years after the construction and if the person who constructed the property is no longer the "owner, tenant or otherwise" at the time of the defective or unsafe condition. The franchisor argued that these elements were clear because it constructed the improvement more than five years earlier and it was not in actual possession or control of the improvement as owner, tenant, or otherwise at the time of the accident. However, the court found that part of the franchise agreement required the franchisees to submit certain operations manuals to the franchisor, which created a factual issue with regard to the applicability of the statute of repose, and the court denied the motion to dismiss.

7. In ***VA Timberline, LLC v. Appalachian Power Co.,*** 2008 WL 269544 (W.D. Va. January 29, 2008), the defendant operated a hydroelectric project under a license from the Federal Energy Regulatory Commission. The plaintiff acquired property along the shore of the lake and developed the property into a subdivision in which it maintained a waterfront parcel. When plaintiff attempted to develop two docks on its property along the shore of the lake, the defendant asserted that it had the power to regulate the development based on its federal license for the hydroelectric project. Based on the deeds at issue, the court determined on summary judgment that the plaintiff could construct the docks along the shoreline, but only in accordance with defendant's federal license.

8. In ***In re: Smith Mountain Lvd. Supply, LLC v. Shreve***, 386 B.R. 602 (W.D. Va. 2008), an insolvent residential home contractor co-mingled personal funds with funds from his construction business in violation of the Virginia law governing larceny of construction funds. Q creditor subcontractor argued that such finding qualified the debt as nondischargeable. The bankruptcy court ruled that such debt was dischargeable because the creditor subcontractor had not proven that the debtor contractor was guilty of larceny under federal common law, only Virginia state law.

9. In ***Steadfast Ins. Co. v. Brodie Contractors, Inc.***, 2008 WL 4780099 (W.D.Va. October 31, 2008), the court considered whether to grant a masonry subcontractor's motion for summary judgment under Virginia's five (5) year breach of contract statute of limitations. The prime contract contained a flow-down provision and requirement that all statutes of limitations accrued on the date of substantial completion, while the subcontract contained a only the flow-down provision. The court ruled that, because the subcontractor's alleged breach occurred over five (5) years after the date of substantial completion, the subcontractor enjoyed the benefit of the prime contract's accrual date and was entitled to summary judgment.

10. In ***AvalonBay Communities, Inc. v. Willden***, 2008 WL 2780983 (E.D. Va. July 16, 2008), an owner alleged that one of its employees had conspired with a contractor to steer contracts to that contractor, then to submit invoices and lien waivers for work that had never been completed, and that the employee had accepted kickbacks in exchange. The court found that the

owner had established by undisputed evidence that the former employee had committed fraud, business conspiracy, racketeering, and breach of fiduciary duty. The court entered summary judgment in favor of the owner on these counts.

11. In ***Thomas M. Gilbert Architects, P.C. v. Accent Builders & Developers, LLC***, 2008 WL 2329709 (E.D. Va. June 4, 2008), an architect brought suit against developers on a townhome project. The architect alleged that the builders and developers had infringed on the architect's copyrights by copying, modifying, and distributing to others the architect's plans for the project. On a motion for partial summary judgment, the court held that the architect was not entitled to statutory damages and attorneys' fees under 17 U.S.C. § 412 because the first alleged act of infringement occurred before the copyrights were registered. Later, in ***Thomas M. Gilbert Architects, P.C. v. Accent Builders and Developers***, 2008 WL 4092925 (E.D.Va. August 28, 2008), the court considered the architect's motion for summary judgment as to whether the developer's actions violated federal copyright laws. The court rejected the developer's defense of copyright misuse due to the architect's excessive proposed fee, as well as the defenses that its actions protected by the fair use or implied license defenses. Therefore, the court granted summary judgment in favor of the architect.

12. In ***Wolverine Fire Prot. Co. v. Atlantic Marine Constr. Co.,*** 2008 WL 1847512 (E.D. Va. April 24, 2008), the relevant contract between the general contractor and subcontractor stated that, at the general contractor's sole discretion, claims "may be arbitrated or decided by some other means of alternative dispute resolution procedure." On the general contractor's motion to dismiss and compel arbitration, the subcontractor argued that the clause was too vague to be enforced because it lacked such things as a location for arbitration, a number of arbitrators, the procedural rules to be followed, and so on. The court held that the Federal Arbitration Act "operates to provide the terms of arbitration on which the contract is silent." Using the Act's gap-filling terms, the court determined that the arbitration clause was valid and enforceable, and granted the defendant's motion to dismiss without prejudice.

13. In ***Rice Contracting Corp. v. Callas Contractors, Inc.***, 2009 WL 21597 (E.D.Va. Jan. 2, 2009), the court considered the defendants' motion to dismiss on the basis of a forum selection clause. The contract between the defendant contractor and plaintiff subcontractor permitted lawsuits to be brought in Fauquier or Loudoun County, and prohibited suit to be brought in any other court. The court determined that such a forum selection clause was not permissive, but mandatory, and dismissed the plaintiff's case.

14. In ***Delta-T Corp. v. Pacific Ethanol, Inc.***, 2009 WL 77869 (E.D.Va. January 07, 2009), the court considered whether the plaintiff was required to submit its claim for non-payment for services rendered in the construction of an ethanol plant to binding arbitration. After determining that personal jurisdiction was proper in Virginia, the court turned its focus to the arbitration provision contained in the initial agreement between the parties to determine whether subsequent agreements modified the arbitration requirement. The later agreements did not refer to arbitration, but instead shortened the prerequisites to the commencement of any legal action. Since the two provisions could be read together to require arbitration, the court required the parties to proceed in arbitration.

15. In ***Mears Group, Inc. v. L.A. Pipeline Constr. Co., Inc.***, 2009 WL 77864 (E.D.Va. Jan. 2, 2009), the court considered the cross-motions for summary judgment of a drilling subcontractor and a general contractor for construction of a natural gas pipeline. When flooding and difficulties in drilling caused the owner to abandon the subcontractor's portion, the general contractor refused to pay the subcontractor's invoice for that work. The cross-motions for summary judgment revolved around the abandonment clause of the subcontract, which permitted the subcontractor to recover its cost in performance if the owner abandoned the job due to ground conditions. Although the general contractor attempted to argue a broader reading of the provision that required the subcontractor to prove that no other reason other than ground conditions caused the abandonment, the court read the provision strictly. Since the subcontractor

had provided undisputed evidence that ground conditions constituted at least one basis for abandoning the work, the court found in favor of the subcontractor.

16. In ***In re Mallon***, 2008 WL 4186183 (Bkrtcy. E.D. Va. Sep. 5, 2008), the court considered whether the debtor's judgment against a construction consultant was dischargeable in a bankruptcy proceeding. Although debtor had been found liable for fraud in a state court action for failing to hold the proper contractor's license, the bankruptcy court determined that factual issues still remained as to whether the requisite elements of the fraud necessary for discharge remained in the bankruptcy action and denied the motion.

17. In ***Gonyonaga v. Board of Zoning Appeals***, 657 S.E.2d 153 (Va. 2008), home owners applied for a variance to enlarge and extend their home. The home had been constructed prior to the enactment of a zoning set-back requirement, which required compliance on older homes only if the structure was demolished by more than 75%. The home owners did not originally plan to demolish 75% of their home, but during the course of construction a building inspector required additional demolition of the exterior walls, which resulted in more than 75% of the original structure being removed. A zoning administrator determined that since more than 75% had been demolished, the work done was outside the scope of work on the approved building permit and directed removal of the new construction. On appeal from the zoning board, the court held that the variance did not relieve the home owners from complying with the set back requirements.

18. In ***Upper Occoquan Sewage Auth. v. Blake Constr. Co., Inc./ Poole & Kent,*** 655 S.E.2d 10 (Va. 2008), the court considered the application of, and percentage rate for, pre-judgment and post-judgment interest on various elements of the damages awarded to the contractor in two prior and separate jury verdicts. The court also considered whether the trial court correctly determined that defendant timely designated the allocation of a payment made on the judgments. The first and second cases totaled $5,165,195, and prejudgment interest at the rate of 1 percent per month totaling $1,832,652, and $7,509,239.62, plus $1,453,192 in pre-judgment interest.

On May 8, 2006, the defendant wired payment of $16,616,472.11 to counsel for the plaintiff, which amount the defendant considered to represent payment in full. The plaintiff argued that it was only a "partial payment." The plaintiff asserted that the defendant had improperly failed to include additional interest on the compensatory damages awarded in the first trial and that the defendant incorrectly calculated post-judgment interest at 6 percent per year rather than 1 percent per month. Also, the plaintiff contended that the defendant failed to calculate post-judgment interest on the pre-judgment interest awarded in both the first and second trials. In an appeal focusing on the calculation of interest, the court held that interest at the rate of 1 percent per month as specified in the jury's verdict was to accrue on the first trial award for the time between the first and second trial. However, the court concluded that post-judgment interest should not accrue on the pre-judgment interest awarded in the first and second trials.

19. In ***Nichols Constr. Corp. v. Virginia Machine Tool Co.****, LLC,* 661 S.E. 2d 467 (Va. 2008), a contractor entered into an AIA contract with an owner to perform replace a roof on the owner's dilapidated industrial building. The contract expressly precluded the recovery of consequential damages in the event of a breach by either party. During the performance of the work, the owner complained that the reinforcement was ineffective, the roof sagged and it did not shed water. Although the general contractor attempted to remediate the problem, the owner became dissatisfied, ordered it off the project, and withheld payments. In the suit for breach of contract, the owner presented testimony of an expert engineer that the only effective remedy was the removal and replacement of the roof which was estimated to cost $426,850. The contractor did not offer expert testimony rebutting the owner's expert or any other evidence to show that the cost was incorrect or that removal and replacement constituted economic waste. The trial court awarded the full replacement value as damages, without an offset for the contract balance, and the contractor appealed the computation of damages.

On appeal, the court ruled that the measure of damages for defective construction is either the cost of correction or the dimunition in fair market value of the property, with the cost of correction being the preferred method of awarding damages. Dimunition in fair market value is used only when the cost of correction or replacement is so disproportionate to the result achieved that it would amount to economic waste. Despite the considerable disparity between the contract price and the amount of damages awarded, because the contractor failed to present evidence that removal and replacement of the roof would constitute economic waste, and failed to rebut the owner's proffered cost of replacement, the court found that the owner's evidence of the cost of replacement was appropriately relied upon by the trial court. The court did, however, find error in not allowing the outstanding contract balance to offset against the damages awarded to the owner and remanded the case for recalculation of the judgment and prejudgment interest.

20. In ***Palmer & Palmer Co., LLC v. Waterfront Marine Constr. Inc.,*** 662 S.E.2d 77 (Va. 2008), a subcontractor entered into contract to drive piles for a house to be built on property belonging to the general contractor. During construction, the subcontractor's crane was damaged when it fell into an abandoned, disconnected septic tank buried on the property. The parties stipulated that neither of them was aware of the existence of the septic tank until after the crane fell into it. Upon suit by the subcontractor, the trial court construed various provisions of the subcontract, including a differing site condition, to impose liability upon the general contractor for failing to prepare the work site, including removing or protecting existing structures, underground obstructions or utilities. On appeal, the court reversed, finding that the differing site condition merely provided a mechanism for payment to the subcontractor for the removal of any unanticipated underground obstructions; it did not impose an affirmative obligation upon the general contractor to remove underground obstructions or be responsible for damages caused thereby. Nor did the court find that the provision requiring the general contractor to protect existing structures impose liability on the general contractor for the damage to the crane; this provision was viewed instead as protection for the subcontractor from claims by the general for damage to the septic tank caused by the crane. Finally, because no evidence was presented that the abandoned, disconnected septic tank had ever been part of an operational septic system, it was not a "utility" and the general contractor had no obligation under the existing utilities clause to protect or remove it.

21. In ***Viking Enter., Inc. v. County of Chesterfield***, 670 S.E.2d 741 (Va. 2009), a contractor hired to construct a county fire station filed suit as a result of the county's failure to compensate it for replacing a concrete floor. Although the contractor had filed suit in the circuit court within the six (6) months prescribed in the public procurement act, the court below dismissed the claim for the contractor's failure to properly notice and file an appeal bond within thirty (30) days from the county's denial as separately required by the code applicable to county determinations. In harmonizing the requirements for filing an appeal with the county and the requirements for filing a suit in the circuit court, the court upheld the dismissal of the contractor's claim for failing to comply with the notice and bond required for appeals from county determinations.

22. In ***Smith Mountain Bldg. Supply, LLC v. Windstar Props.***, 672 S.E.2d 845 (Va. 2009), the court considered whether the trial court correctly invalidated a contractor's mechanic's lien for including amounts outside the 150-day limitation period. Of the two mechanic's liens filed, only a small portion of the liens' amounts were actually within the 150-day window. The claimant argued that, although the mechanic's liens included sums due for materials furnished earlier than 150 days prior to the last day of work, such an inclusion was an inaccuracy that did not invalidate the lien under VA. CODE § 43-15. In reconciling two earlier decisions, the court discussed the rule that including only amounts within the 150-day window was a prerequisite to perfection. Although an inclusion of an amount clearly not permitted could constitute an inaccuracy, thereby saving a lien under VA. CODE § 43-15, an inclusion of amounts outside the 150-day window that are otherwise properly subject to a mechanic's lien cannot be saved. Therefore, the court upheld the invalidation of the contractor's mechanic's lien.

23. In ***Helton v. Phillip A. Glick Plumbing, Inc.***, 672 S.E.2d 842 (Va. 2009), a homeowner had hired a plumbing company to perform work during the construction of his home. After a dispute arose over amount billed by the plumbing company, the owner sent a check for less than the full balance with the notation "Paid in Full." Upon receipt, the plumbing company crossed out this notation, wrote "No" and "Balance Due $1,686.51," and cashed the check. Because the common law did not allow acceptance with alteration of an instrument tendered in good faith as full payment for a disputed debt, the court followed the majority rule of other jurisdictions and determined that the altered check constituted an accord and satisfaction.

24. In ***Luria v. Board of Directors***, 672 S.E.2d 837 (Va. 2009), the court considered whether the managing member of a developer limited liability company owed a fiduciary duty to a condominium association. The managing member has made improper distributions prior to learning that the condominium suffered from significant structural defects resulting from his actions. The court reversed the trial court's finding of liability against the managing member because, at the time of making the improper distributions, the member did not have actual knowledge that he would be a creditor to the condominium association because the defects were not known.

25. In ***McCatty v. Commonwealth***, 2008 WL 123094 (Va. Ct. App. January 15, 2008), a husband and wife who owned residential real estate as tenants by the entirety entered into a construction contract for improvements on the property. The contractor did not perform the work and became insolvent. The couple sued for breach of contract and fraud, and they obtained a default judgment. Therefore, the couple filed two claims, one for the husband and one for the wife, with the Virginia Contractor Transaction Recovery Fund. The court upheld the Commonwealth's determination that the couple could only claim one recovery because the couple had one contract involving a single transaction, the project took place on only one parcel of property, and they obtained one judgment in a single lawsuit arising out of the contractor's dishonest and improper conduct. Therefore, the couple could obtain only one recovery.

26. In ***Pitts v. Commonwealth***, 2008 WL 425531 (Va. Ct. App. February 19, 2008), a contractor was tried and convicted of construction fraud. The contractor appealed, arguing that his agreement with a homeowner to assume the contractual obligations previously undertaken by him and his former partner was an "assumption of a pre-existing debt" and not an advance of money, which is an essential element of construction fraud. The court affirmed, holding the contractor acted with fraudulent intent when he received the initial advance and a subsequent advance. Fraudulent intent was shown by: (a) the fact that the contractor entered into the second contract knowing he had been advanced money to buy materials, but he no longer had that money to be able to complete the work; (b) the fact that the contractor needed the first of three installment payment earmarked for labor to pay for the truck to deliver the materials; and (c) the contractor only worked on the project for two days, never returned and could not be reached by telephone or certified mail.

27. In ***Phillips v. Commonwealth***, 2008 WL 220255 (Va. Ct. App. January 29, 2008), a contractor was convicted of construction fraud. The contractor appealed, arguing that the evidence was insufficient to prove that, at the time he obtained an advance of funds, he possessed a fraudulent intent—an essential element of the offense. The court agreed and reversed the judgment, holding that the evidence did not support a finding that the contractor obtained an advance with fraudulent intent. To determine whether fraudulent intent exists, the court must look to the conduct and representations of the defendant at the time he procured the advance, not the time the parties entered into the contract. Fraudulent intent can be shown by false statements or a general lack of communication. In this case, the contractor received an advance and failed to perform the work, but there was no evidence the contractor made false statements to obtain the advance. Also, contractor actually started work and communicated with the homeowner, who eventually told the contractor to stop work, after which the contractor delivered a portion of the materials and some of his personal equipment.

28. In ***Wade v. Commonwealth***, 2009 WL 585967 (Va. Ct. App. Mar. 10, 2009), a general contractor appealed his conviction for entering into a construction contract without the required license. After upholding the trial court's determination that the general contractor's plea of guilty was knowingly and voluntarily given, the court considered whether the restitution ordered by the trial court was correct. Because the victim homeowner had been required to pay a completion contractors over twice the amount of restitution awarded, the court upheld the restitution award.

29. In ***Tackett v. Commonwealth***, 2009 WL 435717 (Va. Ct. App. Feb. 24, 2009), the court considered whether the evidence was sufficient to support the conviction of an individual subcontractor for theft of copper wire. In upholding the conviction for sufficient evidence, although no one had actually seen the subcontractor take the wire, the court found that guilt could be inferred because only the subcontractor and owner had access to the room in which the wire was located and was working there on the day in question. Also, in upholding the trial court's determination as to the value of the copper wire, the court determined that the opinion of a non-expert was admissible to prove the value of property.

30. In ***AMEC Civil, L.L.C. v. Commonwealth***, 74 Va. Cir. 492, 2008 Va. Cir. LEXIS 64 (City of Norfolk Feb. 12, 2008), the court considered whether a contractor's failure to provide written notice to VDOT of its claim for payment barred the contractor's suit. The contractor argued that actual notice satisfied the purpose of the statute requiring written notice, as VDOT had been in communication with the contractor about the disputed issue, engaged in settlement discussions, and actively prepared for trial. In light of the fact that actual notice remedied any prejudice to VDOT, the court ruled that lack of written notice did not provide a bar to the claim.

31. In ***Paramount Dev. & Constr., L.L.C. v. 3330 Spring Lane, L.L.C.***, 2008 Va. Cir. LEXIS 15 (Fairfax County 2008), a contractor had performed renovation work for individual condominium units and the common areas, and filed a mechanic's lien for work performed only in the common areas after the defendant terminated its services. In defense, the defendant relied on a waiver and release of liens executed by the contractor that applied to "condominium units." The court ruled that the contractor's claim could proceed since the term "condominium units" unambiguously applied only to the units themselves and not the common areas.

Legislation:

1. **VA. CODE § 2.2-1133, Department of General Services; Division of Engineering and Buildings; use of value engineering.** The statute requires the submission of a value engineering report to the Division of Engineering and Buildings. Under the statute, each item included in the value engineering report must be designated as accepted, declined, or accepted as modified. The report must be approved by the Division within 45 days before the project may move to the next phase of design.

2. **VA. CODE § 2.2-4301, Virginia Public Procurement Act; procurement of professional services for certain transportation projects.** The statute increases the monetary limits for architectural and professional engineering contracts associated with projects that any locality and certain authorities and sanitation districts may enter into under the Virginia Public Procurement Act. Additionally, the statute raises the amount for a single contract from $1 million to $5 million and increases the maximum amount for each task order from $200,000 to $1 million.

3. **VA. CODE § 2.2-4303, Virginia Public Procurement Act; methods of procurement.** The statute clarifies that any public body may use competitive negotiation for the construction, alteration, repair, renovation, or demolition of structures (and not just buildings) when the contract is not expected to cost more than $1 million.

4. **VA. CODE § 2.2-4311.1, Public body contracts; illegal alien employment.** The statute requires that all public bodies provide in every written contract that the contractor does

not, and shall not during the performance of the contract for goods and services in the Commonwealth, knowingly employ an unauthorized alien as defined in the federal Immigration Reform and Control Act of 1986.

5. **VA. CODE § 2.2-4344, Virginia Public Procurement Act; regional industry facility authorities; exemption.** The statute authorizes regional industrial facility authorities to enter into certain contracts without competition.

6. **VA. CODE § 10.1-1188, Environmental impact reports.** The statute requires an environmental impact report be done for any major state construction project that will cost $500,000 or more. Prior to enactment, the threshold amount requiring such a report was $100,000.

7. **VA. CODE § 15.2-2303, Approval of certain proffered conditions.** The statute provides that in any instance in which a locality has accepted proffered conditions that include pedestrian improvements, and the Virginia Department of Transportation has reviewed and not objected to the proposed pedestrian improvements during the processing of the rezoning, the Virginia Department of Transportation shall allow the proffered improvements to be constructed, except when such improvements will violate local, state, or federal laws, regulations, or mandated engineering and safety standards.

8. **VA. CODE § 15.2-2307, Variances; nonconforming uses.** The statute provides that a zoning ordinance shall permit the owner of any residential or commercial building damaged or destroyed by a natural disaster or other act of God to repair, rebuild, or replace such building to eliminate or reduce the nonconforming features to the extent possible, without the need to obtain a variance. Prior to enactment, if a residential or commercial building was damaged or destroyed by a natural disaster or other act of God, the zoning ordinances were permissive and was not required to allow that such building be repaired, rebuilt, or replaced to eliminate or reduce the nonconforming features to the extent possible, without the need to obtain a variance.

9. **VA. CODE § 54.1-1129, Board for Contractors; water well systems providers.** The statute provides that a licensed plumber may perform normal maintenance and repair on large-diameter bored or hand-dug water table wells without a certification as a water well system provider provided that the wells are 100 feet or less in depth and the work is being performed for an entity granted tax-exempt status under § 501(c)(3) of the Internal Revenue Code.

10. **VA. CODE § 55-70.1, Home owner warranty breach; tolling of limitations period.** The statute provides that when a homeowner sends notice to a vendor of a warranty violation, the statute of limitations is tolled for six months. The provision will apply to warranty claims arising after January 1, 2009.

11. **VA. CODE § 56-233.1, Public utilities; competitive bidding.** The statute requires public utilities that are subject to annual review provisions of Title 56 to use competitive bidding in purchasing and construction practices.

12. **VA. CODE § 56-575.17, Public-Private Education Facilities and Infrastructure Act of 2002; public hearing prior to interim or comprehensive agreement.** The statute provides that at least 30 days prior to entering into an interim or comprehensive agreement under the Public-Private Education Facilities and Infrastructure Act, a responsible public entity must hold a public hearing on the proposals. Prior to enactment, a responsible public entity was required to provide an opportunity for public comment, which may include a public hearing at the sole discretion of the responsible public entity.

13. **VA. CODE § 59.1-200 & VA. CODE § 54.1-1115, Board for Contractors; prohibits acts; penalties.** The statute was amended to provide that any person who undertakes work without any valid Virginia contractor's license or certificate when a license or certificate is required

shall also be guilty of a violation of the Virginia Consumer Protection Act (§ 59.1-196 et seq.) provided the violation involves a consumer transaction as defined in the Virginia Consumer Protection Act.

14. **§§ 8, 29, AND 35, AND § 45, AS AMENDED, OF CHAPTER 66 OF THE ACTS OF ASSEMBLY OF 1960**, **Hampton Roads Sanitation District.** The statutory amendments redefine the term "sewage disposal system." The amendment also provides that all construction contracts, except in cases of emergency, that the District's Commission may let for construction, or materials in connection with such construction, shall be let after public advertising and in accordance with the provisions of the Virginia Public-Private Education Facilities and Infrastructure Act of 2002, as well as all subsequent amendments and additions to Virginia public procurement law. The amendment also requires that the Virginia Department of Environment Quality approve any substantial change in the method used by the Commission for treating and disposing of sewage and industrial wastes so as to prevent the pollution of any waters within the District as effective and satisfactory for the purpose intended. Further, the District may enter into any contract that the Commission determines to be necessary or appropriate to place any obligation or investment of the District, as represented by bonds or the investment of their proceeds, in whole or in part, on the interest rate, cash flow or other basis desired by the Commission.

15. **H.B. 1710, (Pending) Contracts; certain indemnification provisions in construction contracts declared void.** The bill provides that any provision in a contract relating to the construction by which the contractor performing such work purports to indemnify or hold harmless another party to the contract against liability for damage arising out of bodily injury to persons or damage to property suffered in the course of performance of the contract, caused by or resulting in whole or in part from the negligence of such other party or his agents or employees, is against public policy. Currently, such damage or injury must result solely from the negligence of such other party for such provision to be against public policy.

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Wisconsin

Case Law

1. In ***Stuart v. Weisflog's Showroom Gallery, Inc.***, *2008 WI 22, 308 Wis. 2d 103, 746 N.W.2d 762 (2008) ("Stuart I")*, the Wisconsin Supreme Court considered a number of issues relating to claims made by the Stuarts against a home remodeler and his company, Weisflog's Showroom Gallery, Inc. ("Weisflog's"), alleging negligence in the design and construction of a home remodeling and addition project, and violations of the Home Improvement Practices Act ("HIPA") based on misrepresentations.

First, the court analyzed whether the Stuarts' HIPA and negligence claims were barred by a statute of limitations. The court determined that the claims were not barred because they are governed by the discovery rule and the six-year statute of limitations in Wisconsin Statutes section 893.93(1)(b), rather than the contract statute of limitations.

Second, the court examined whether Wisconsin Statutes section 100.20(5) authorizes the doubling of an entire damage award "because of a violation . . . of any order" issued pursuant to HIPA, even if a HIPA violation is combined with additional wrongdoing that contributes to the loss in question. The court held that, given the clear language of section 100.20(5) and the need to "'dispel the reluctance of parties injured by unfair trade practices to bring forward their causes

of action and help deter similar and future contractor malfeasance,'" section 100.20(5) does authorize the doubling of an entire damage award. Moreover, given the facts of the case, a clear causal connection existed between the entire pecuniary loss and the HIPA violations.

The third holding from the court was that, based on the facts and evidence, the circuit court erred by asking the jury to apportion damages between the HIPA and the negligence claims. To obtain apportionment in lawsuits under HIPA, a party must meet the burden of showing that the damages can be separated. The court noted that in the Stuarts' case, there was no clear way to apportion the pecuniary loss between negligence damages and HIPA damages, and the jury did not have enough evidence or instruction for apportionment.

Fourth, the court examined whether the economic loss doctrine ("ELD") applies to bar HIPA violations or negligence claims. The court concluded that because of public policy concerns, the ELD cannot apply to bar statutory claims under HIPA. Next, in analyzing the negligence claims, the court applied the predominant purpose test to the contracts between the parties and determined that the transactions were predominantly for services, not goods used in construction. Following the bright line rule that the ELD does not apply to claims for the negligent provision of services, the court held that the ELD did not bar the Stuarts' negligence claims.

The fifth consideration for the court was whether there could be personal liability under HIPA when an individual is acting only in his or her corporate business capacity. Looking at the plain language of HIPA, along with Wisconsin's prior case law dealing with agency theory, the court reached the conclusion that a corporate employee may be held personally liable for acts that violate HIPA.

Finally, the court held that the circuit court erred in its determination of attorney fees because the circuit court should have applied the lodestar methodology, which requires that the court multiply the reasonable hours expended by a reasonable rate, and then make adjustments based on Wisconsin Supreme Court Rule 20:1.5(a).

2. In ***Stuart v. Weisflog's Showroom Gallery, Inc.****, 2008 WI 86, 311 Wis. 2d 492, 753 N.W.2d 448 (2008)("Stuart II")*, the Wisconsin Supreme Court held that Weisflog's Showroom Gallery's ("Weisflog's") commercial general liability ("CGL") policy did not cover the misrepresentation and negligence damages at issue in *Stuart I*. The CGL policy did not cover damages caused by Weisflog's misrepresentations because the misrepresentations—which were in violation of the Home Improvement Practices Act ("HIPA"), contained in Wis. Admin. Code § ATCP 110—were not accidental "occurrences" within the meaning of the policy. The court reaffirmed a prior Wisconsin Supreme Court decision that held that where there is a volitional act involved in a misrepresentation, it cannot be considered an "occurrence" for purposes of insurance coverage. Weisflog's false assertions to the Stuarts involved a degree of volition that made the misrepresentations, along with the damages, inapplicable for CGL coverage. The court rejected any arguments attempting to further distinguish the specific claims and facts of the case.

The court went on to examine whether the CGL policy would provide coverage for the Stuarts' negligence claims, because the rule of concurrent risks could still compel coverage for those claims. The insurer argued that there was no trigger of coverage under the CGL policy because the damages were economic damages, not property damages. The court rejected this argument because the Stuarts' complaint clearly alleged property damage arising out of Weisflog's misrepresentations and negligence. Next, the court considered the application of the business risk exclusions, concluding that the "your product" exclusion did not bar coverage, but that the "your work" exclusion did apply. Specifically, the court reasoned that the terms of the "your product" exclusion did not apply because the Stuarts' addition to their house was considered real property, which is an exception to the "your product" exclusion. The "your work" exclusion, however, was applicable, as the property damage arose out of Weisflog's negligence and misrepresentations, the damage did not occur on Weisflog's own property, and the work was

completed at the time the damage arose. The subcontractor exception did not reinstate coverage under the facts of the case.

3. In ***State v. Keyes****, 2008 WI 54, 309 Wis. 2d 516, 750 N.W.2d 30 (2008)*, the Wisconsin Supreme Court considered whether the State's theft by contractor statute, Wisconsin Statutes section 779.02(5), prohibits contractors and subcontractors from receiving a profit on a project before completion of the project.

Section 779.02(5) safeguards against misappropriation of construction project funds by creating trust funds for the benefit of owners, subcontractors, and suppliers. The trust fund is to pay claims due or to become due for labor and materials used for the improvements. The statute prohibits use of money in the trust fund for anything other than paying claims until such time as the claims have been paid in full. In case of deficiency, the claims are to be paid proportionally. Until all claims are paid, the contractor's use of money in the trust fund for any purpose other than paying claims constitutes theft by contractor.

The State alleged that the Keyes, as prime contractors, violated the theft by contractor statute by paying themselves in full while there were unpaid claims due to other subcontractors. The Keyes argued that they did nothing wrong by paying themselves in full because they performed subcontractor work on the project and used the trust fund money to compensate themselves for such work. The court of appeals focused on whether the Keyes received a profit on the project, and held that the Keyes violated the theft by contractor statute by taking a profit on the project while there were other subcontractors with unpaid claims. The Wisconsin Supreme Court disagreed with the court of appeals' focus on profit over proportionality. The Wisconsin Supreme Court held that whether payments to the contractor are considered "profit" is irrelevant, in part because it is unclear how to construe or define "profit." The important consideration is proportionality. The Wisconsin Supreme Court held that, under section 779.02(5), contractors are permitted to pay themselves—profit or otherwise—while there are unpaid claims due to other subcontractors, as long as the other subcontractors are paid proportionally. A contractor's use of trust fund money to pay itself in full while other subcontractors have not been paid proportionally constitutes theft by contractor.

4. In ***PRN Associates LLC v. State Dep't of Administration****, 2008 WI App 103, 756 N.W.2d 580 (2008),* the Wisconsin Court of Appeals considered whether an unsuccessful bidder on a state university construction project could contest the award of the project to the successful bidder and recover damages. The court held that once a public contract is awarded, the matter is moot in terms of challenging the award or challenging the process. If a bidding contractor wants to challenge the award or the process, the contractor must seek and obtain a temporary injunction before the public agency awards the contract. Even if a bidding contractor obtains injunctive relief, the court cannot order the contract to be awarded to any particular party—the public agency can either award the contract to the bidder who successfully challenges the initial award decision or it can call for new bids on the procurement. With regard to damages, even if the bidding contractor was successful in obtaining an injunction, it would not be able to recover damages beyond its reasonable and necessary expenditures in preparing the bid plus the costs of obtaining the bonds required by the specifications; lost profits are not recoverable.

5. In ***Wisconsin State Local Government Property Insurance Fund v. Thomas A. Mason Co.***, *2008 WI App 49, 308 Wis. 2d 512, 748 N.W.2d 476 (2008)*, the Wisconsin Court of Appeals considered whether a state agency (the "Fund") created to provide property insurance for local governments had a right of subrogation against a subcontractor and its insurer for fire damage caused by the subcontractor's employee at the Villa Terrace museum renovation project. The construction contracts between Milwaukee County and the general contractor and between the general contractor and the subcontractor incorporated AIA standard form contracts. Under these construction contracts, the parties waived all rights of recovery they might have against one another for damages caused by fire, including subrogation rights. The Fund's insurance contract with the County specifically recognized the County's right to waive the Fund's subrogation right

for any loss it paid. Yet, the Fund argued that Wisconsin Statues section 605.24(3) nullified the waiver provision. Section 605.24(3) provides that the Fund shall not lose any subrogation right if the local government unit, after commencement of coverage, waives any right of recovery it would have otherwise had. The court held that section 605.24(3) does not nullify the permission granted by the Fund to the county to waive the Fund's subrogation rights, because there is nothing in the statutes that prohibits the Fund from voluntarily contracting away section 605.24(3)'s protection, as it did here. The Fund also argued that the waiver-of-subrogation clause in its insurance contract with the County only encompassed damages not exceeding the $234,500 contract price for the renovation project, because the County was only required to obtain a builder's risk policy in the amount of the initial contract sum. The court rejected the Fund's argument because the builder's risk endorsement that might have limited the scope of the subrogation rights waiver was not filled in and, thus, was a nullity. The Fund was not permitted to recoup any of the $1.7 million it paid to the County for the damage to the Villa Terra museum.

6. In ***Wisconsin Builders Ass'n. v. State of Wisconsin Dep't of Commerce,*** *2009 WI App 20, No. 2008AP1438 (Wis. Ct. App. Dec. 23, 2008)*, the Wisconsin Court of Appeals considered whether Wisconsin Administrative Code section Commerce 62.0903(6), which addresses automatic fire sprinkler systems in multifamily dwellings, conflicts with Wisconsin Statutes section 101.14(4m)(b), which addresses the same topic. The statute requires sprinkler systems in multifamily dwellings containing more than 16,000 square feet or more than eight dwelling units. The administrative rule requires sprinkler systems in smaller multifamily dwellings. The court held that the statute requiring sprinkler systems in larger multifamily dwellings did not expressly restrict the Department's authority to promulgate rules requiring sprinkler systems in smaller multifamily dwellings, and; therefore, the statute and the administrative rule did not conflict and both were valid and enforceable.

7. In ***Gilbert v. Labor and Industry Review Commission****, 2008 WI App 173, No. 2006AP2694 (Wis. Ct. App. Nov. 26, 2008)*, the Wisconsin Court of Appeals considered whether Gilbert, d/b/a Gary Gilbert Construction, was liable for delinquent unemployment taxes. The two issues considered by the court were (1) whether services performed by workers constituted employment in Wisconsin within the meaning of Wisconsin Statutes section 108.02(15)(b) and (d); and (2) whether the workers were Gilbert's employees within the meaning of Wisconsin Statutes section 108.02(12)(a), (b), and (bm). With respect to the first issue, the court held that because the workers' services were directed and controlled from Gilbert's business office in Wisconsin, the workers' services constituted employment in Wisconsin under section 108.02(15). The fact that the majority of the work was performed in Illinois did not change the court's decision. With respect to the second issue and to determine whether Gilbert overcame the presumption that the workers were his employees, the court examined criteria set forth in section 108.05(12)(b) and (bm). The court held that Gilbert was unable to satisfy the requisite number of criterion in section 108.05(12)(b) and (bm) to establish an exemption from the unemployment compensation law. Although the workers used their own equipment and had their own business cards, the workers failed to own and maintain an office, equipment, materials and other facilities that are indicative of an existing business. The workers generally did not work for other entities. The workers were paid on an hourly basis every other week, regardless of whether Gilbert was paid by his clients. On the basis of these facts, the court held that the workers were Gilbert's employees for unemployment tax purposes.

8. In ***Park Avenue Plaza v. City of Mequon****, 2008 WI App 39, 308 Wis. 2d 439, 747 N.W.2d 703 (Wis. Ct. App. 2008)*, the Wisconsin Court of Appeals considered whether the City complied with the statutory procedures set forth in Wisconsin Statutes section 66.0703, governing a municipality's power to levy and collect special assessments. The public improvements underlying the appeal included adding new lanes and a median, new lighting, landscaping, sidewalks, curbs, and a storm sewer. The City levied a special assessment against only commercial properties along the improved road. The court considered three issues: (1) whether the special assessment complied with statutory requirements under section 66.0703; (2) whether the assessed properties received special benefits; and (3) whether the assessment was

reasonable where all residential properties were excluded from the assessment. The commercial property owners argued that section 66.0703 required the City to begin the assessment process before actual work begins. The court disagreed, and held that there is no constitutional obstacle to a post-completion special assessment, as long as the steps in section 66.0703 are accomplished. The court also held that because the commercial properties received a "special benefit" from the public improvements, it was, therefore, appropriate for the City to assess a special assessment upon only commercial properties along the improved road. The commercial properties enjoyed benefits not enjoyed by residential properties, specifically, increased customer trips to retail centers, shorter travel times for employees, higher occupancy levels and possibly higher rental rates for offices and retail, and more timely deliveries and lower transportation costs to light industrial centers. Finally, the court held that the amount of the assessment was reasonable based on the fact that the assessment was fairly and equitably apportioned among property owners in comparable situations, none of whom was unique and somehow unduly burdened by the assessment.

9. In ***Wisconsin Realtors Association, Inc. v. Town of West Point****, 2008 WI App 40, 309 Wis. 2d 199, 747 N.W.2d 681 (2008)*, the Wisconsin Court of Appeals considered whether Wisconsin Statutes section 236.45(2) grants a qualifying "municipality, town or county" the authority to temporarily prohibit land division while such local government develops a comprehensive plan under section 66.1001. Section 236.45(2) expressly authorizes a temporary prohibition on land division if the prohibition carries out specified statutory purposes, including such purposes as furthering the orderly layout and use of land, preventing the overcrowding of land, avoiding undue concentration of population, and facilitating the provision of schools, parks, and playgrounds. The court noted that the purposes listed in section 236.45(2) substantially overlap with the purposes behind comprehensive plans under section 66.1001. The Wisconsin Realtors Association and the Wisconsin Builders Association challenged section 236.45(2), arguing that the statute does not authorize a town-wide prohibition on land division because the statute prohibits land division only "*in areas* where such prohibition will carry out the purposes of this section" (emphasis added). The court rejected the Associations' argument, holding that "in areas" may refer to an entire town, as long as the town-wide prohibition on land division furthers the purposes of the statute. The court likewise rejected the Associations' argument that the Town's temporary prohibition on land division conflicted with section 236.45(2), which requires that ordinances prohibiting land division "make applicable" all provisions of chapter 236. Chapter 236 includes procedures for plat application acceptance and review, and the court held that the "make applicable" language referred to ordinances regulating permissible divisions, not ordinances that prohibit divisions. Finally, the court rejected the Associations' argument that reading section 236.45(2) as permitting town-wide prohibitions on land divisions renders meaningless section 62.23(7)(da), which grants cities interim zoning power to preserve existing uses. The court noted that sections 62.23(7) and 236.45 deal with different powers—section 62.23(7)(da) addresses city zoning power to preserve existing uses, while section 236.45 addresses temporary town-wide prohibitions on land division. The court, therefore, upheld the Town's ordinance establishing a town-wide temporary stay of land division.

10. In ***Blanchar v. Lake Land Builders, Inc.****, No. 2008AP1282 (Wis. Ct. App. Dec. 30, 2008)*, the Wisconsin Court of Appeals considered whether a purchaser had a "particular relationship" with a builder such that he was no longer a member of "the public" for purposes of a section 100.18 statutory misrepresentation claim. The purchaser had entered into a contract with the builder to purchase a vacant lot. Under the terms of the contract, the purchaser was to receive a $10,000 discount on the purchase price of the vacant lot if the purchaser subsequently hired the builder to construct a home on the lot. After the parties had entered into the vacant land contract, the builder allegedly made misrepresentations to induce the purchaser to enter into the construction contract. The court held that the fact that the parties had entered into a contract for the vacant land did not take the purchaser out of "the public" for purposes of a section 100.18 claim with regard to this second contract, because the alleged misrepresentations occurred before the parties entered into the contract at issue (the second, construction contract). In doing so, the court reaffirmed its holding in *Kailin v. Armstrong*, 2002 WI App 70, 252 Wis. 2d 676, 643

N.W.2d 132. The court also considered the purchaser's claim for piercing the corporate veil, and held that because the purchaser's complaint failed to allege any facts pertaining to the third element of the claim, the piercing the corporate veil claim was properly dismissed.

11. In ***Below v. Norton****, 2008 WI 77, 310 Wis. 2d 713, 751 N.W.2d 351 (2008)*, the home purchaser, Below, brought an action against home sellers, Nortons, for intentional misrepresentation, strict responsibility misrepresentation, negligent misrepresentation, misrepresentation in violation of Wis. Stat. § 100.18 (false advertising), and misrepresentation in violation of Wis. Stat. §§ 895.446 and 943.0(1)(d). Below alleged that the Nortons knew of a defect with the sewer line before the sale and misrepresented their knowledge to induce Below to purchase the home. Below also alleged that she relied on the misrepresentation and that the defect was not disclosed in the property condition report, causing her to suffer pecuniary loss.

The circuit court held that the economic loss doctrine ("ELD") barred Below's common-law intentional, negligent, and strict responsibility misrepresentation claims. It also dismissed Belows other claims under Wis. Stat. §§100.18 and 895.446 regarding them as not "applicable." The Court of Appeals affirmed, holding that the ELD barred Below's tort claims.

The ELD, is a judicially created doctrine, that bars recovery of purely economic losses from manufacturers under tort theory. An "economic loss" refers to a recovery that result either from a product failing in its intended use or from a product failing to live up to a contracting party's expectations. The Wisconsin Supreme Court held that "Below's alleged damage, the house's inadequate value, is an economic loss because the house is alleged to be inferior." The Court found that Below could normally recover her economic loss through contractual remedies because of her home sales contract. Thus, the Court's decision expanded the ELD to bar recovery for common-law intentional misrepresentation claims arising out of residential, or noncommercial, real estate transactions.

In her dissent, Justice Bradley opined, "According to the majority, a person selling a home can look the buyer in the eye, lie about the condition of the home, and escape legal consequence in tort for the lie because of the economic loss doctrine."

12. In ***Solowicz v. Forward Geneva National***, *2008 WL 5336907 (Ct. App. 2008),* the Court of Appeals held that the Wisconsin Condominium Ownership Act, Wis. Stat. ch. 703, does not limit the duration of a developer's control over a master-planned community. The Court found that Geneva National was a private quasi-town, which required an extended time to develop and market and the restrictive covenant granting developer control until eighty-five percent of units were sold existed before complainants purchased their units.

13. In ***JP Morgan Chase Bank V. Green***, *2008 WI App 78, 753 N.W.2d 536 (2008),* the homeowner had a first mortgage with M&I Bank for $67,000, and a second mortgage with JP Morgan for $44,000. JP Morgan did not appear when M&I initiated foreclosure in 2005. At a March 29, 2006 sheriff's sale, Hare Investments was the high bidder, with a bid of $68,680. Later, JP Morgan initiated its own foreclosure action in January 2006, and the sheriff's sale from the foreclosure netted $99,001. This sale was later confirmed by the circuit court. When JP Morgan learned of the first foreclosure action, it paid M&I the balance due on its mortgage, and M&I assigned JP Morgan all of its rights. JP Morgan then tried to cancel M&I's motion to confirm the first sale to Hare Investments. The circuit court rescinded the confirmation of the second sale, and entered an order confirming the first sale to Hale Investments. JP Morgan appealed the

circuit court order that confirmed the sheriff's sale in the first action to Hare Investments, and vacated confirmation of the second sheriff's sale. The Court of Appeals held that Hare Investments was entitled to apply for confirmation of the sale in the first action even though M&I was the party that had requested the confirmation of the first sale. It also held that JP Morgan was not entitled to obtain an order for a second sale and confirmation of the second action because after being served, it failed to respond in the first action.

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