



Forum on the Construction Industry Programs - Publications - People

Construction Law Update: **Case Law & Legislation** **Affecting the Construction Industry** **(2009-2010)**

Presented by

Division 10 – Legislation and Environment

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INTRODUCTION

Division 10 is proud to present the Fourth Edition of the annual publication, **Construction Law Update: Case Law & Legislation Affecting the Construction Industry (2009-2010)**. There are so many new things to report this year ... so let's get started!

First, we are happy to report that the **Construction Law Update** has been included in the Forum's electronic materials for the 2010 Annual Meeting in Austin, Texas. To make this goal a reality, we had to bump up some deadlines and press a little harder on the contributors so that we had enough time to go to press. We have also been able to work with the Forum to archive our previous year updates (2006, 2007, 2008) on the Forum's *eLibrary* site at:

<http://www.legalist.com/austin2010/elibrary.html>

Second, we added a new group of assistant editors this year to help assist in culling, prodding, reviewing, editing, calling and all that other fun stuff that it takes to get this product into your hands. As a result, we are proud to report that we have construction law updates from 51 states and jurisdictions, which is up 17 contributions from the previous year. Puerto Rico, we're coming after you next year!

Finally, Division 10 has added a new working group to track and review construction-related information in the Federal arena. We have included a new section that tracks environmental updates, administrative and executive orders, rules and regulations, and legislation.

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

We would like to thank all the volunteers and contributors for their efforts this year. We would be remiss if we did not thank Nicole Curley of Smith, Cashion & Orr PLC and Cherie Wickham of Stites & Harbison, PLLC for their countless hours of administrative help this year.

The submissions in this publication are made throughout the 2009-2010 year, which means that some legislation may have passed, been rejected, or even tabled since the publication of this update. The case law and legislation included in this update are not intended to be an exhaustive compilation of every construction-related decision or legislative enactment from within a particular jurisdiction. We rely heavily on our authors to submit timely and accurate information. It is written by you and for you!

If you would like to join this great team of contributors and authors, please contact one of our editors. Have a great year!

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FIFTY-STATE UPDATE

Alabama

Case Law

1. **Indemnity/Insurance:** In *Doster Construction Co. v. Marathon Electrical Contractors, Inc.*, __ So.2d __ (Ala. Sept. 25, 2009), the Supreme Court discussed the interplay between contractual indemnity clauses and contractual requirements for additional insured endorsements. The general contractor had required its electrical subcontractor both to indemnify it broadly and to afford it additional insured status under its liability insurance policy. When an employee of a different subcontractor was injured, the general contractor became responsible to that sub on the basis of a contractual indemnity agreement between them, and sought indemnity and coverage by a third-party complaint against the electrical subcontractor. The Supreme Court held that the indemnity clause should have been enforced, even though general contractor negligence was allegedly involved, since there was no language in the clause excepting losses resulting from the indemnitee's own negligence from the indemnitor's obligations, if the indemnitor's negligence also contributed. On the other hand, there was no breach of the obligation to provide the general contractor with additional insured status. The policy had been endorsed to provide this coverage, but by its terms did not extend to the liability the general contractor had assumed by its indemnity agreement with the subcontractor whose employee was injured.

2. **Arbitration:** In *Herring-Malbis I, LLC, v. Temco, Inc.*, __ So. 2d __ (Ala. Oct. 30, 2009), the Supreme Court continued to flesh out Alabama's approach to binding arbitration. Here, a contractor working under a contract including the 1997 AIA General Conditions filed suit for breach of contract; the owner/developer successfully moved to compel alternative dispute resolution as called for by the AIA Contract, and the parties first mediated and then arbitrated their dispute before AAA. "Right before the hearing, the contractor filed a motion in the trial court to amend its original complaint and add a claim under Alabama's Prompt Payment Act for attorney's fees and expenses. This motion was not acted on prior to the arbitration hearing, which proceeded on the basis of a demand and an answering statement, not including any request for attorney's fees or mention of the Prompt Payment Act. The contractor essentially prevailed in arbitration, with the award providing that each party was responsible for its own fees. Subsequently, the trial court granted the motion to amend the original complaint and eventually proceeded to award attorney's fees to the contractor. The Supreme Court reversed, holding that the parties were obliged to bring any of their claims arising out of or related to the contract to arbitration, and thus the contractor was obligated to include the claim for an attorney's fee in its demand before the arbitrator. Whether it did or did not, the arbitrator's award precluding any recovery of attorney's fees was conclusive, on grounds either of waiver or of res judicata.

3. **Indemnity:** In *Hotcim (US), Inc. v. Ohio Casualty Ins. Co.*, __ So.2d __ (Ala. Nov. 13, 2009), in responding to a certified question from the Eleventh Circuit Court of Appeals, the Alabama Supreme Court took the opportunity to discuss the current state of Alabama law on indemnification. The case arose from a construction site injury to the employee of a general contractor which had agreed to indemnify the owner. The Court repeated the principle that Alabama law permits parties to enter into valid indemnity agreements allowing indemnitees to recover indemnity even for claims resulting solely from the negligence of the indemnitee. Moreover, as a new matter, the Court held that parties may validly agree to an indemnity agreement based upon proportional fault, even though Alabama common law does not permit contribution among joint tortfeasors.

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Alaska

Case Law

1. In ***Squires v. Alaska Board of Architects, Eng'rs & Land Surveyors***, No. S-12722, 2009 WL 1039844 (Alaska, April 17, 2009), the Alaska Supreme Court upheld the rejection of an applicant's request that he be allowed to waive the Fundamentals of Engineering exam ("FE") mandated by the state's licensing board, holding that the applicant failed to present third-party verification of 20 years of engineering experience, as required by 12 AAC 36.090. The Court further rejected the applicant's constitutional claims, holding that the licensing board did not violate the applicant's due process or equal protection rights.

2. In ***Bohlmann v. Alaska Constr. & Eng'g, Inc.***, No. S-12553, 2009 WL 1039841 (Alaska April 17, 2009), the Alaska Supreme Court held that the Alaska Workers' Compensation Board has a duty to assist unrepresented claimants, and that the board's failure to correct an employer's erroneous assertion that its injured worker's claim was time barred constituted an abuse of discretion. There, an excavation equipment operator was seriously injured by falling boulders and small rocks at a quarry site. The operator filed a *pro se* claim for adjustment of his worker's compensation pay rate with the Alaska Division of Workers' Compensation. The employer filed a notice of controversion, arguing that the worker's compensation pay rate had been correctly computed and that the attempt to modify it was time barred. Following an administrative hearing, the Alaska Workers' Compensation Board dismissed the claim on grounds that the two-year period for filing an affidavit of readiness, required by AS 23.30.110(c), had expired. The board's decision was affirmed on appeal to the Alaska Workers' Compensation Appeals Commission. The Alaska Supreme Court reversed and remanded the case, noting that the "board, as an adjudicative body... has a duty similar to that of courts to assist unrepresented litigants."

Legislation

1. **H.B. 24, procurement preference for veterans.** In the most recent legislative session, the Alaska House of Representatives passed H.B. 24, creating a five percent preference on public contracts, for Alaska veteran owned businesses. This is in addition to any other preferences. This preference is capped at \$5,000 and available only to Alaska residents who served in the armed forces of the United States (including reserve units) or served in the Alaska Territorial Guard, the Alaska Army National Guard, the Alaska Air National Guard, or the Alaska Naval Militia, and were not dishonorably discharged. On April 17, 2009, the bill was referred to the Alaska Senate, where it lies in committee.

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Arizona

Case Law

1. In ***Keystone Floor & More, LLC v. Arizona Registrar of Contractors***, 2009 WL 2044422 (App.2009) (no attorneys' fees regarding appeal of registrar of contractor's decision), Keystone Floor and More, LLC ("Contractor") performed tile installation work in a private residence pursuant to an oral contract. The tile began to crack after Keystone completed the work and received payment from the owner. The owner filed a complaint with the Arizona Registrar of Contractors ("ROC") and the ROC issued a corrective work order to

Keystone regarding the cracked tile. After Keystone failed to complete all work in accordance with the corrective work order, the ROC issued a citation and complaint recommending that Keystone's contracting be revoked. The issue was referred to an administrative law judge, who determined that Keystone violated Arizona statutes by failing to complete its work in a professional and workmanlike manner and recommended that Keystone's license be revoked. The ROC adopted the judge's decision and revoked Keystone's license.

Keystone subsequently filed a complaint against the ROC and the owner in superior court seeking judicial review of the ROC's revocation of Keystone's license. In his answer, the owner alleged that the matter arose out of contract and requested an award of attorneys' fees pursuant to A.R.S. § 12-341.01(A). After hearing oral argument and reviewing briefs, the superior court issued a ruling affirming the ROC decision. The owner then applied for an award of attorneys' fees in accordance with §12-341.01(A). The superior court granted the owner's application for attorneys' fees. Keystone timely appealed the decision.

In reversing the superior court's award of attorneys' fees, the Arizona Court of Appeals held that Keystone's appeal of the ROC's decision did not arise out of contract but instead arose out of statute. The Court reasoned that despite the fact that the appeal to the superior court involved a contract, it was not the "cause or origin" of the appeal. Instead, the contract was "peripheral" to the primary issue of whether the ROC erred in finding Keystone had violated its statutory duties as a licensed contractor, and thus the owner was not entitled to fees pursuant to A.R.S. § 12-341.01.

2. In ***Flagstaff Affordable Housing Limited Partnership v. Design Alliance, Inc.***, 2009 WL 755285 (App.2009) (economic loss rule does not bar professional negligence claim against architect), Flagstaff Affordable Housing Limited Partnership ("Owner") entered into a contract with Design Alliance, Inc. ("Architect") for the design of an apartment complex in Flagstaff, Arizona. After construction, the U.S. Department of Housing and Urban Development filed a complaint against the Owner for violating the Fair Housing Design Construction requirements of 24 C.F.R. 100.205. Owner was forced to incur substantial expense to remedy the design deficiencies.

The Owner filed a complaint against Architect alleging breach of contract and professional negligence. No personal injury or property damage had occurred, and Owner sought economic losses as compensatory damages. Architect filed a motion to dismiss the professional negligence claim on the basis that the economic loss rule barred Owner's claim. The trial court granted Architect's motion to dismiss. Owner appealed.

The Arizona Court of Appeals reversed and held that prior Arizona cases addressing the economic loss rule in product liability and construction defects had not decided whether the rule should be applied against design professionals. The Court of Appeals noted that prior Arizona case law held that the relationship between "professionals" and their clients impose "special duties to all within the foreseeable range of harm as a matter of public policy. This was regardless of whether there was a contract, express or implied, and generally regardless of what were the covenants of the contract. These prior cases held that the economic loss rule did not apply to negligence actions against "professionals" like attorneys and accountants. In *Flagstaff*, the Court of Appeals found that architects were also properly categorized as "professionals" for purposes of the application of the economic loss rule because (1) previous Arizona case law decisions held that architects were required to comply with a "standard of care" like attorneys and accountants; (2) architects possessed special knowledge and skills like attorneys and accountants; (3) several other jurisdictions did not apply the economic loss rule to design professionals, and (4) other Arizona cases applying the economic loss rule in the construction defect context were distinguishable from the case at hand. Accordingly, the Court

of Appeals held that the economic loss rule does not apply to professional negligence claims against design professionals.

3. In ***Hughes Custom Building, LLC v. Davey***, 2009 WL 1260171 (App.2009) (economic loss doctrine does not bar builder's negligence claim against engineer), James Davey and Associates, Inc. ("Engineer") performed various engineering services on land located at a real estate subdivision pursuant to a contract with the subdivision's developers. Hughes Custom Building, LLC ("Builder") purchased two lots in the subdivision, constructed homes on those lots, and sold the homes to two separate owners. The owners then filed civil and Registrar of Contractor complaints against Builder alleging that improper compaction of the subdivision land had resulted in soil subsidence and structural damage. Builder subsequently filed a negligence claim against Engineer. Engineer moved to dismiss Builder's negligence claim by alleging, in part, that the economic loss doctrine barred Builder's claim because Builder had not alleged any personal injury or secondary property loss resulting from Engineer's alleged negligence. The trial court granted Engineer's motion and Builder appealed.

The Court of Appeals reversed and held that the application of the economic loss rule is **not** exclusively determined by the existence of personal injury or damage to secondary property, apparently overruling previous Arizona law to the contrary. Instead, the Court of Appeals held that the economic loss rule must be analyzed on a case-by-case basis utilizing three separate factors: (1) the nature of the defect causing loss, (2) how the loss occurred, and (3) the type of loss for which the plaintiff seeks redress.

The Court of Appeals first addressed the third element—the type of loss for which the plaintiff seeks redress—and explained that this analysis focuses on whether a plaintiff's damages include physical damage to persons or "other property." The Court determined that the lots and homes constituted separate and distinct property, and thus the damage to the homes constituted damage to "other property." Specifically, the Court held that Builder's allegations of defect pertained to the **soil**, not the homes, and thus the third element mitigated strongly against the application of the economic loss rule against Builder's negligence claim.

Next, the Court of Appeals analyzed the first element—the nature of the defect causing loss—and stated that this element turns on whether the defect in question poses an unreasonable danger to a person or property or if the defect merely goes to the quality of construction. Here, the Court cited to inspection reports stating that the damaged homes created an unreasonable danger to both to property and to the occupants of the houses, again mitigating strongly against the application of the economic loss rule.

Finally, the Court analyzed the second element—the manner in which the loss occurred—and held that this analysis required the Court to determine whether the loss resulted from a "sudden accident" or "from a slow process of deterioration." The Court held that even if it were assumed that this factor weighed against the Builder, the first and third elements weighed conclusively against the application of the rule. Thus, the economic loss rule did not bar Builder's negligence claim against the Engineer.

4. In ***Highland Village Partners, LLC v. Bradbury & Stamm Construction Co., Inc.***, 219 Ariz. 147, 195 P.3d 184 (App.2008) (owner may expressly assign its implied warranty rights in commercial property), Bradbury & Stamm Construction Co., Inc. ("Builder") constructed an apartment complex on behalf of its client ("Owner"). Owner later sold the complex to Highland Village Partners, LLC ("Buyer"). In the sales agreement, Owner expressly assigned to Buyer all warranties or guaranties from contractors, subcontractors, suppliers, or materialmen as well as all contract.

Less than a year later, Buyer filed suit against Builder alleging breach of the implied warranty of workmanship and habitability due to the existence of various construction defects at the project. Builder filed a motion for summary judgment arguing that Buyer lacked privity of contract with Builder and that any warranty claims belonged exclusively to Owner. The trial court granted Builder's motion. Buyer appealed.

The Court of Appeals reversed and held that while the implied warranty of workmanship and habitability does not automatically run to subsequent purchasers of commercial property, the original purchaser can expressly assign its warranty rights in accordance with the Arizona public policy supporting the freedom to contract. Moreover, the Court found that allowing the express assignment of the implied warranty of workmanship and habitability did not violate public policy because (1) Arizona's statute of repose and the doctrine of laches prevent assignees from sitting on their rights under an implied warranty, and (2) builders are free to insert non-assignability clauses in their building contracts. Accordingly, the Court of Appeals upheld the express assignment of the Owner's implied warranty rights.

5. In ***Airfreight Express, Ltd. v. EvergreenAir Center, Inc.***, 215 Ariz. 103, 158 P.3d 232 (2007) (bad faith bars limitation of liability clause), Airfreight Express, Ltd. ("Owner") contracted with EvergreenAir Center, Inc. ("Contractor") to perform maintenance and repairs to its aircraft. The agreement contained a limitation of damages clause purporting to bar all claims for lost profits. Owner subsequently sued Contractor alleging that Contractor failed to assign a sufficient number of mechanics and inspectors to work on its aircraft and that it acted in bad faith in failing to complete its work. The trial court granted Contractor's motion for summary judgment based upon the contractual limitation of damages clause in the contract. Owner appealed. The Court of Appeals reversed and held that a limitation of liability clause does not apply where the party relying on the clause acted in bad faith.

6. In ***1800 Ocotillo, LLC v. WLB Group, Inc.***, 219 Ariz. 200, 196 P.3d 222 (2008) (limitation of liability clauses do not violate public policy and do not require submission to the jury), 1800 Ocotillo, LLC ("Builder") contracted with WLB Group, Inc. ("Engineer") whereby Engineer was to prepare a survey identifying boundary lines and rights-of-way related to the construction of townhomes near a canal. After Engineer completed the survey, the canal operator claimed an interest in a right-of-way that was not accurately reflected in WLB's survey, causing the City of Phoenix to deny Builder certain building permits.

Builder sued, alleging that Engineer negligently prepared the survey and caused Builder to incur delay damages and additional engineering fees and services. Engineer responded by arguing that any liability on its part was limited by a contractual clause limiting Engineer's liability to the total amount of fees paid to Engineer from Builder. Builder countered by arguing that this liability limitation violated public policy. The trial court rejected Builder's argument and granted partial summary judgment limiting Engineer's liability to the fees paid to Engineer. Builder appealed.

The Arizona Court of Appeals affirmed and held that the liability limitation provision did not violate public policy. However, the Court of Appeals held that such a provision was subject to Article 18, Section 5 of the Arizona Constitution addressing assumption of risk, requiring a jury to decide whether to enforce the liability limitation provision and, if so, the extent of its application. Engineer petitioned for review of the assumption of risk issue and Builder cross-petitioned for review of the public policy issue. The Arizona Supreme Court granted both petitions.

In addressing the public policy issue, the Supreme Court held that the liability limitation clause did not violate Arizona's anti-indemnity statute, A.R.S. § 32-1159, because the plain language of the statute applied only to indemnification, hold harmless agreements, or duty to defend agreements. The Supreme Court distinguished these agreements, which shift *all*

responsibility for negligence from one entity to another, from limitation of liability clauses, which merely *limit* a negligent party's responsibility for its own negligence. Accordingly, the Supreme Court held that liability limitation clauses do not violate public policy so long as the limitation is not so low that it effectively eliminates the incentive of the promisee to perform its duties in a reasonable manner.

With respect to the assumption of risk issue, the Supreme Court held that a limitation of liability clause was not a form of "assumption of risk" as that term is used in the Arizona Constitution. The Supreme Court held that the term "assumption of risk" referred to defenses that effectively relieved a party from a duty to exercise due care as opposed to a defense creating a ceiling on recoverable damages. Accordingly, limitation of liability clauses are not required to be resolved by a jury pursuant to the Arizona Constitution.

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Arkansas

Legislation

1. **Ark. Code Ann. §§ 18-44-133, -134, Lien of architect, engineer, surveyor, appraiser, abstractor, or title insurance agent, AND Lien for landscaping services and supplies.** The statutes providing for liens for architects, engineers, surveyors, appraisers, abstractors, title insurance agents, and landscapers were repealed and reincorporated into Ark. Code Ann. § 18-44-105, creating one statute that allows a lien for an architect, engineer, surveyor, appraiser, landscaper, abstractor, or title insurance agent.

2. **Ark. Code Ann. § 18-44-108, Refusal to list parties doing work or furnishing materials.** The statute allowing an owner, material supplier, subcontractor or other interested party to petition a contractor or subcontractor for a list of parties doing work or furnishing material for a building **and** the amount due to such parties was amended to add penalties for the refusal to comply with the statute. Amended section (b)(2) states that a contractor or subcontractor failing to comply with the statute is subject to a suit by the aggrieved party in the circuit court of the county where the property is situated, and additionally states that the prevailing party in such action shall receive a judgment for damages proximately caused by any violation, costs, and a reasonable attorney's fee.

3. **Ark. Code Ann. § 18-44-113, Assignment of Liens.** Previously, assignments of liens were not enforceable **against** a property owner unless the owner had actual notice of the assignment. The statute was amended to state that the owner shall be considered to have actual notice if, within thirty (30) days of an assignment, a copy of the assignment is hand-delivered to the owner, mailed to the owner (as evidenced by a return receipt signed by the addressee, or a returned envelope showing a refusal of delivery or that the item was unclaimed), or delivered by any other means that provides written, third-party verification of delivery at any place where the owner maintains an office, conducts business, or resides.

4. **Ark. Code Ann. § 18-44-114, Notice and service generally.** The statute requiring ten (10) days notice before filing a lien was amended to allow service via any method that provides written, **third**-party verification of delivery. Also, when a ten-day notice is served by mail, service is completed upon mailing, and an unopened envelope marked unclaimed or refused shall be proof of service of an unclaimed or refused notice.

5. **Ark. Code Ann. § 18-44-115, Notice to owner by contractor.** The statute detailing the requisite notice from a contractor to a property owner received several amendments.

First, the statute was amended to state that, if a residential contractor fails to give notice under § 115, then the contractor is barred from bringing suit, including a suit for quantum meruit, to enforce any provision of a residential contract.

Second, the statute was amended to state that, if a lien claimant gives notice under section 115 prior to commencing work, then his notice is good for all other lien claimants. However, if a lien claimant relies on another lien claimant's notice when filing suit to enforce a lien, then his lien only secures the labor, material, and services supplied *after* the effective date of the other lien claimant's notice.

Third, a residential contractor who fails to give notice under § 115 is now guilty of a violation of Ark. Code Ann. § 5-1-108, which is punishable of a fine not to exceed \$1,000.00

Fourth, the requisite statutory notice was amended to identify specific lien claimants and the type of work such claimants may do on the property.

Fifth, the statute now defines "Commercial real estate" as "nonresidential real estate" and "residential real estate containing five (5) or more units." Consumers who construct or improve residential real estate, as opposed to commercial real estate, are entitled to additional notice and protection.

6. **Ark. Code Ann. § 18-44-118, Filing of bond in contest of lien.** The statute regarding a contest of a lien was amended to detail the nature of a civil action in protest of a lien.

The amended statute states that such a protest shall be filed as a civil action in the circuit court of the county where the lien is filed, and that the issues in such an action are limited to whether the lien was filed in the requisite form and whether the statutory notice requirements were satisfied.

The amended statute also provides for a special notice to be served alongside the customary summons. Such notice informs the respondent that the complainant seeks to have a lien discharged, and that any response shall be made within five (5) business days, or a discharge of lien shall be granted. The notice additionally states that, upon written objection to a discharge, a hearing shall be scheduled to determine the validity of the protest.

If the respondent does not file a written objection within five (5) business days of service, then the complainant is entitled to an immediate discharge of lien. If the respondent does timely file a written objection, then a hearing shall be set and the action "shall be heard as expeditiously as the business of the court permits."

If the circuit court finds the lien's form or the notice deficient, then it shall enter an order of discharge. The prevailing party in such an action is entitled to costs and a reasonable attorney's fee.

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California

Case Law

1. In **Sanders Construction Co., Inc. v. Cerda**, 175 Cal.App.4th 430, 95 Cal.Rptr.3d 911 (2009), the Court of Appeal held that a general contractor is responsible for the unpaid wages of the employees of unlicensed subcontractors.

In this case, a general contractor hired a subcontractor to install drywall. The general contractor paid the subcontractor, who the contractor believed was then going to pay its employees. A few months later, the general contractor discovered that the subcontractor's license had expired before it was hired for the project, but he continued to work with him to complete the project. The employees of the subcontractor later filed wage claims against the general contractor with the state Labor Commissioner. The Labor Commissioner found that the general contractor was responsible for the wages of the subcontractor's employees, concluding that Labor Code Section 2750.5 states that the general contractor is the employer of those employed by its unlicensed subcontractors. The general contractor appealed this decision.

The general contractor argued that Labor Code Section 2570.5 applied to make the general contractor responsible for the payment of an unlicensed subcontractor's employees only in cases involving workers compensation and unemployment benefits. However, the court rejected this argument, finding that "no meaningful distinction exists between being paid wages and receiving other benefits based on wages. In both instances the same policy reasons militate against allowing a general contractor to escape liability for the obligations of an unlicensed subcontractor." *Id.* at 436. The court further held that the workers were not required to be licensed and, therefore, Business & Professions Code Section 7031 did not prohibit them from suing for their wages. Thus, the workers of the unlicensed subcontractor were entitled to recover their wages and interest from the general contractor.

This case emphasizes the importance of a general contractor to exercise due diligence in its investigation of subcontractors and to determine that the subcontractors it hires hold current and valid licenses.

2. In **White v. Cridlebaugh**, 175 Cal.App.4th 1535, 97 Cal.Rptr.3d 504 (2009), the Court of Appeal held that: (1) homeowners who hired an unlicensed contractor could recover all compensation paid to the unlicensed contractor; and (2) the homeowners' recovery would not be reduced by the unlicensed contractor's claim of offset for the materials and services provided in connection with its work.

In this case, the homeowners hired the contractor to construct their new home, unaware that the contractor was not validly licensed. While the contractor's company was formerly owned by a licensed contractor, the licensed contractor was no longer associated with the company. The contractor never held a California contractor's license in his own name. Therefore, the court concluded, contractor was unlicensed.

The contractor began work on the home, and the homeowners paid the contractor's bills. Disputes arose regarding the contractor's work and billing on the project, and so the homeowners instructed the contractor to cease all work. The homeowners and contractor both brought claims in court, each seeking recovery of damages against the other.

The court analyzed California's Contractor's State License Law ("CSLL"), as set forth in Business & Professions Code Sections 7000, *et seq.* The court noted that the CSLL has various protections in place to protect a person who uses an unlicensed contractor. For example, Business & Professions Code Section 7031(b) allows any person who utilizes the

services of an unlicensed contractor to bring an action in court “to recover *all* compensation paid to the unlicensed contractor for performance of any act or contract unless the substantial compliance doctrine applies.” *Id.* at 1548 (emphasis in original). The court broadly interpreted the phrase “all compensation” as used in Section 7031(b) to include compensation that has already been paid to the unlicensed contractor. Therefore, the court held, the unlicensed contractor was required to return all compensation received, without reductions or offsets for the value of the material provided.

This case again emphasizes the importance of maintaining a current, valid license. The California courts continue to take a strong stance against unlicensed contractors, and so contractors must be careful to comply with all licensing requirements.

3. In ***Freedman v. State Farm Ins. Co.***, 173 Cal.App.4th 957, 93 Cal.Rptr.3d 296 (2009), the court held that a homeowners’ insurance policy excludes coverage for losses due to a third party’s negligent conduct when the negligent conduct interacts with a risk that is specifically excluded from the policy.

In this case, the homeowners hired a contractor to remodel a bathroom in their home. During the installation of the new drywall, the contractor drove a nail through a pipe in the plumbing system. The nail did not initially cause a leak, but five years later, corrosion around the nail finally caused a leak, which caused extensive water damage to the interior of the home. The homeowners made a claim on their homeowners policy, which was denied. The homeowners’ policy provided “all risk” coverage for their dwelling, but excluded loss from, among other things: (1) corrosion, electrolysis or rust; and (2) water damage, defined as continuous or repeated seepage or leakage of water from a plumbing system. The policy further excluded negligent conduct and defective workmanship by third parties whenever they interacted with an excluded risk.

The homeowners argued that their claim was covered under their policy’s “all risk” coverage of their dwelling since the third-party negligence of the contractor driving a nail through the pipe was the efficient proximate cause of their loss. However, the court disagreed, concluding that the third party negligence provisions of the policy effectively excluded third party’s negligent conduct and defective workmanship whenever they interact with an excluded risk. Here, the contractor’s negligence interacted with an excluded risk, namely, corrosion and continuous water leakage. Therefore, the policy excluded the “contractor-negligence-induced corrosion and contractor-negligence-induced continuous or repeated seepage or leakage of water” and so the homeowners’ claim was properly denied. *Id.* at 963.

This case supports an insurer’s right to draft a policy that defeats the efficient proximate cause doctrine. The efficient proximate cause doctrine states that when a loss is caused by a combination of covered and specifically excluded risks, the loss is still covered if the covered risk was the efficient proximate cause of the loss. The efficient proximate cause of a loss is the predominant or most important cause of the loss. Here, the efficient proximate cause doctrine is defeated by a policy that excludes certain types of loss, even though a covered risk may have contributed to, aggravated, or caused the loss.

4. In ***Daewoo Engineering & Construction Co., Ltd. v. United States***, 557 F.3d 1332 (Fed. Cir. 2009), the Court of Appeals held that a contractor could be penalized under the Contract Disputes Act for bringing a claim that was based on meritless calculations of future costs.

In this case, the United States Army Corps of Engineers solicited bids for the construction of a 53-mile road. After submitting a final revised bid for \$88.6 million, the contractor was awarded the contract. According to the contract, the construction was to be

completed in 1,080 days. The contractor began work, however, the contractor soon experienced delays that it attributed to humidity and weather. The contractor submitted a certified claim requesting an adjustment to the contract price and to the time to complete performance. The contracting officer denied the contractor's claim. The contractor filed suit seeking to recover about \$64 million. Of this, \$50 million related to claimed future costs and damages. The government counterclaimed for damages of \$64 million plus \$10,000 under the False Claims Act.

The lower court found that the contractor had filed at least \$50 million of the \$64 million certified claim in bad faith and assessed a penalty of \$50.6 million against the contractor under the Contract Disputes Act. The Court of Appeals also concluded that \$50.6 million portion of the claim for future costs was fraudulent because the contractor's projected cost calculation was baseless. The calculation assumed that the government was responsible for each day of additional performance, disregarding any consideration of whether there was any contractor-caused delay or delay for which the government was not responsible. The court rejected the contractor's argument that a claim is fraudulent only if it rests upon false facts rather than on a baseless calculation, and therefore, held that the contractor's claim was fraudulent.

The court further affirmed the lower court's ruling that the contractor was subject to a \$50.6 million penalty under the Contract Disputes Act and that the contractor had forfeited its \$13 million portion of the claim for past damages, pursuant to 28 U.S.C. Section 2514. This case emphasizes the importance of developing coherent factual and legal theories at the outset of a dispute. Moreover, this case demonstrates that the contractor should ensure that its legal theories are supported by the factual record before submitting a certified claim to the contracting officer, or else it could face a counterclaim that it violated the Contract Disputes Act.

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Colorado

Case law

1. In ***Smith v. Executive Custom Homes, Inc.***, ___ P.3d ___, 2009 WL 262463 (Colo.App. 2009), the Colorado Court of Appeals determined that the "repair doctrine" applies to a homeowner's defective construction claim for purposes of tolling the statute of limitations for construction defect claims arising under the Colorado Construction Defect Action Reform Act ("CDARA"). In *Smith*, a homeowner brought a personal injury action against the defendant homebuilder for personal injuries sustained in a fall on ice that accumulated on the home's exterior steps as a result of alleged defective roof gutters and downspouts. Defendant filed a motion for summary judgment arguing that Plaintiff failed to satisfy the two-year statute of limitations in § 13-80-104(1) of CDARA. The trial court granted the motion. The Court of Appeals reversed, holding that the repair doctrine equitably tolled Plaintiff's claims. At the outset, the Court of Appeals confirmed that a claim arises under CDARA when the physical manifestation of defect that ultimately causes the injury is discovered, not the date of homeowner's physical injury. *Id.* at *3. The Court further confirmed that under CDARA, property owners must act with diligence upon the discovery of a construction defect or risk possible forfeiture of their action for the defect, including an action for personal injuries occurring after the defect was discovered, by expiration of the statute of limitations. "However, the running of the statute of limitations can be equitably tolled by a form of promissory estoppel referred to as the 'repair doctrine.'" *Id.* The doctrine allows tolling of a limitations period when a plaintiff can show

that after a defect was noticed (1) repairs were attempted; (2) representations or promises, express or implied, were made by the defendant that the repairs would remedy the defect; (3) the plaintiff reasonably relied on the representations or promises; and (4) as a result, the plaintiff delayed filing a legal action against the defendant. “The repair doctrine protects a homeowner who has duly sought to remedy a defect but who was led to reasonably believe that he or she will receive satisfaction without resort to litigation. Thus, the promise of repair relied upon by a party invoking the repair doctrine need not be implied from all of the circumstances. A promise implied in fact is one existing by inference from the circumstance or actions of the parties.” *Id.* at *5. In its reasoning, the Court concluded: “[h]ere, it was undisputed that homeowners not only promptly complied with the procedures, but expressly demanded the [Defendant] either repair the condition or reimburse them for the costs of the repair if it refused. Particularly because homeowners’ demand mandated that [Defendant] make a choice, a trier of fact could find from the lack of response that [Defendant] was either renegeing on its generic promise to make repairs when duly requested or not placing the responsibility for the repair back on the homeowners...Therefore, drawing all inferences from the undisputed facts in homeowner’s favor, we conclude that because they duly complied with the development’s procedures for obtaining construction defect repairs, and because [Defendant] failed to communicate anything in the nature of a refusal to homeowners, homeowners could reasonably have understood [Defendant] to have promised to undertake the requested repair.” *Id.*

2. In ***Snook v. Joyce Homes, Inc.***, ___ P.3d ___, 2009 WL 261803 (Colo.App. 2009), the Colorado Court of Appeals was asked to determine, as a matter of law, whether the subcontractor of the homebuilder’s subcontract was its “statutory employer” for purpose of capping the sub-subcontractor’s claim for worker’s compensation to \$15,000, as set forth in § 8-41-401(3), C.R.S. (2008), of the Colorado Worker’s Compensation Act. Here, Snook’s contract was with Joyce Home’s subcontractor, Total Interior Trim Systems (Total Interior). Snook claimed worker’s compensation benefits from Joyce Homes after falling from a scaffolding that he alleged was negligently constructed. The trial court ruled that that Joyce Homes was the statutory employer of Snook for purposes of limiting Snook’s worker’s compensation claim to \$15,000. The Court of Appeal affirmed. Under Colorado law, “a statutory employer is one who conducts any business by leasing or contracting out any part or all of the work thereof to any lessee, sublessee, contractor, or subcontractor, irrespective of the number of employees engaged in such work.” *Id.* at *5 (citing § 8-41-401(1), C.R.S. (2008)). The general test to determine an entity’s status as a statutory employer pursuant to § 8-4-401 is whether the work contracted out is of the regular business of the constructive employer. *Id.* “The work performed by the subcontracted worker must be such part of his regular business operation as the statutory employer ordinarily would accomplish with his own employees.” *Id.* In applying these principals to the facts of the case, the Court held: “[h]ere it is undisputed that the business of Joyce Homes was constructing residential homes and that Snook was a sole proprietor and was hired as an independent contractor by one of Joyce Homes’ subcontractors to perform trim work. Snook does not dispute the contracts Joyce Homes proffered in support of its motion, demonstrating its relationship with Total Interior, and, in turn, Total Interior’s relationship with Snook. In his deposition, which Joyce Homes also proffered, Snook admitted he knew he was contractually obligated to obtain workers’ compensation coverage, but failed to do so. These undisputed facts reflect the absence of any genuine issue of material fact that Snook was a sole proprietor and an independent contractor not covered by the workers’ compensation system, and that Joyce Homes was his statutory employer” for purposes of limiting damages. *Id.*

3. In ***Copper Mountain, Inc. v Industrial Systems, Inc.***, ___ P.3d ___, 2009 WL 662072 (Colo. 2009), the Colorado Supreme Court was asked to determine whether the waiver provision in a Standard AIA Owner-Contractor Agreement between Copper Mountain, Inc. (“Copper”) and Amako Resort Construction (U.S.), Inc. (“Amako”) bars Copper’s claims against Amako and Amako’s subcontractor, Industrial Systems, Inc. (“Industrial”), for fire-related damages to a ski lodge that Amako and Industrial were renovating. The property elements

damaged in the fire, however, were not included in the Work. The court of appeals affirmed the trial court's determination that the waiver clause in the contract precluded Copper's claims against Amako and Industrial. The Colorado Supreme Court reversed, reasoning as follows: "[w]e hold that the contract does not bar Copper's claims against Amako and Industrial for damages to property that was not part of the contractual Work, despite the fact that Copper insured the damaged property under an existing policy covering the Work. Under paragraph 11.4.7 of the contract, Copper waived rights against Amako for damages caused by fire 'to the extent covered by property insurance obtained pursuant to this Paragraph 11.4 or other property insurance applicable to the Work....' We conclude that this clause only bars claims for damages to the contractual Work, and does not bar claims for damages to non-Work property. We further conclude that the waiver provision of paragraph 11.4.5 only applies to project Work addressed by paragraph 11.7." *Id.* at *1. Colorado's interpretation of paragraph 11.4.7 of the AIA contract differs from some jurisdictions, which hold that paragraph 11.4.7 in the AIA contract bars an owner's claims for damages to non-Work property to the extent the owner's insurance policy covering Work also covers the non-Work property. See, e.g., *Lexington Ins. Co. v. Entrex Commc'n Servs., Inc.*, 275 Neb. 702, 749 N.W.2d 124, 134 (2008); *Trinity Universal Ins. Co. v. Bill Cox Constr., Inc.*, 75 S.W.3d 6, 13 (Tex.App. 2001); *Employers Mut. Cas. Co. v. A.C.C.T., Inc.*, 580 N.W.2d 490, 493 (Minn. 1998).

4. In ***General Security Indemnity Co. of Arizona v. Mountain States Mutual Casualty Co.***, ___ P.3d ___, 2009 WL 400053 (Colo.App. 2009), the Colorado Court of Appeals was asked to determine, as a matter of first impression, whether a claim for "poor workmanship" constituted an "occurrence" under common CGL policies for purposes of triggering defense coverage from the CGL carrier. The Court of Appeals determined that claims for poor workmanship are not an "occurrence" and therefore, do not trigger an insurer's duty to defend, regardless of whether such claim is premised on breach of contract or tort. In rendering its decision, the Court of Appeals reasoned that under the subject CGL policies, the word "occurrence" is defined as: "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.* at *4. "Divisions of this court have previously defined 'accident' in CGL policies as 'an unanticipated or unusual result flowing from a commonplace cause.'" Based upon these accepted definitions of occurrence and accident, the Court of Appeals concluded, as a matter of law, that "a claim for damages arising from poor workmanship, standing alone, does not allege an accident that constitutes a covered occurrence, regardless of the underlying legal theory pled." *Id.* at *5.

Legislation

1. **SB09-040, Regulation of Manufactured Homes: SB09-040 takes affect on July 1, 2009.** The Bill modifies the recording requirements for certain documents related to a manufactured home, as outlined in § 38-29-101, *et. seq.* C.R.S. (2009). 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, the Bill 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, including a copy of the recorded certificate of permanent location, a statement that the identification number has been verified pursuant to § 38-29-122(3)(a), and a copy of the recorded long-term lease. The Director shall then accept the documents as sufficient evidence of the applicant's proof of ownership of the manufactured home.

2. **HB09-1080, Building Code Official Civil Immunity: The House Bill was passed on January 29, 2009, and is effective as of that date.** The Bill 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. The Bill defines a "building code official"

to mean “an individual maintaining a certification in good standing by the International Code Council or similar association of building code officials.

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Connecticut

Case Law

1. ***Lindade Construction, Inc. et al. v. Continental Cas. Co.***, No. X10-CV-07-5008768-S (Conn. Super. Ct. November 24, 2008). Upholding “pay if paid” clause.

In *Lindade*, 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 get paid 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. ***Town of New Canaan v. Brooks Laboratories***, 44 Conn. L. Rptr. 501 (January 28, 2008). The economic loss doctrine is not applicable to construction contracts.

The plaintiff brought suit against the defendant, Brooks Laboratories (“Brooks”), claiming breach of contract and negligence as a result of faulty asbestos abatement. The defendant filed an apportionment complaint against several parties. The apportionment defendants, in a motion to strike, argued that the economic loss doctrine adopted by Connecticut barred Brooks’ claims.

The court stated, that in Connecticut “the economic loss doctrine is a judicially created principle which prohibits recovery in tort where the basis for that tort claim arises from violation of a contract and damages are limited to purely economic losses as opposed to personal injury or property damage.” (Internal quotation marks omitted.) *Id.* at 502. After reviewing Connecticut’s economic loss doctrine and the plaintiffs claims, the court held “Connecticut has not adopted the economic loss doctrine with respect to claims similar to those asserted by [the

plaintiff] against [certain apportionment defendants]. Accordingly, the motions to strike cannot be granted on that ground.” *Id.* at 504.

3. ***North Haven Construction Co. v. Banton Construction Co.***, 46 Conn. L. Rptr. 221 (November 3, 2008). A statutory bond includes the terms of the statute, even if not expressly stated. The time limits for bringing a cause of action under Connecticut’s Little Miller Act cannot be expanded through contract language.

In *North Haven*, The plaintiff entered into a construction contract with the defendant for work on a public project. Pursuant to the Little Miller Act (“Act”), the defendant as principal and Fidelity and Deposit Company of Maryland (“Fidelity”) as surety, posted a payment bond. After several letters requesting to be paid for damages caused by project delay, the plaintiff brought suit against the defendant and Fidelity.

Fidelity filed a motion to dismiss challenging the court’s jurisdiction over it because the plaintiff failed to commence suit within the statutory requirements of the Little Miller Act and the plaintiff failed to comply with the statutory notice requirements.

In response, the plaintiff argued that the statutory period for bringing the claim was expanded by the language in the bond and that it did comply with the notice requirements.

The court held that when a statutory bond is given, like those required on public work projects, the terms of the statute are read into the bond. Furthermore, the court held that statutes of limitations set forth in the Act were “a jurisdictional requirement establishing a condition precedent to maintaining a cause of action under the Little Miller Act [and]. . .the statute having created the cause of action. . .must be strictly complied with.” *Id.* at 224. The court rejected the plaintiff’s argument that the bond controlled; nor could they attempt to “contract around the statute of limitations” stated in the Act. *Id.*

4. ***State of Connecticut, et al. v. Lombardo Brothers Mason Contractors, Inc.***, Docket No. X01-UWY-CV-08-5010658-S, 2009 Conn. Super. LEXIS 389 (Feb. 23, 2009), *corrected in* 2009 Conn. Super. LEXIS 638 (Mar. 9, 2009). The State is subject to contractual and statutory periods of limitation and statutes of repose, and is not exempted from filing suit in a timely manner.

Twelve (12) years after taking occupancy, the State of Connecticut brought suit against fifteen defendants for alleged defective design and construction of the law library at the University of Connecticut School of Law (the Project was designed starting in 1992, construction commenced in 1994, state took occupancy on Jan. 31, 2006, construction completed in 1996 and the complaint was served on Feb. 14, 2008). Specifically, the State alleged that during the months and years following completion of the Project and occupancy by the State, the library began leaking, and that in the 2000’s, the State retained forensic engineers to investigate the full extent and likely causes of the problem. The State offered no excuse for waiting to file suit until twelve years after construction was completed and the leaks were discovered.

The defendants filed motions to strike based upon, *inter alia*, untimeliness of the State’s complaint. In arguing that its action was not barred by the passage of the applicable statute of limitations or statute of repose, the State relied upon an ancient maximum, *nullum tempus occurrit regi*, which literally translates to “no time runs against the King.”

The Court first considered the motion filed by the construction manager. In rejecting the State’s *nullum tempus* argument, the Court found persuasive the fact that the contract between the State and the construction manager contained an express provision which precluded the State from bringing suit against the CM more than seven years after substantial completion, and further contained a limitation of remedies provision which limited the State’s remedies for any

cause of action arising out of the contract. This contractual (rather than statutory) period of limitation was held to be binding on the State, irrespective of whether any statutory period of limitations or repose might otherwise apply.

The Court then went on to consider whether, in the absence of an express provision in a contract, the applicable statutes of limitations and/or statutes of repose would bar the State's action against the remaining defendants. The court, in great depth, discussed the distinctions between a statute of limitations and a statute of repose.

With respect to statutes of repose, the Court concluded that the legislative purpose behind statutes of repose—to free certain defendants from suit after a set period regardless of the merits of the delay—would be completely frustrated by the use of *nullum tempus* to provide immunity to the State. Accordingly, the Court rejected *nullum tempus* as a defense to the State's violation of the applicable statutes of repose, and dismissed the State's tort claims to which the statute of repose applied.

With respect to the statute of limitations, the Court reasoned that the State's delay in initiating the action was “unduly burdensome and unexplained,” in light of the State's admission in its Complaint that the leaks in the law library had been discovered just months after the State took occupancy. The Court, concerned with the “slippery slope” that would result from allowing the State to file suit on stale claims in perpetuity, held that the State's contract claims were barred by the applicable statute of limitations.

5. ***Mafoo Electrical Contractors, Inc. v. Turner Construction Company***, Civil Action No. 3:07-CV-00114 (VLB), 2009 U.S. Dist. LEXIS 24499 (March 26, 2009). Upholding no damages for delay clause.

In *Mafoo*, the Court considered whether an electrical subcontractor's claim for equitable adjustment to the contract was barred by the “no damages for delay” clause in its contract with the general contractor. The electrical subcontractor acknowledged the applicability of the clause, but argued that one of several equitable exceptions to enforcement should apply.

The Court first noted the general rule in Connecticut that “no damages for delay clauses are generally valid and enforceable and are not contrary to public policy.” (citing *White Oak Corp. v. Dept. of Trans.*, 585 A.2d 1199 (Conn. 1991)). The Court then identified four situations where such clauses will not be enforced: (1) the delays are caused by the contractee's bad faith or its willful, malicious, or grossly negligent conduct, (2) the delays are unanticipated, (3) the delays are so unreasonable that they constitute an intentional abandonment of the contract by the contractee, and/or (4) the delays resulted from the contractee's breach of a fundamental obligation of the contract.

With this framework, the Court considered whether any of the four exceptions would apply in this case. In rejecting the first exception, the Court noted that neither explicit nor implicit in the plaintiff's allegations, or in the facts alleged in the complaint, was any willful or malicious, or reckless conduct. At most, the plaintiff alleged poor performance by the general contractor, which did not rise to the level of gross negligence or bad faith necessary to implicate the first exception.

The Court further noted that the plaintiff itself was untimely in providing the GC with its notices of delay and did not describe its damages to the GC with the detail required by the contract. The Court held that plaintiff's failure to notify the GC of the effect of the GC's poor performance deprived the GC of the requisite knowledge necessary to commit gross, wanton, malicious or reckless negligence in its performance of the contract because it could not act intentionally or in reckless disregard of a harm of which it was not aware.

The Court further rejected the plaintiff's argument that the delays in question were "uncontemplated." The court reasoned that these types of delays were foreseeable and were not sufficiently lengthy to be considered an abandonment of the contract. Accordingly, plaintiff did not establish the second or third exceptions to enforcement of the no damage for delay clause. Nor did the Court find any "breach of a fundamental, affirmative obligation" in the contract which would satisfy the final exception. The court reasoned that there had been no "complete failure of a condition precedent to performance," but merely a delay in performance that did not constitute a fundamental breach. In order to overcome an otherwise enforceable no damages for delay clause, the "fundamental breach must completely frustrate the performance of one of the parties, not merely delay it for a time." Accordingly, the court granted the GC's motion for partial summary judgment as to the subcontractor's delay claims.

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Delaware

Case Law

1. In ***King Construction, Inc. v. Plaza Four Realty, LLC, 976 A.2d 145 (Del. 2009)*** the Delaware Supreme Court affirmed the lower court's decision to dismiss King Construction's mechanic's lien action as a result of three deficiencies in the lien: 1) failure to allege that the owner provided prior written consent to the contract, which was between the contractor and a tenant leasing property from the owner; 2) failure to allege last day of work and 3) premature filing of the lien claim. The Supreme Court affirmed that the Delaware mechanic's lien statute requires that a construction contract with a tenant, must allege the owner's prior written consent to the construction, because liens resulting from the assent of a tenant to improvements falls into a "special category" of liens under the lien statute, requiring that the lien statement allege all 11 elements required under Delaware's lien law *and* that the requirement for prior written consent be met. In addition, the Supreme Court noted that the lien statement must allege the date on which work was completed, even though the contractor argued that there was no prejudice to the owner for failing to provide that information. Finally, a lien claim cannot be asserted *before* the date of completion of work on the project. Here, the contractor admitted that it was continuing to supply labor and materials at the time it filed its lien claim. The Supreme Court concluded that the Delaware lien statute has both a starting date and an ending date for the time within which a claim may be filed.

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District of Columbia

Case Law

1. In ***American Nat. Red Cross v. Vinton Roofing Co., Inc., 629 F.Supp.2d 5 (D.D.C. 2009)***, an owner filed suit against a roofing contractor alleging that the contractor had failed to properly secure the work in progress to prevent leaks, which resulted in significant property damage when it rained. On the owner's motion for summary judgment, the court found that there was no material dispute that the contractor had failed to secure its work as required by the contract and that such failure clearly caused damages to the plaintiff. The court rejected

the contractor's Act of God defense, stating that this defense is permitted only when the damage "is the result of the direct, immediate and exclusive operation of the forces of nature, uncontrolled or uninfluenced by the power of man and without human intervention, and is of such character that it could not have been prevented or avoided by foresight of prudence." In granting summary judgment on liability grounds in favor of the owner, the court found that the contractor's decision to work despite the forecast of rain and the failure to properly secure the building upon leaving for the day was human intervention that could have been avoided by foresight or prudence.

2. In **Harrington v. Trotman**, 983 A.2d 342 (D.C. 2009), a homeowner brought an action for unjust enrichment against a contractor alleging that he paid the contractor more than the value of the work performed. After the trial court entered judgment in favor of the homeowner, the contractor appealed on the grounds that parties had an express contract. The D.C. Court of Appeals reversed, finding that the existence of an express written contract between the parties precluded a finding of unjust enrichment against the contractor. The homeowner could not enforce the written contract because he failed to make the payments required under the contract and pay for change order work. The homeowner could not avoid its breach by attempting to seek damages for unjust enrichment.

3. In **Hawa Constr., LLC v. Pollock**, 2009 WL 4884018 (D.D.C. 2009), a homeowner alleged that a contractor's failure to obtain written approval from the homeowner prior to making changes in the specifications barred the contractor from seeking payment for those changes. The court dismissed the homeowner's claim on the grounds that the municipal regulations could not be used as a shield to prevent a homeowner from paying for changes that it orally requested and were performed. The court analogized the regulation with the statute of frauds.

4. In **Highland Renovation Corp. v. Hanover Ins. Group**, 620 F.Supp.2d 79 (D.D.C. 2009), the district court analyzed whether a subcontractor's claim against a payment bond on a renovation project for the Old Post Office Pavilion was brought within the 1 year limitations period established by the Miller Act. The subcontractor argued that certain punch list and change order work was performed within the 1 year period preceding the filing of the complaint. The report and recommendation of the magistrate judge found that that work was corrective or remedial in nature and thus did not toll the Miller Act statute of limitations. The subcontractor's primary evidence was payroll sheets for work performed during the year prior, though the payroll sheets failed to indicate what type of work was being performed. In addition, the contractor failed to provide any evidence that the alleged change order work was actually change order work. Because the subcontractor could not meet its burden of establishing that it performed crucial work within the 1 year limitations period, the district court granted judgment in favor of the surety.

5. In **Hunt Constr. Group, Inc. v. National Wrecking Corp.**, 2009 WL 4110379 (D.C. Cir. 2009), near the end of project performance, the contractor recognized that a subcontractor's delays were imperiling completion by the contractually required deadline. The contractor incurred additional expenses to mitigate the impact of the subcontractor's default. After completion, the contractor sued the subcontractor and its performance bond sureties for breach, seeking recovery of costs associated with the subcontractor's delay. The court found that notice to the sureties of the subcontractor's default was a condition precedent to recovery under the performance bond and that the contractor's failure to give notice of such default until after completion barred recovery under the bonds.

6. In **McNair Builders, Inc. v. 1629 16th Street, LLC**, 968 A.2d 505 (D.C. 2009), a contractor filed a mechanic's lien against property which had recently changed ownership, as well as a *lis pendens*. After the trial court dismissed the mechanic's lien and *lis pendens*, the

contractor appealed. The D.C. Court of Appeals first rejected the contractor's argument that the contractor could maintain a *lis pendens* on the property with merely a contractual claim, as a *lis pendens* is only permitted where litigation involves a specific piece of property. Therefore, the *lis pendens* could only remain on the property if the contractor had properly initiated an action to enforce the mechanic's lien. The Court of Appeals upheld the trial court's dismissal of the mechanic's lien because the contractor had failed to properly identify the new owner of the property in its lien, despite the fact that the new owner may have had actual notice of the lien. The Court of Appeals noted this problem could have been entirely avoided had the contractor performed a proper title search before filing its mechanic's lien.

Legislation

1. **B18-0377, Green Building Technical Corrections, Clarification, and Revision Amendment Act of 2009.** Amends the Green Building Act of 2006 and the Office of Property Management Establishment Act of 1998, to correct enrollment errors, and to provide certain technical corrections, clarifications and revisions. The amendment eliminates the requirement for a "green" performance bond and instead only requires the posting of a bond.

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Florida

Case Law

1. In ***Diamond Regal Development, Inc. V. Matinnaz Construction, Inc.***, 1 So.3d 1104 (Fla. 1st DCA 2009), the general contractor was awarded a contract to build a \$20 million dollar project. The Owner and GC both declared the other in breach for failure to timely pay and for abandonment. The trial court excluded the Owner's rebuttal expert offered to dispute the GC's lost profits as he was in fact the second lowest bidder, and was not awarded the job. The appellate court remanded for a new trial stating that an expert should not be excluded merely because he was involved in the facts of the underlying case. It is also improper to exclude him because of a perceived bias.

2. In ***Spectrum Interiors, Inc. v. Exterior Walls, Inc.***, 2 So.3d 1093 (Fla. 5th DCA 2009), a contractor that executed a partial release and waiver could not claim damages prior to the date the release was good through.

3. In ***Hebden v. Roy A. Kunnemann Construction, Inc.***, 3 So.2d 417 (Fla. 4th DCA 2009), the owner gave the contractor written notice as required by Section 558.004 Fla. Stat. The contractor advised it would make certain repairs but the court found that the owner improperly denied the contractor access to the interior of the residence to cure the defects. The trial court nonetheless, granted a \$5,000.00 offset to the owner, even though the owner's actions prevented the contractor from making the repairs. On appeal, the court held that Chapter 558 does not operate as a penalty nor does an owner forfeit its rights to recover damages of the cost to making the work conform to the contract.

4. In ***McMilan/Miami, LLC v. Krystal Capital Managers, LLC***, 1 So.3d 312 (Fla. 3d DCA 2009), the posting of a *lis pendens* bond is not a prerequisite to an award for attorney fees for the wrongful filing of the *lis pendens*.

5. In ***Beta Drywall Acquisition, LLC v. Mintz & Fraade, P.C.***, 34 Fla. L. Weekly D636 (Fla. 4th DCA March 25, 2009), New York lawyers who performed legal work in New York for a Florida drywall company had sufficient contacts with Florida to be sued in Florida under long-arm jurisdiction.

6. In ***General Impact Glass & Windows Corp. v. Rollac Shutter of Texas, Inc.***, 34 Fla. L. Weekly D737 (Fla. 3d DCA April 8, 2009), an order compelling arbitration was reversed because the only reference to arbitration was on the manufacturer's website and product catalogue and the orders for the goods themselves did not contain an agreement to arbitrate.

Legislation

1. FL H.B. 55, 111TH REGULAR SESSION, HOUSE BILL 55, DATE-INTRO: DECEMBER 3, 2008, LAST-ACTION: APRIL 28, 2009; In SENATE. Placed on Special Order Calendar., Relates to excise tax on documents; imposes the tax on the consideration for short sale transfers of real property; excludes certain unpaid indebtedness from such consideration; defines the term short sale; authorizes the Department of Revenue to adopt rules establishing arm's length criteria for short sale purposes.

2. FL H.B. 61, 111TH REGULAR SESSION, HOUSE BILL 61, DATE-INTRO: DECEMBER 4, 2008, LAST-ACTION: APRIL 29, 2009; In SENATE. Passed SENATE., Relates to timeshare resort taxation; revises application of provisions imposing specified taxes upon consideration paid for occupancy of specified timeshare resort products; expands the list of entities authorized to offer debt cancellation products for purposes of casualty insurance to include sellers of timeshare interests; relates to public offering statements; provides failure to disclose constitutes an unfair and deceptive trade practice; provides for voided contracts and refunds.

3. FL H.B. 161, 111TH REGULAR SESSION, HOUSE BILL 161, DATE-INTRO: DECEMBER 23, 2008, LAST-ACTION: APRIL 27, 2009; In HOUSE. Read third time. Passed HOUSE. To SENATE., Relates to affordable housing; revises and provides provisions relating to affordable housing; provides for assessment of property receiving low-income housing tax credit; defines term community land trust; provides for assessment of structural improvements, condominium parcels, and cooperative parcels on land owned by community land trust and used to provide affordable housing.

4. FL H.B. 267, 111TH REGULAR SESSION, HOUSE BILL 267, DATE-INTRO: JANUARY 8, 2009, LAST-ACTION: APRIL 14, 2009; In HOUSE. Placed on Calendar., Relates to affordable housing; provides for assessing property receiving low-income housing tax credit; defines term community land trust; provides for assessment of structural improvements, condominium parcels, and cooperative parcels on land owned by community land trust and used to provide affordable housing; provides for conveyance of structural improvements, condominium parcels, and cooperative parcels subject to specified conditions.

5. FL H.B. 299, 111TH REGULAR SESSION, HOUSE BILL 299, DATE-INTRO: JANUARY 12, 2009, LAST-ACTION: MARCH 3, 2009; To HOUSE Committee on GOVERNMENTAL AFFAIRS POLICY., Relates to construction bonds; requires surety to record in public records payment bond for public works construction projects; requires bond number to be stated on first page of bond; prohibits issuing authority for building permit or private provider providing inspection services from inspecting specified improvements until filing of payment bond or statement that contract is exempt from payment bond requirements.

6. FL H.B. 351, 111TH REGULAR SESSION, HOUSE BILL 351, DATE-INTRO: JANUARY 14, 2009, LAST-ACTION: APRIL 28, 2009; In HOUSE. Laid on table., Relates to property insurance rate reduction; creates Property Insurance Rate Reduction Act; requires insurance companies writing property insurance policies in state to consider county ordinances and amendments to Florida Building Code when setting property insurance rates.

7. FL H.B. 401, 111TH REGULAR SESSION, HOUSE BILL 401, DATE-INTRO: JANUARY 15, 2009, LAST-ACTION: MARCH 3, 2009; To HOUSE Committee on INSURANCE, BUSINESS AND FINANCIAL AFFAIRS POLICY., Relates to statements of nonforeclosure and pending foreclosure; requires that lessor of residential dwelling unit notify lessee of dwelling unit whether dwelling unit that is subject of rental agreement is or is not in foreclosure or in short-sale status and whether mortgage lender intends to initiate foreclosure proceedings or short-sale procedures within specified time; requires that notice be included in rental agreement; provides form for notice.

8. FL H.B. 611, 111TH REGULAR SESSION, HOUSE BILL 611, DATE-INTRO: JANUARY 26, 2009, LAST-ACTION: APRIL 30, 2009; In SENATE. Passed SENATE., Relates to public construction projects; revises exceptions to requirement that certain public projects be competitively awarded; requires local government to support decision to perform project with its own employees and make factual finding that project cost will be same or less than lowest bid; provides additional exceptions for projects related to public-use airports, certain ports, and certain public transit systems.

9. FL H.B. 653, 111TH REGULAR SESSION, HOUSE BILL 653, DATE-INTRO: JANUARY 29, 2009, LAST-ACTION: MARCH 7, 2009; Referred to HOUSE FULL APPROPRIATIONS COUNCIL ON GENERAL GOVERNMENT AND HEALTH CARE., Relates to homestead property foreclosure actions; designates act Foreclosure Bill of Rights; provides procedural requirements and limitations for plaintiffs, defendants, and courts in homestead property mortgage foreclosure actions; specifies document production requirements; requires mediation; specifies settlement negotiation requirements; provides criteria for commercial reasonableness of renegotiated loans.

10. FL H.B. 709, 111TH REGULAR SESSION, HOUSE BILL 709, DATE-INTRO: FEBRUARY 3, 2009, LAST-ACTION: APRIL 28, 2009; In HOUSE. Laid on table., Relates to construction defects; revises requirements and procedures for notice and opportunity to repair certain defects; specifies there are no construction lien rights under certain provisions of law for certain testing; provides exception; provides requirements for parties to exchange specified materials in actions claiming construction defects; provides penalties; revises requirements for application to claims for legal relief.

11. FL H.B. 737, 111TH REGULAR SESSION, HOUSE BILL 737, DATE-INTRO: FEBRUARY 4, 2009, LAST-ACTION: APRIL 28, 2009; In HOUSE. Laid on table., Relates to lis pendens; permits real and property to be sold exempt from claims asserted in action when lis pendens has expired or been withdrawn or discharged; requires notice of lis pendens to include the date of action or case number of action; extends time in which holder of unrecorded interest or lien may intervene in pending action; provides for control and discharge of lis pendens that no longer affects the property.

12. FL H.B. 1093, 111TH REGULAR SESSION, HOUSE BILL 1093, DATE-INTRO: FEBRUARY 24, 2009, LAST-ACTION: MARCH 9, 2009; Referred to HOUSE POLICY COUNCIL., Relates to termination of a rental agreement at foreclosure; prohibits landlord from terminating rental agreement without specified period of prior notice; requires landlord to notify each tenant that foreclosure proceedings have been initiated against premises of which tenant's dwelling unit is part; requires written notice to include specified information; authorizes tenant to

terminate rental agreement; requires tenant to pay rent so long as tenant remains in dwelling unit.

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Georgia

Case law

1. In ***Bragg v. Oxford Constr. Co.***, 285 Ga. 98 (2009), the Georgia Supreme Court narrowly reaffirmed the “acceptance” doctrine in a road construction case. The contractor on a county road repaving project followed the direction of the county engineer in applying a patch to a certain area of the road where the plaintiff’s car accident later occurred. The Court of Appeals, and then the Supreme Court, affirmed the trial court’s grant of summary judgment to the contractor, holding that where the contractor does not hold itself out as a design expert, performs the work without negligence, and the work is accepted by the owner, the contractor cannot be found liable to third parties who are injured. However, a strong three-judge dissent urged the Court to abandon the acceptance doctrine, which it deemed antiquated and out-of-step with the increasing number of states that have adopted the modern “foreseeability doctrine” as to injuries to third parties.

2. In ***Jordan Jones & Goulding, Inc. v. Newell Recycling of Atlanta, Inc.***, 2009 Ga. App. LEXIS 878 (July 21, 2009) the Georgia Court of Appeals clarified when the four-year statute of limitations for professional negligence may apply in a breach of contract action. A scrap metal processor hired a professional engineering firm to design a concrete apron around the processor’s facility. The engineer’s design was incorporated into the construction documents, but after the project was completed the apron began to crack and the scrap metal processor sued the engineering firm for a breach of its professional services contract - five years after the engineering services were rendered. The trial court denied the engineering firm’s motion for summary judgment, holding that the six-year statute of limitations for written contracts superseded the four-year statute applicable to professional negligence claims and thus the scrap metal processor’s claims were not time-barred. The Court of Appeals disagreed and reversed the trial court, holding that any cause of action that calls into question the conduct of a professional in his area of expertise is a professional negligence action that is governed by a four-year statute of limitations. This is regardless of whether the cause of action arises from a written agreement or is styled as a breach of contract action.

3. In ***Order Homes, LLC v. Iverson***, 2009 Ga. App. LEXIS 967 (Aug. 19, 2009), the Court of Appeals detailed when non-signatories to a construction arbitration agreement may nonetheless be bound to arbitrate. A homeowner’s contract with a homebuilder contained a provision requiring arbitration of all construction defect claims “and all other claims between the parties.” The homeowner subsequently filed a complaint alleging, in addition to defective construction against the homebuilder, counts for fraud, negligence, unjust enrichment, and declaratory judgment against not only the homebuilder but the homebuilder’s principals and affiliate companies. While these additional defendants were not signatories to the arbitration clause, the Court of Appeals reversed the trial court’s decision not to compel arbitration of the homeowner’s claims against the non-signatories, holding that arbitration could be compelled by those appellants under the theory of equitable estoppel. The court noted that equitable estoppel could be applied in two factual circumstances, both of which applied to the facts at bar: First, where a signatory must rely upon the terms and conditions of the written agreement containing the arbitration clause to assert claims against a non-signatory, arbitration is appropriate.

Second, where a signatory raises allegations of “substantially independent and concerted misconduct” by both the non-signatory and one or more signatories, arbitration may also be compelled against a non-signatory.

4. In *Bollers v. Noir Enterprises, Inc.*, 297 Ga. App. 435, 677 S.E.2d 338 (2009), the Court pointed out the pitfalls of an inaccurate property description in a claim of mechanic’s lien. When a contractor and homeowner entered into a payment dispute, the contractor filed two claims of lien against the home. For a property description, the claims of lien listed the home’s street address and referenced exhibits that included, in one lien, a metes and bounds description and, in the second lien, a plat survey. The Court of Appeals reversed the trial court’s ruling that these descriptions were adequate to meet the lien statute’s requirement of either identifying the land or providing the key by which the land could be identified with extrinsic evidence. In this case, the street address and attached exhibits provided in the claim of lien were both different than the street address and legal descriptions contained in the homeowner’s warranty deed, in that the city and zip code differed and the exhibits to the liens contained descriptions that included more acreage than those in the warranty deed. Upon showing this discrepancy, the Court held that the burden shifted to the contractor to “point to a key that ‘opens the door to extrinsic evidence leading unerringly to the land intended by the parties to be the subject of the’ liens.” While the Court noted that a street address alone may be sufficient in certain cases, where a more detailed description in the lien conflicts with similarly detailed descriptions in extrinsic documents, such a discrepancy can be fatal to the lien claim if extrinsic evidence is not introduced to explain the discrepancy, which was not done in this case. The contractor’s lien was thus invalidated.

5. In *Tillman Park, LLC v. Dabbs-Williams General Contractors*, 298 Ga. App. 27, 679 S.E.2d 67 (2009), a contractor and owner disputed over the standard AIA-form language requiring a decision by the architect on claims as a “condition precedent” to the institution of arbitration. When the contractor sued the owner in court for alleged extra work performed on a condominium project, the owner counterclaimed and moved to compel arbitration based upon language in the standard AIA A201-1997 form general conditions. The contractor responded by citing the language in the A-201 requiring an initial decision by the architect on all claims as a condition precedent to the institution of arbitration, and noting that since the parties did not formally designate an architect in the contract documents, the arbitration clause was unenforceable. The Court of Appeals, citing recent Florida caselaw, held that this question could not be answered on summary judgment as a matter of law. Rather, a clause calling for an architect’s decision as a condition precedent to arbitration, combined with the parties’ failure to explicitly appoint an architect, created an ambiguity that could only be answered by the finder of fact via extrinsic and parol evidence. The Court thus remanded the claim to the trial court for an examination of affidavits and other parol evidence that might allow the fact-finder to determine the parties’ intent in such a situation.

Legislation

1. **O.C.G.A. § 13-10-90 and 13-10-91, Georgia Immigration Security & Compliance Act.** This statute requires all contractors performing work for any public entity in Georgia to register and participate in the federal government’s “e-Verify” program, which allows employers to verify a potential employee’s employment eligibility via an online database maintained by the Department of Homeland Security and the Social Security Administration. The statute was passed in 2007 and phased in over time based on the size of the employer. Effective July 1, 2009, it now applies to all contractors on public projects regardless of size or number of employees.

2. **O.C.G.A. § 44-14-360 to 44-14-369, Liens of Mechanics and Materialmen.** Significant changes were made to the mechanics and materialmen’s lien statutes in the 2008

legislative session, as detailed in this summary last year. Those changes became effective on March 31, 2009.

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Hawaii

Case law

1. In ***Royal Kunia Community Assoc. v. Nemoto***, 119 Haw. 437, 198 P.3d 700 (Haw. Ct. App. 2008), the Hawaii Intermediate Court of Appeals (“ICA”) addressed a construction related dispute between owners and the homeowners’ association. The owners obtained permission to pour concrete on a portion of their property, but permission was denied for pouring concrete on a driveway apron. Nevertheless, the owners placed concrete on the entire front portion of their property, placing a Japanese rock garden over the concrete poured on the apron area. The ICA affirmed the circuit court’s ruling that the owners violated a restrictive covenant requiring permission from the association for any improvements involving landscaping. The circuit court erred, however, in granting summary judgment to the association on its claims that the owners also violated an association rule prohibiting the parking on their property of a truck exceeding one-ton capacity limit. The owners offered evidence that the association had a method for calculating capacity, under which the truck did not exceed the one-ton limit.

Legislation

The following bills were enacted in the recently concluded, 2009 session of the Hawaii legislature. The Governor has until June 29, 2009, to veto these bills.

1. **HB640** - Exempts from the purview of chapter 343, Haw. Rev. Stat., the environmental review law, primary actions that require a ministerial permit, that involve secondary actions relating to infrastructure development within public right-of-ways that have no significant effect on the environment.

2. **HB643** - Authorizes the contractors license board to suspend, revoke, or refuse to renew a contractor's license for employing a worker on a public work project who is ineligible under federal law to work in the United States.

3. **HB1186** - Eliminates the Hawaii Community Development Authority's cash-in-lieu option for meeting reserved housing requirements, while retaining the option in cases of a fractional unit resulting from the percentage requirement calculation.

4. **HB 1479** - Requires the Department of Labor and Industrial Relations to include in certified payroll records a fringe benefit reporting form, on which contractors and subcontractors itemize the cost of fringe benefits paid to both union and non-union laborers who perform work for the construction, alteration, or repair of public buildings and public works.

5. **HB 1713** - Authorizes the governor to designate state employees, when no emergency exists, to enter on private property to mitigate hazardous situations after giving the landowner and occupier notice and a reasonable opportunity to mitigate the hazardous situation without assistance of the State. May seek recovery and reimbursement of costs and expenses. Extends sunset date for Act 78, Session Laws of Hawaii 2007, until June 30, 2010.

6. SB19 - Requires a procurement preference to a bidder in a public works construction contract of not less than \$250,000 if the bidder is a party to an apprenticeship agreement registered with the department of labor and industrial relations for each apprenticeable trade the bidder will employ to construct the public works.

7. SB440 - Requires counties within 90 days to accept or reject a public infrastructure dedication, under specified conditions, as part of an affordable housing project, or the infrastructure is deemed dedicated.

8. HB1316 – clarifies the joint and several liability for design professionals in tort claims relating to the design, construction and maintenance of public highways.

9. SB203 – Increases penalties for violation of contractors' licensing law.

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Idaho

Case Law

1. In ***Farrell v. Whiteman***, 200 P.3d 1153 (Idaho 2009), an architect sued to recover unpaid design fees he incurred in connection with services on behalf of defendant. The defendant defended based on Idaho's architect licensing statutes, claiming that the architect had not complied with Idaho's architect licensing statutes (he was not licensed in Idaho until midway through the project) and, as a result, the design contract was illegal and unenforceable. The district court found that the architect was licensed at "critical times" in the performance of the contract, and therefore did not violate the licensing statute and awarded the architect damages based on quantum meruit. In considering those damages, the Idaho Supreme Court weighed the public interest in compliance with the licensing statute, with the public interest involved in allowing a party to avoid any payment for design fees, where there has been no allegation that there was anything defective or substandard about the architect's services. The Court determined that the windfall that would result to the recipient of the design services would, in fact, be contrary to public policy. The case was remanded to the district court for consideration of the quantum meruit value of the architect's services.

2. In ***Evco Sound & Elect. v. Seaboard Surety***, ___ P.3d ___ (Idaho 2009), a general contractor submitted a bid for the construction of a public high school. Evco was a sub-subcontractor who submitted a bid to a subcontractor in connection with the project, and then submitted a revised bid. When the bids were opened, the general contractor was the low bid, but its bid exceeded the school district's budget. Following some "value engineering" discussions during which the general spoke with the sub-subcontractor about its scope of work, the contract was let to the general contractor. The subcontractor and sub-subcontractor exchanged faxes outlining the scope and cost of the work, cutting and pasting from various version of the subcontract agreement with the general contractor. Neither the subcontractor nor the sub-subcontractor signed the sub-subcontract agreement. At the end of the job, the subcontractor claimed it was owed funds, and made a claim on the payment bond. The surety defended on the ground that the contract had never been signed, and the sub-subcontractor failed to give written notice to the surety (required within 90 days of the date of the last work) or file the suit as required by Idaho Code § 54-1927 (within one year of the date of the last work). The trial court granted summary judgment for the surety. The appellate court disagreed, noting that the sub-subcontractor had been working on a 60 item punch list when it filed suit. The

Supreme Court noted that there was no evidence that the punch list work was “remedial or corrective” or that that it was warranty work—which may not have extended the time to file suit. Instead, the work was part of the original contract. In addition, the evidence indicated that the surety was provided notice within the requisite 90 days. The surety also argued that no contract was ever created, as the written contract was never signed. The trial court and Supreme Court looked to the classic test of “meeting of the minds” that would indicate a valid contract had been formed—offer and acceptance and understanding of terms. That the contract was not signed was not fatal to the agreement or its enforcement.

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Illinois

Case Law

1. In ***Springfield Heating and Air Conditioning, Inc. v. 3947-55 King Drive at Oakwood Southeast Contractors, LLC***, 387 Ill. App. 3d 906, 901 N.E.2d 978, 327 Ill. Dec. 245 (1st Dist., January 15, 2009) the court ruled that the dismissal of a lien claim for fraud was unwarranted where the lien claimant erroneously overstated its claim. The court explained that an express showing of an intent to defraud must be established by evidence in addition to the overstatement in the lien claim itself.

2. In ***ABN AMRO Mortgage Group, Inc. v. McGahan***, 388 Ill. App. 3d 900, 906 N.E.2d 21, 329 Ill. Dec. 176 (1st Dist., March 13, 2009) the court explained that foreclosure actions are in rem actions as opposed to quasi in rem actions. A foreclosure determines the rights to a piece of property not only against a particular person, but against the whole world.

3. In ***Weather-Tite, Inc. v. University of St. Francis***, 233 Ill. 2d 385, 909 N.E.2d 830, 330 Ill. Dec. 808 (May 21, 2009) the court ruled that once an owner has notice of money due a subcontractor, the owner must withhold enough money to pay that subcontractor the amount shown due on the general contractor’s sworn statement pursuant to section 5 of the Mechanics Lien Act. At that point, an owner can not rely on a general contractor to distribute funds to a subcontractor.

4. In ***O’Connor Construction Company, Inc. v. Belmont Harbor Home Development, LLC***, 391 Ill. App. 3d 533, 909 N.E. 2d 294, 330 Ill. Dec. 581 (1st Dist., May 19, 2009) the court noted that a subcontractor was entitled to an award of attorneys’ fees where the owner acknowledged withholding an undisputed amount due the subcontractor and provided no reasonable explanation for withholding that amount due. The case was remanded to the trial court for determination of the award of attorneys’ fees.

5. In ***K. Miller Construction Company, Inc. v. Joseph J. McGinnis***, 913 N.E.2d 1147, 332 Ill. Dec. 857, 2009 WL 2448568 (1st Dist., August 10, 2009) the court held that although a general contractor could not recover under the Home Repair and Remodeling Act, the Act did not abolish recovery on the equitable remedy of quantum meruit.

6. In ***Crawford Supply Co. v. Schwartz***, No. 1-09-0900 (1st Dist., September 25, 2009) the court determined that a subcontractor’s failure to provide the 60-day notice, as required by the Mechanics Lien Act for single family homes, does not invalidate a

subcontractor's lien as a matter of law. In order to determine if it does invalidate a subcontractor's lien, the court must determine that there has been prejudice to the homeowner.

7. In **Weydart Homes, Inc. v. Kammes**, 2009 WL 3153041, No. 2-08-0768 (2nd Dist. September 30, 2009) the court ruled that a contractor's sworn statement pursuant to Section 5 of the Mechanics Lien Act, which was not notarized, rendered that contractor's claim for lien unenforceable.

8. In **Roberts v. Adkins**, ___ Ill. App. 3d ___, 921 N.E.2d 802, 336 Ill. Dec. 946 (Ill. App. Ct. 2010), the court ruled that a contractor had failed to comply with the requirements of the Home Repair and Remodeling Act and, therefore, did not have a contract that could form the basis for a mechanics lien. The Act requires contractors to obtain a signed contract from the homeowner for contracts over \$1,000. The contractor was required to obtain a written contract when he became aware that anticipated costs would exceed \$1,000.

9. In **Fandel v. Allen**, No. 3-08-0237 (Ill. App. Ct. Jan. 14, 2010), the court held that a contractor's failure to obtain a signed contract from the homeowner and failure to provide the brochure required by the Home Repair and Remodeling Act did not invalidate the contractor's mechanics lien claim. The court determined that the oral agreement between the parties created a valid contract by which the contractor could record and enforce a mechanics lien claim. The contractor's violations of the Act did not invalidate an otherwise enforceable contract.

10. In **LaSalle Bank National Association v. Cypress Creek 1, LP**, No. 3-08-0114 (Ill. App. Ct. Jan. 15, 2010), the court concluded that the trial court properly allocated the proceeds of sale between the bank and the mechanics lien claimants pursuant to Section 16 of the Mechanics Lien Act (770 ILCS 60/16) using a proportionality approach where the proceeds of sale were insufficient to satisfy the mortgage and mechanics liens. However, the court determined that the trial court allocated an excessive amount to the bank, as the bank was not allowed to share equally with the perfected mechanics lien claimants where it was a subrogee of unperfected lien claimants.

11. In **Illinois Concrete-I.C.I., Inc. v. Storefitters, Inc.**, No. 2-09-0854 (Ill. App. Ct. Jan. 20, 2010), the appellate court affirmed the trial court's determination that the defendants had waived their contractual right to arbitration by filing a demand pursuant to Section 34 of the Mechanics Lien Act (770 ILCS 60/34) requiring a mechanics lien claimant to file suit within 30 days or lose its claim. By taking the affirmative step of demanding plaintiff file suit, defendant acted in an inconsistent manner with its rights to seek arbitration and, thus, acted as an abandonment of the right.

Legislation

1. **20 ILCS 3130, Green Buildings Act.** All new state-funded building construction and major renovations of existing state-owned facilities are required to seek LEED, Green Globes, or equivalent certification. All construction and major renovation projects, regardless of size, must achieve the highest level of certification practical within the project budget.

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Indiana

Case Law

1. In ***Dreaded v. St. Paul Guardian Ins. Co.***, No. 49S02-0805-CV-244 at 8 (Ind. 2009), the Indiana Supreme Court recently announced that an insurer's duty to defend is not triggered until the insured complies with the notice provision of the insurance policy, and accordingly, the insurer has no obligation to pay costs incurred before the date the insured gives notice of the claim.

Dreaded was the insured and received notice from IDEM demanding that it investigate possible soil contamination in November 2000. *Id.* at 2. Dreaded hired an attorney to defend it and hired an environmental consultant to investigate. The contractor's investigation resulted in multiple reports being submitted to IDEM. In August 2003, Dreaded, which was covered by several CGL policies issued by St. Paul, notified St. Paul and requested that St. Paul take up its defense in the IDEM claim and reimburse Dreaded for defense costs incurred up to that point. St. Paul agreed to defend from that point forward, but expressly reserved its rights and refused to reimburse Dreaded for defense costs incurred prior to the March 2004 notice and tender.

Dreaded sued and St. Paul defended by claiming that notice and voluntary payment provisions in the policy precluded St. Paul's duty to defend prior to receiving notice and precluded Dreaded's claims for pre-notice expenses. The Indiana Supreme Court agreed.

The court explained that the notice and voluntary payment provision in the policies were clear and unambiguous, and therefore must be given its plain meaning. Dreaded was not a case where the insurer was seeking to completely disclaim its policy obligation on the grounds that the insured didn't report the claim to the insurer within the time constraints in the notice provision. And the Court explained that an insurer cannot defend a claim of which it has no knowledge. Therefore, the insurer's duty to defend "simply does not arise until it receives the foundational information designated in the notice requirement," and "[u]ntil an insurer receives such enabling information, it cannot be held accountable for breaching that duty."

The court held that where the insured's failure to comply with the notice requirement is undisputed, the insured cannot successfully sue for breaching policy obligations during the time where the insurer knows nothing about the claim. Simply put, prejudice is irrelevant, and the insurer's duty to defend does not arise until the insured complies with the policy's notice requirement. In such a case, the insurer is entitled to summary judgment with regard to costs incurred by the insured before the insured gives notice of the claim to the insurer.

2. In ***Indianapolis-Marion County Public Library v. Thornton Tomasetti Engineers***, 900 N.E.2d 801 (Ind. Ct. App. 2009), the Court affirmed summary judgment for the structural engineer on the owner's claims of negligence. The owner had entered into a contract with an architectural firm who subsequently retained the structural engineer to provide structural engineering services for the project. When issues arose with regard to the design and construction of the project, the owner sued the architect and the structural engineer directly for the costs associated with the repair of the structure.

In response to the owner's claims that it should be permitted to assert a direct claim against a design professional with whom it had no direct contract, the court held that the owner had purchased a package through the architect for the design of the entire project. The "design" was the "product" purchased by the owner. This "product" included the structural design. The damages related to the repair and reconstruction of the structural engineer's product, constituted economic loss for which the owner's sole remedy lies in contract.

The Court further rejected the owner's assertion that its negligence claim should be allowed to proceed because the structural engineer owes professional duties akin to those owed by other professionals such as attorneys and accountants. "Where the loss is solely economic in nature, as where the claim of loss relates to the product's failure to live up to expectations, and in the absence of damage to other property or person, then such losses are more appropriately recovered by contract remedies."

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Iowa

Case Law

1. In ***State ex rel. Claypool v. Evans***, 757 N.W.2d 166 (Iowa 2008); Decided October 24, 2008, Plaintiffs, the State and homeowners, filed an action against contractors and developers, claiming that a condominium development was highly inaccessible, therefore, violating the Iowa Civil Rights Act (ICRA), Iowa Code § 216.1 et seq. (which contained provisions similar to the Americans With Disabilities Act regarding access). Defendants' motions for summary judgment were granted by the Iowa District Court for Johnson County and affirmed by the Iowa Supreme Court. Under the ICRA, the alleged discriminatory practice occurred and terminated at the time the defendants sold the units. Similarly, the Court held that the owners' claims were also untimely under the ICRA. The Court stated that "[h]ad the legislature wanted developers and designers of the unit to be liable after the sale, it could have expressly provided for continuing liability in the [ICRA]." 757 N.W.2d at 172.

2. In ***Accurate Controls, Inc. v. Cerro Gordo County Bd. of Supervisors***, 627 F. Supp. 2d 976 (N.D. Iowa 2009); Decided June 18, 2009, In consolidated suits, a plaintiff sub-subcontractor that entered into a contract with a subcontractor on a county jail project sued defendants, a general contractor, a surety, and a county board of supervisors, under Iowa Code chapter 573 (Iowa's little Miller Act) to recover payment. The sub-subcontractor claimed it was not paid by the subcontractor, which had since ceased operations. The parties filed cross-motions for summary judgment regarding the sub-subcontractor's claim. The court held that Iowa Code § 573.16, requiring actions to be brought in the county where the project at issue was located, did not deprive the court of subject matter jurisdiction. Further, the court held that the sub-subcontractor's claim was not untimely under § 573.16. Additionally, Iowa Code § 573.15 (which bars a chapter 573 claim for material furnished to a subcontractor unless notice was provided to a general contractor), applied to claims for materials furnished by any entity even if that entity also made a claim for labor, unless the materials were obtained by a direct request of a general contractor to a material supplier. Therefore, section 573.15 should be applied to that part of the sub-subcontractor's claim for "material furnished." Because the sub-subcontractor had not complied with the notice requirements based on the fact that its invoices were only sent to the subcontractor and not to the general contractor, summary judgment was granted in favor of defendants as to the sub-subcontractor's claim for payment of materials. The court otherwise denied the remaining motions submitted by the parties.

Legislation

1. **Iowa HSB 173/SSB 1215. This study bill will carry over to the 2010 legislative session.** Revises Iowa Code Chapter 572, Mechanic's Lien Law (for private jobs), to require contractors and material providers to give public notice of their rights in order to perfect a mechanic's lien. Notice will be posted on a State Construction Registry. Also expands

the right to recover attorney fees to any prevailing plaintiff and allows any prevailing defendant to recover attorney fees, not just those defending claims involving owner-occupied properties. Commercial construction is exempt from the central registry requirements. Presently assigned to subcommittee in House and Senate Judiciary Committees.

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Kansas

Case Law

1. In ***Double M Const., Inc. v. State Corp. Com'n***, 202 P.3d 7, 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 two 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 it to request utility locations or to provide notification of the 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.

Legislation

1. **H.B. 2238, Amending the Kansas Fairness in Private Construction Act and the Kansas Fairness in Public Construction Act.** Kansas House Bill 2238 would amend K.S.A. §§ 16-1802 and 16-1804 of the Kansas Fairness in Private Construction Act, and K.S.A. §§ 16-1902 and 16-1904 of the Kansas Fairness in Public Construction Act. The amendments would reduce the amount of retainage an owner may withhold on both private and public construction projects, as well as ensure prompt release of retainage. Specifically, the amended acts would 1) reduce allowed retainage from 10% to 5%; 2) require retainage be released within 45 days of a project's substantial completion date, which is defined in the amended statute; 3)

allow for alternate securities in lieu of retainage, such as retainage bonds, bank letters of credit, certificates of deposit, cash bonds or other mutually acceptable items of value equal to or exceeding the amount of retained funds; and 4) prohibit retainage from being withheld if a payment/performance bond is provided. The bill is currently being debated in the House Commerce & Labor Committee.

2. **H.B. 2277, Requiring Payment of Minimum Wages for Public Works Projects.** The proposed act requires that all contractor or subcontractor employees working on any public works project be paid not less than the hourly wages, including fringe benefits, of the wages paid to corresponding classes of laborers and mechanics employed on similar projects in the county where the project is located. The minimum wage would be based on the wage paid to the majority of laborers or mechanics in the county. If there is no majority wage, the minimum wage would be based on the average wages paid, weighted by the total employed in the classification, or the wage would be based on the wage paid on federally funded projects, under federal law, at the location of the public works project. The required wages would be included in the bid or contract specifications. The bill is currently being debated in the House.

3. **S.B. 271, Expanding the Exceptions Related to County Bidding Requirements on Construction Contracts.** Kansas Senate Bill 271 would amend K.S.A. § 19-214 to allow the bidding requirement for county construction projects over \$25,000 to be suspended when a public health, safety, and welfare emergency is declared by the board of county commissioners.

4. **S.B. 292, Adding a Notice Requirement to Kansas' Mechanic's Lien Statute When Pursuing a Payment or Public Works Bond Claim.** Kansas Senate Bill 292 is intended to amend K.S.A. §§ 60-1110 and 60-1111 to require a remote bond claimant to serve a notice of furnishing on the original contractor and owner, who were required to obtain a bond, prior to bringing suit. A notice of furnishing requires a claimant to 1) provide notice stating the name of the contractor, and 2) to file the notice within three months after the date supplies, material or equipment was last furnished, or labor was performed, by the claimant.

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5. K.S.A. § 16-121; Laws 2008, ch. 132, § 1; SB 379: Construction contracts, motor carrier transportation contracts, dealer agreements, franchise agreements; certain indemnification provisions and additional insured provisions void, when. Effective January 1, 2009, K.S.A. §16-121 affects three substantive areas of particular importance for the Kansas construction industry. First, contractors are prohibited from indemnifying another for their own negligence or intentional acts or omissions (16-121(b)), unless the obligation is supported by liability insurance coverage furnished by the promisor (16-121(d)(6)) . Second, the statute prohibits contract terms that require a party to provide liability coverage to another as an additional insured for the other's own negligence or intentional acts or omissions (16-121(c)); however, numerous exceptions are still provided for under the language of the statute (16-121(d)). Third, 60-121(e) mandates that "the laws of Kansas shall apply to and govern every contract to be performed in this state." This section also requires that any litigation, arbitration or other dispute resolution proceeding arising from these contracts be conducted in the state.

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Kentucky

Case Law

1. In ***Beaver v. Oakley***, 279 S.W.3d 527 (Ky. 2009), the Kentucky Supreme Court was asked to determine whether a construction manager or its project superintendent must have a written contract with an injured worker's direct employer to qualify as a "contractor" entitled to up-the-ladder immunity from tort liability available under Kentucky's worker's compensation statutes (KRS 342.011 *et. seq.*). During the project, the plaintiff, who was an employee of an electrical contractor hired directly by the owner, was injured when he fell from a forklift operated by the owner's CM-Agent's on-site representative. Following the accident, the plaintiff asserted tort claims directly against the CM-Agent's on-site representative to recover compensation for his injuries.

Under Kentucky law, an injured worker's recovery against his employer is limited to workers' compensation benefits, and the injured worker cannot receive any tort damages from the employer or its employees for work-related injuries. *Id.* at 530. The term "employer" is construed broadly "to cover not only the worker's direct employer but also a contractor utilizing the worker's direct employer as a subcontractor." *Id.* An injured worker, however, may assert a tort claim against a person responsible for the injury if that person is not within the definition of the injured person's statutory employer. *Id.*

The facts of this case presented a unique issue because the CM-Agent did not have a direct contract with the plaintiff's employer. The Court, however, examined the facts of the case and concluded that the CM-Agent really functioned as the "contractor" in coordinating the worksite. *Id.* at 532. The Court further stated that in applying Kentucky's worker's compensation statutes, "the role of contractor [must be construed] in a practical and functional—not hypertechnical—way." *Id.* Thus, the Court held that the CM-Agent qualified as the plaintiff's statutory employer, and therefore, the defendant was immune from the injured workers tort claims under Kentucky law.

2. In ***Alley Cat v. Chauvin***, 274 S.W.3d 451, 455 (Ky. 2009), the Kentucky Supreme Court held that a Kentucky Court does not have subject matter jurisdiction to enforce an arbitration agreement under the Kentucky Uniform Arbitration Act (KRS 417.045 *et. seq.*) unless the agreement specifies Kentucky as the location of the arbitration proceeding. This case is of particular importance to local construction attorneys in light of the prevalence of alternate dispute resolution provisions in construction contracts. Assuming that the project is located in Kentucky, contracts specifying the location of the project as an arbitration locale should not present a problem. The author is personally aware of at least one case where an out of state contractor unsuccessfully moved to stay a Kentucky lawsuit and compel arbitration in a foreign jurisdiction because of the *Alley Cat* decision.

3. In ***Medcom Contr. Servs. v. Shepherdsville Christian Church Disciples of Christ, Inc.***, 290 S.W.3d 681 (Ky. App. 2009), the Court held that the defendants, a contractor and an architect, could not avoid a law suit on the basis of an arbitration that was dismissed for administrative reasons. The owner entered into separate contracts with the defendants for the design and construction of an addition to its building. Each contract specified that all disputes would be resolved through arbitration.

In late 2003, the owner instituted an arbitration proceeding against the defendants that was administered by AAA. Two years later, the arbitrator informed the parties that the arbitration was being canceled "with prejudice" for nonpayment of fees, and shortly thereafter, the AAA terminated the administration of the matter and closed its file. *Id.* at 683. In May 2006, the owner filed suit in Kentucky state court. The defendants answered asserting that the

plaintiff's claims were barred by the prior arbitration decision and by the doctrine of *res judicata*. *Id.* The trial court denied the defendants' motions for summary judgment on these grounds.

On appeal, the defendants primarily argued that the plaintiff's state court action was barred because the plaintiff failed to timely challenge the award under the provisions of Kentucky's Uniform Arbitration Act (KRS, Chapter 417). The Court of Appeals, however, found that the letter from the arbitrator did not constitute an "award" because it was not a decision in favor of any party on the merits of the case. *Id.* at 685. The provisions of KRS 417.160 do not apply in the absence of an award, and therefore, the plaintiff was not barred from proceeding with its lawsuit.

The record was not entirely clear, but it appeared that one of the defendants was the party responsible for the termination of the arbitration proceeding for nonpayment of fees. The Court noted the inequity of the defendant's arguments, "it would seem hardly fair for an arbitrator to penalize a party who complied with the arbitration agreement because an opposing party failed to pay the required fees." *Id.* at 685. The Court also disapproved of AAA's Management of the proceeding noting that "we are greatly puzzled by AAA's conduct in the arbitration proceeding by unilaterally terminating the proceeding after receiving substantial fees in the case." *Id.* The Court also felt that its decision was appropriate from a policy perspective because "[i]f courts were to condone awards in this fashion, then parties in every case would routinely not pay fees to get arbitrators to terminate the proceedings and the defaulting party could thus claim that he had received an 'award on the merits.'" *Id.*

From this point forward, under Kentucky law, "termination of an arbitration for nonpayment of fees does not constitute an arbitration award under KRS 417.120." *Id.* at 686. However, the Court did note that "[a] party in default for nonpayment could still have an award entered against him as long as the arbitrator considers the matter on the merits."

4. In ***Louisville Galleria, LLC v. Scarborough Mechanical Services, Inc.***, 2009 Ky. App. Unpub. LEXIS 698 (Ky. App. August 21, 2009), the Court of Appeals held that a subcontractor working on a tenant's unit could assert a mechanics' lien against the landlord's fee simple interest in real property. In cases involving work performed for tenants, the issue often arises as to whether a contractor's mechanics' lien can attach to the landlord's fee simple interest in the property or is limited to the tenant's leasehold interest in the property. Previous Kentucky cases reached different conclusions in interpreting KRS 376.010, depending on whether the facts established that the improvements had been constructed with the landlord's consent. In this case, the Court noted that several provisions of the lease indicated that the contractor had performed work with the written consent of the owner: (a) the lease required the tenant to make improvements to the property suitable for the operation of a first class health club and fitness facility; (b) the tenant was required to provide the landlord with detailed plans and specifications showing the proposed improvements; (c) the tenant could begin work on the premises without the landlord's approval; and (d) the landlord provided the tenant with a construction allowance that would be paid to the tenant upon completion of the Project. *Id.* at *9. Based on these provisions, the Court held that the landlord's fee simple interest in the property was subject to the contractor's mechanics' lien.

5. In ***Industrial Risk Insurers v. Giddings & Lewis, Inc.***, 2009 Ky. App. LEXIS 106, ___ S.W. ___ (Ky. App. 2009), the Court of Appeals ended a long running debate in Kentucky regarding the economic loss rule. Prior to 2009, the economic loss rule had been discussed and/or applied in a number of different contexts, but a Kentucky appellate court had never explicitly adopted the economic loss rule in a reported decision. In this case, the Kentucky Court of Appeals finally announced that "the Economic Loss Rule does apply in Kentucky." *Id.* at 18.

6. In *Lexicon, Inc. v. Icon Constr., Inc.*, 2009 Ky. App. Unpub. LEXIS 319 (Ky. Ct. App. Mar. 20, 2009), the plaintiff, a subcontractor, sought additional compensation arising from alleged delays and impacts to its work on a construction project. The plaintiff subcontracted with the prime contractor to erect specialized mechanical equipment for the Project. The subcontractor alleged that its performance on the project was delayed while it was waiting on equipment (supplied by the general contractor) to be delivered to the project for installation. *Id.* at *9. During the project, however, the plaintiff executed numerous releases that were submitted with its periodic payment applications, and never reserved any of its delay and impact claims. *Id.* at *18. The Kentucky Court of Appeals, affirming the trial court's ruling, held that the plaintiff had waived any delay and impact claims that it may have had for work performed prior to the submittal of its payment applications and execution of the releases. *Id.* at *18-*19. The plaintiff has petitioned the Ky. Supreme Court for *certiorari* review, however, the Court has not decided whether it will accept the case.

Legislation

1. **KRS § 56.770 to 56.884, Energy Efficiency for State Government Buildings.** Kentucky recently enacted series of statutes designed to maximize the use of energy efficiency measures in the construction, renovation, and maintenance of buildings owned or leased by the state. Kentucky has now become one of the first states to require that, after July 1, 2009, all public buildings (for which fifty percent (50%) or more of the total capital cost is paid by the Commonwealth of Kentucky) be designed and constructed in accordance with new High Performance Building Regulations. KRS § 56.775 (1). In addition to other energy related matters, the statutes and related regulations specifically require that certain LEED certification levels be achieved in the design and construction of new public buildings.

All public buildings worth \$25 million or more in budget must be “designed, built, and submitted for certification to achieve a rating of Silver Level or higher” using LEED 2009. 200 KAR 6:070 § 2(1) (High Performance Building Standards). Public buildings between \$5 million and \$25 million must be designed, built, and submitted for certification to achieve a rating of LEED Certified or higher. *Id.* at § 2(2). Additionally, public buildings greater than \$5 million must achieve a minimum of 7 points under the LEED Energy and Atmosphere Credit 1, Optimize Energy Performance. *Id.* at § 2(3). Public buildings between \$600,000 and \$5 million in budget must be designed and built using the LEED rating system as guidance. *Id.* at § 2(4)

There are two exceptions to the new regulations. The first exception applies when a public building fails to achieve the LEED rating due to the sole failure to receive a point for Material and Resource Credit 7 regarding certified wood. *Id.* at § 5(a). Under this exception, the building will be deemed to have achieved the required LEED rating, if the project used wood products certified under the American Tree Farm System or the Sustainable Forestry Initiative.

Under the second exception, a public building may be granted an exemption if there is an “extraordinary undue burden on the agency if project compliance is required.” *Id.* at § 3(2). Factors that will be considered in determining if such an extraordinary undue burden exists include whether (1) the cost of compliance exceeds a building's life cycle cost savings, (2) compliance increases costs beyond the funding capacity for the project, (3) compliance compromises the historic nature of a building, (4) compliance will violate any laws, (4) the unique nature of a project makes it impractical, or (5) the building will use another high performance building program such as Energy Star or Green Globes.

In addition to the requirements mentioned above, all public buildings (as defined above) must be designed and constructed so that they are capable of being rated as Energy Star buildings. *Id.* at § 4. However, unlike the requirements discussed above, an exemption cannot be granted from this requirement.

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Louisiana

Case Law

1. **Public Works:** In *The Ramelli Group LLC v. The City of New Orleans*, 997 So.2d 612 (La. App. 4 Cir. 2008), the court held that on Public Works, parties who feel their bid was not accepted in violation of Title 38 can seek injunctive relief to enjoin the award of the contract pursuant to §38:2220(B). The plaintiff sought injunctive relief 8 months after a public contract was awarded. The 4th Circuit held that while the statute didn't have a specific prescriptive period for authorized injunctive actions, it could be "gleaned" from the statute and jurisprudence that "timely" injunctive life must be sought. By failing to seek the injunctive immediately, the plaintiff waived its right to enjoin the award of the contract.

2. **Prevailing Building Codes:** In *Bonvillain Builders LLC et al v. Charon E. Gentile, M.D.*, (La. 1 Cir 2009), No. 2008-CA-1994, 2009 La. App. LEXIS 1855, the Louisiana 1st Circuit considered circumstances where a general contractor bid a project without accounting for the design and installation of a drainage system, which was required by code for commercial buildings. The general contractor desired a change order for the drainage system, which it argued was a "hidden condition." After testimony, the trial court held the drainage system was "an unforeseen item," but the 1st Circuit reversed calling the trial court's holding legal error. The general contractor had an obligation to construct according to prevailing laws and codes, and his ignorance of the applicable code did not render his neglect a "hidden condition."

3. **Arbitration:** In *Graves, et al. v. BP America, Inc.*, U.S. 5th Circuit Court of Appeals, May 6, 2009, No. 08-40575, the Fifth Circuit held that non-signatory survivors were bound by an arbitration agreement between the decedent and his employer, because under Louisiana contract theory, the nonsignatory plaintiffs "stand in the decedent's legal shoes." While not a construction law case per se, the holding will apply in construction cases where Louisiana contract theories (such as piercing the corporate veil) will extend to require nonsignatories to arbitration agreements to arbitrate notwithstanding.

Legislation

1. **Act 467** of 2009 Legislative Session, Rep. Ponti and Sen. Thompson, amends La R.S. 47:6030(A) and (B)(2) relative to individual and corporate income tax credits available for installation of wind or solar energy systems. The amendment limits each system to one total tax credit, but broadens who is allowed to claim the credit. Previously, only the resident of the property could claim the tax credit, but under the amended statute, any taxpayer who installs and owns the system itself can claim the credit. This provides installation companies the opportunity to lease the solar equipment to homeowners, and claim the tax credits directly.

2. **Act 348**, Rep. Gautreaux, La. R.S. 33:130.790–130.793. Authorizes local government subdivisions to create "sustainable energy financing districts" to incur debt and issue funds to property owners in the district for use on solar and energy efficiency projects.

Property owners can repay the loans over a twenty-year period, and through their payment of annual property taxes.

3. Act 520, Rep. Leger, La. R.S. 47:6035. This is a tax credit system for green industries similar to tax credits offered to filmmakers in Louisiana. It provides a tiered system offering 10% - 25% tax credit against start-up costs and payroll of new green businesses in the state. Green jobs and industries include, but are not limited to, “renewable energy services,” and “green building and construction.”

4. Act 156 of the 2009 Legislative Session amended La. R.S. 37:2160(C) and 2162(I), and enacted 37:2158(E) and 2160(D), all providing increased criminal and civil penalties for engaging in the business of contracting without authority. The legislation also provided that any collected funds should be remitted to the contractor’s educational trust fund of §37:2162(J).

5. Act 725 of the 2008 Legislative Session became law on January 1, 2009, providing significant changes for licensing of electrical and mechanical contractors. Previously, “electrical or mechanical” contractors only required a license when the project cost exceeded \$50,000. Act 725, however, lowers this threshold to just \$10,000.

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Maine

Case Law

1. In ***Morabito v. Nelson***, PORSC-CV-06-280 (Me. Super. Ct., Cumb. Cty., July 6, 2009) (Cole, J.) the Maine Superior Court refused to confirm an arbitration award under 14 M.R.S.A. § 5937 because the arbitrator failed to explicitly state the individual award against each of the four defendants making the award ambiguous. Given that only two of the four defendants were parties to the original home construction contract, the arbitrator’s collective referral to all four defendants as “Respondents” made unclear the divergent liability of the parties to the contract versus the other two defendants. . In order to confirm an award under 14 M.R.S.A. § 5937, the award must be sufficiently clear and definite so that those called upon to enforce it are not misled or called upon to pay more than is due. For a court of law to confirm and enter judgment, an arbitration decision must be unambiguous and enforceable by its terms and must state the party against whom each individual claim or award was made.

2. In ***Hascall & Hall v. Saco Island, L.P.***, ALFSC-RE-08-90 (Me. Super. Ct., Yor. Cty., February 12, 2009) (Brennan, J.), the Maine Superior Court held that a contractor’s entry into a contract with the agent of owner for improvements on the owner’s property is equivalent to a contract directly between contractor and the property owner. Therefore, rather than the usual 90 days to record a notice of lien, the contractor was entitled to 120 days after the last of the labor or services are performed or labor, materials or service are furnished to file a complaint with the court seeking enforcement of a lien. 10 M.R.S.A. § 3255(1).

In addition, the Superior Court rejected defendants argument that the contractor’s claim was untimely work on one building was completed under a separate contract and the complaint seeking enforcement of the lien was not filed within 120 days of the work ceasing on that building because. The court held that even though work ceased on one building before the other, in the context of improvement to the property, as described in the recorded deed, the

work ended within 120 days of when the plaintiff contractor filed the complaint seeking to enforce the lien on the entire property.

3. In **Houghton v. Koenke**, PORSC-RE-07-226 (Me. Super. Ct., Cumb. Cty., June 24, 2009) (Delahanty II, J.), a property owner was not entitled to the protection of the Maine Home Construction Contract Act, 10 M.R.S.A. § 1486, *et seq.*, because the property's mixed use as a dental practice and a single apartment did not meet the statutory definition of "residence" which excludes protection for buildings used for commercial or business purpose and requires that all units be "living units," even if some of the units are for rental. 10 M.R.S.A. § 1486(5).

4. In **Village Builders, Inc. v. Unemployment Insurance Commission**, PORSC-AP-08-26 (Me. Super. Ct., Cumb. Cty., March 16, 2009) (Crowley, J.), the Maine Superior Court held that a general contractor could not avoid the statutory presumption of "employment" of a subcontracted carpenter, and the corresponding liability for unemployment compensation contributions because carpentry services were in the usual course of business of the general contractor, or in the alternative, the general contractor had a place of business at the project location for the duration of the project. Sc 26 M.R.S.A. § 1043(11)(E)(1)-(3), 26 M.R.S.A. § 1221. Here the general contractor failed to satisfy all three prongs of the so-called "ABC Test" in order to rebut the statutory presumption of "employment" and establish the carpenter as an independent contractor. The prongs of the "ABC Test" require proof that (1) the individual has been and will continue to be free from control both under the contract and in fact, (2) the services provided are either outside the usual course of business or outside all the places of business of the putative employer, and (3) such individual is customarily engaged in an independently established trade, occupation, or business.

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5. In **Addy v. Jenkins, Inc.**, 2009 ME 46, 969 A.2d 935, the Maine Law Court upheld the Maine Superior Court's order granting Jenkins, Inc.'s motion for summary judgment on a claim of negligence brought against it by Brian Addy. Addy, a subcontractor of Jenkins, Inc., was injured when he fell from staging erected by Jenkins, Inc. at a construction site. The evidence presented showed that Addy did not remember how he fell or what caused him to fall. There were no other witnesses to the accident.

The Superior Court concluded that Addy had provided sufficient evidence that Jenkins, Inc. had breached its duty to provide safe staging because Jenkins, Inc. had not installed safety equipment, including rails, platforms and ladders. However, the Superior Court concluded that Addy failed to make a prima facie case that Jenkins, Inc.'s breach was the proximate cause of the injuries because of Addy's lack of memory regarding the specifics of the accident.

6. In **Platz Assocs. v. Finley**, 2009 ME 55, 973 A.2d 743, the Maine Law Court considered a Maine Superior Court's order granting Platz's motion for summary on its mechanics lien and unjust enrichment actions against Martin Finley. Finley entered into an agreement to sell a mill he owned to Travis Soule. During the pendency of the purchase and sale agreement, which was extended four times, Soule engaged the architectural services of Platz. When Soule failed to response to payment demands, Platz filed a mechanics lien certificate on the property. Subsequently, Platz filed a complaint to perfect the lien and a complaint for unjust enrichment against both Finley and Soule.

The Law Court upheld the grant of summary judgment to Platz on the lien claim finding that, in the absence of any contradictory evidence from Finley, Platz's affidavit was sufficient to establish the date services were last provided. In addition, the Law Court concluded that

Finley's failure to respond to a request for admissions established as fact that Finley knew about and consented to the work done by Platz. However, the Law Court vacated the grant of summary judgment to Platz on the unjust enrichment claim, concluding that there was a dispute of fact as to whether Finley ever received architectural drawings and, thus, a benefit from Platz.

7. In *Brunswick Topsham Water Dist. v. Layne Christensen Co.*, 2009 WL 2056560 (Me.Super. May 7, 2009), the Maine Superior Court engaged in an extensive discussion of Maine's Prompt Payment Act, 10 M.R.S.A. §§ 1111-1120 (2009). The Court held that the Prompt Payment Act provides for the prompt payment of amounts invoiced in construction matters and provides an incentive to an owner to make timely payments. The Act provides for penalties against owners who do not make timely payments. See 10 M.R.S.A. §§ 1111-1120. The available remedies include prejudgment interest at an enhanced rate, a 1% monthly penalty on amounts wrongfully withheld, and attorney fees. 10 M.R.S.A. §§ 1113(4), 1118(2), 1118(4). The remedies provided by the Prompt Payment Act are intended to augment damages that are traditionally available for contract or quantum meruit claims and, as such, it is not sufficient for the party seeking penalties to merely prove that work was completed and that an outstanding balance exists." In seeking penalties, the contractor must prove (1) the services were performed in accordance with the agreement or understanding of the parties, (2) the contractor had invoiced the work, and (3) the owner failed to make payment within twenty days after receipt of the invoice. 10 M.R.S.A. § 1113(3). Under the Prompt Payment Act, penalties may not be imposed on any amount withheld that "bears a reasonable relation to the value of any claim held in good faith." 10 M.R.S.A. § 1118(3).

The Court concluded that the District failed to establish that it has a "good faith" claim for not making prompt payments to Layne Christensen Co. To the contrary, the Court found that the District did not communicate to Layne that the invoices would not be paid, why it would not be paid. The Court found that the District held the invoices for nearly a year before it developed its belief that Layne did not perform the work properly. The Court also found that the District improperly withheld payment to Layne on a second, unrelated construction contract.

The Court also discussed what costs and expenses are recoverable for violation of the Prompt Payment Act. The Act provides that the "substantially prevailing party in any proceeding to recover any payment within the scope of this chapter must be awarded reasonable attorney's fees in an amount to be determined by the court ... together with expenses." 10 M.R.S.A. § 1118(4). Layne, as the prevailing party, was entitled to its attorney's fees and expenses. In order to prevail on Layne's claim for payment, Layne had to defend against and defeat the District's claim that Layne's work was defective. The Court concluded that due to the complexity of the case, the significant effort required and the interrelationship of the District's claim that Layne performed defectively under the construction contract and Layne's claims that the District failed to pay the invoices due under both contracts, Layne was to be awarded attorneys fee.

The Court rejected Layne's argument that the Prompt Pay Act's use of the term expenses rather than costs means it is entitled to all of the expenses related to the experts. The Court concluded that the narrow and explicit language relating to "reasonable expert fees and expenses" in 14 M.R.S.A. § 1502-C and 16 M.R.S.A. § 251 controls the question of what expert expenses are covered. In the Court's view, those statutory provisions authorize only fees that are directly related to attendance at trial. The Court concluded that records review, travel time and trial preparation expenses were not permitted costs under 16 M.R.S.A. § 251. The Court denied Layne's costs for items such as research, preparation of reports, deposition and trial preparation and attendance at depositions because these costs and expenses are not authorized by 14 M.R.S.A. § 1502-C, 16 M.R.S.A. § 251 or M.R. Civ. P. 54(f).

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Legislation

1. **10 M.R.S.A. § 1487, Home Construction Contracts.** The Maine Legislature modified the subsection governing dispute resolution of home construction contracts so that, if available, a small claims action is always available to homeowners for dispute resolution. The new suggested language still allows parties to opt for binding arbitration, non-binding arbitration, and mediation but only puts these forums in place for disputes that may not be resolved through a small claims action.

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Maryland

Case law

1. In ***Questar Builders, Inc. v. CB Flooring***, 410 Md. 241 (2009), the Court of Appeals, on its own initiative, reviewed a Circuit Court's decision that a general contractor breached its contract with a flooring subcontractor by terminating their contract. The contractor claimed that the Circuit Court's decision was in error because the contract had a termination for convenience clause which the contractor claimed allowed it to terminate the contract at any time. The Court of Appeals reviewed the effect of a termination for convenience clause and whether that clause gave the contractor the unfettered right to terminate the contract. The Court of Appeals held that "termination for convenience rights... may be enforceable subject to the implied limitation that they be exercised in good faith and in accordance with fair dealing." *Id.* at 280. As such, the Court of Appeals remanded the case to the Circuit Court to determine if the contractor exercised good faith in terminating the subcontractor. In remanding the case the Court of Appeals provided the guidance that "under the covenant of good faith and fair dealing, a party [exercising discretion must] refrain from doing anything that will have the effect of frustrating the right of the other party to receive the fruits of the contract between them." *Id.* at 281.

2. In ***Hartford Underwriters Insurance Co. v. Phoebus***, 187 Md. App. 668 (2009), the owner of a restaurant entered into an AIA A107-1997 Contract (the "Contract") with a contractor for the construction of a restaurant. The Contract specifically had a Waiver of Subrogation Clause which waived the parties' rights to claims covered by property insurance. After the restaurant had been completed and the owner had made a final payment to the contractor, the restaurant burnt down due to faulty wiring. The insurance company, on behalf of the owner, brought suit against the contractor and one of its subcontractors (collectively the "Contractor") and the Contractor argued that the subrogation clause in the Contract prevented the suit. The Circuit Court for Calvert County agreed with the Contractor and granted its motion for summary judgment. The Court of Special Appeals reviewed and found that because the Waiver of Subrogation Clause lacked clarity and there was no Completed Project Insurance clause the Contract could not be interpreted as waiving all of the owner's rights to recover from damages covered by insurance. Further, the Court of Special Appeals held that the public policy consideration behind Waiver of Subrogation clauses in construction contracts apply to the "period of time in which construction is taking place, and not to the (unlimited) period of time after construction and final payment." *Id.* at 688. As such, the Court of Special Appeals reversed and remanded the Circuit Court's decision.

3. In ***T.W. Herring Investments, LLC v. Atlantic Builders Group, Inc.***, 186 Md. App. 673, 678 (2009) a contractor seeking a mechanics' lien claimed that the party who verified the property owner's answer was not authorized to verify the answer and, therefore, the owner's answer was of no effect. The Circuit Court agreed with the contractor and entered an order establishing a mechanics' lien. The owner appealed and the Court of Special Appeals reviewed whether the owner's answer was properly verified. The Court of Special Appeals reviewed Maryland's Mechanics' Liens statute and determined that the only requirement from the statute for an affiant verifying the answer was that the affiant has the proper knowledge. *Id.* at 679-680. As such, the Court of Special Appeals determined that a party answering a petition for a mechanics' lien could extend "authority to a person with knowledge for the limited purpose of executing an affidavit on the party's behalf." *Id.* at 680-681. The Court of Special Appeals found that the owner had extended such authority to the person who signed the affidavit in this case and, as such, vacated the Circuit Court's order establishing a mechanics' lien. *Id.* at 681, 683. The Court of Special Appeals also held that the Mechanics' Lien Statute does not require that the affidavit verifying the answer recite that the "affiant is authorized to make the affidavit, or the facts demonstrating the authorization." *Id.* at 681.

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4. In ***Alpha Constr. & Engineering Corp. v. Insurance Co. of the State of Pa.***, 601 F.Supp.2d 684 (D.Md. Mar. 9, 2009), an inspection consultant brought an declaratory judgment action against the owner's insurer arguing that they, or alternatively, two of their employees, were insureds under the owner's commercial general liability policy. The insurer counter-claimed that it was entitled to contribution or indemnity from the consultant for costs it incurred in defending the owner in the underlying suit and paying to settle that action. On summary judgment, the court held that the owner's consultant was neither an insured under the policy nor a third-party beneficiary of the policy, and that the consultants had a duty to defend and indemnify the owner in the underlying claim. Although the consultant argued that it was a "contractor" within the meaning of the policy, the court noted that the policy excluded those contractors that did not participate in OCIP. The consultant's exclusion from OCIP precluded the consultant from being an insured under the policy. The court also held that the consultant's duty to defend arose from its contract with the owner and the insured could enforce this provision.

5. In ***American Infrastructure-MD, Inc. v. Maryland***, 2009 WL 321582 (D.Md. Jan. 29, 2009), a construction corporation filed a complaint under Section 1983 against the Maryland Transportation Authority, alleging that a lower bidder on a state project was not responsive to the minority business goals of the project. The lower bidder completed the certification process to become a minority business enterprise under the state requirements. The state argued that the Maryland three-year statute of limitations on tort claims barred the contractor's claims. The contractor argued that that statute should not have run until the state issued its letter putting the contractor on notice that the lower bidder may not have complied with the minority business enterprise certification requirements. The court ruled that the statute began to run from when the underlying injury occurred – i.e., when the construction company's bid was rejected.

3. In ***Baltimore Street Builders v. Stewart***, 975 A.2d 271 (Md. App. 2009), an unlicensed home improvement contractor filed an action to enforce a mechanic's lien against a homeowner. The trial court granted summary judgment in favor of the homeowner on the grounds that the contractor was not licensed. On appeal, the contractor argued that it had substantially complied with the licensing requirement, in that a subcontractor on the project, of which a member of the contractor LLC owned an interest, held a proper license. Although the contractor could maintain an action if it substantially complied with the licensing requirement, the Court of Special Appeals determined that in this case the contractor had not substantially

complied with the purpose of the statute: to ensure homeowners that the party they contracted with was financially sound and properly skilled.

4. In ***Benfield Electric Co., Inc. v. Keybank***, 2009 WL 5206626 (D. Md. Dec. 23, 2009), an electrical subcontractor filed an action for, among other things, a constructive trust against a lender on a residential construction project. The subcontractor argued that the lender had induced it to forgo its right to a mechanic's lien by making promises of payment on behalf of the property owner. The district court refused to impose a constructive trust because the subcontractor could not prove that it would suffer any harm, as any mechanic's lien would have been subordinate to the lender's lien.

5. In ***Corsair Special Situations Fund, L.P., v. AJD Constr. Co.***, 2009 WL 3287584 (4th Cir. Oct. 13, 2009), a lender with a secured interest in a subcontractor's accounts receivables brought action against a general contractor seeking recovery of payments made directly to the subcontractor's suppliers. The trial court granted the lender's motion for summary judgment. On appeal, the Fourth Circuit affirmed judgment against the general contractor and held that payments made by the general contractor to the subcontractor's material suppliers through an escrow account were payments made to the subcontractor. The general contractor had notice of the lender's right to the subcontractor's accounts receivable and that the general contractor ignored the notice and continued to make payments to suppliers by establishing an escrow account. The escrow account was nothing more than a method through which the general contractor could make payments to the suppliers without giving the appearance that it was making direct payments, in violation of lender's right to the accounts receivables.

6. In ***Doveview, LLC v. SunTrust Bank***, 2009 WL 2032140 (D. Md. July 10, 2009), a lender canceled a construction loan for a 192 unit apartment complex, leaving the project unfinished. The guarantor debtor on the loan filed suit against the lender, alleging the lender wrongfully canceled the loan. On a motion to dismiss, the bank argued that it had the unequivocal right to cancel the loan because the project was over budget, the guarantor had defaulted on other loans with the lender, and the guarantor had failed to provide the requisite financial documents. Because the court determined that the exact budget for the project as specified in the project drawings was subject to ambiguity, the court denied the lender's summary judgment motion and directed the parties to conduct further discovery on the issue.

7. In ***Equal Rights Center v. Archstone Smith Trust***, 603 F.Supp.2d 814 (D.Md. 2009), a nonprofit membership organization that furthered the interests of persons with disabilities sued an apartment complex operating trust and an architect, claiming that multiple properties were designed, constructed, and maintained in a manner that failed to render them fully accessible to disabled and handicapped persons, in violation of the Fair Housing Act ("FHA") and the Americans with Disabilities Act ("ADA"). The trust asserted a state-law cross-claim against the architect for indemnity. Following several settlement agreements and resulting consent decrees disposing of all claims and cross-claims except the trust's state-law cross-claim, the trust moved to amend the cross-claim to assert a claim for contribution and the parties' cross-moved for summary judgment. The court denied the amendment to the cross-claim, as the trust had proceeded for three years in litigation asserting only that architect was solely liable, and a contribution count would require that additional discovery be had to determine the myriad of state laws that had been violated. The court also held that the state law claims asserted by the trust against the architect were barred by the ADA and FHA, because they were derivative claims arising from the trusts first-party liability for violations of the ADA and FHA, which barred indemnity claims under the ADA and FHA.

8. In ***Fidelity & Deposit Co. of Md. v. Gladwynne Constr. Co.***, 964 A.2d 726 (Md. App. 2009), a surety issuing a payment and performance bond for a construction project brought an action against the general contractor for breach of contract, seeking indemnification

for sums paid out on claims under the bonds. Although the surety had received certified checks from the general contractor for the amounts sought, the surety lost the checks and then waited three years to demand reissuance and file suit. The trial court granted judgment in favor of the contractor, and the surety appealed. The Court of Special Appeals found that the general contractor's obligation to the surety was suspended when the surety received the checks, and would only recommence once the surety presented the lost checks, via affidavit or otherwise, to the bank for acceptance or rejection. Therefore, the Court of Special Appeals affirmed the lower court's dismissal of the action.

10. In ***Scholz Design, Inc. v. Zimmerman***, 2009 WL 2226048 (D. Md. July 22, 2009), an architectural firm brought a copyright infringement action against a homeowner and builder who had allegedly used a modified version of the firm's plans for a home for which the firm held a certificate of copyright registration. On a motion to dismiss for lack of subject matter jurisdiction by the homeowner, the court noted that the final plans for the home had stark differences from the original plans, including changes in some form to almost every room of the house. In granting the motion to dismiss, the court found that the new home plans were a derivative work that must be registered separately. However, the court granted the architectural firm leave to amend to allege infringement upon the original home design.

11. In ***Skanska USA Building, Inc. v. Smith Mgmt. Constr., Inc.***, 967 A.2d 827 (Md. App. 2009), a construction manager on a project to construct a research facility to be leased to by the National Institute of Health ("NIH") filed suit against the development manager of the project for uncompensated change order work. The development manager moved to dismiss the action asserting that the court lacked jurisdiction based upon a clause in the contract requiring that any dispute be brought under the Contract Disputes Act. After the trial court dismissed the action, the Court of Special Appeals confirmed the construction manager's claims came within the Contract Disputes Act and that Maryland courts lacked subject matter jurisdiction to adjudicate whether the claims were ones for which NIH was responsible. However, the Court directed that the case be remanded for the purpose of staying the action rather than dismissal. Although the liability of NIH, who controlled the project but was not the primary party, was not yet determined, the Court of Special Appeals found that the best course of action was to require the construction manager to bring its claim against NIH via a certified claim, which could not be done in a Maryland state forum.

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Legislation

1. **Senate Bill 909, Workplace Fraud Act of 2009.** S.B. 209 took effect on October 1, 2009. The Act is codified in various sections of the Labor and Employment Article of the Annotated Code of Maryland but primarily at §3-901 *et seq.* The Act seeks to prevent employers in the construction and landscaping industries from misclassifying workers as independent contractors rather than as employees to avoid certain payroll and related costs. The Act provides the Maryland Commissioner of Labor and Industry with broad investigatory powers and permits individual workers to bring civil actions against an employer who knowingly and improperly classifies them as independent contractors. Construction and landscaping companies should consider reviewing whether they engage any workers as independent contractors.

2. **Senate Bill 991, Crane Operators – Certificate of Competence.** Senate Bill 991, codified at §9.5-101 *et seq.* of the Business Occupations and Professions Article of the Annotated Code of Maryland and effective as of October 1, 2009, prohibits a person from

operating a crane or authorizing the operation of a crane in Maryland for the purposes of construction or demolition work unless the operator holds a certificate of competence. Crane operators must carry the certificate while operating the crane and make the certificate available upon request of the Commissioner of Labor and Industry. If a crane operator does not provide proof of certification, the Commissioner must issue a written notice requiring the operation of the crane to cease.

Pursuant to SB 991, the operation of a crane includes the inspection of a crane, assisting in the erection or dismantling of a crane, and the performance of routine maintenance on a crane. Crane operation does not include its movement on a State highway. SB 991 applies to persons who operate tower cranes, but not to those who operate many other types of power equipment, such as hydraulic cranes, power-operated derricks, aircraft, bucket trucks, digger derrick trucks, fork lifts, knuckle booms, trolley booms, or line trucks used by a public utility company in the construction or maintenance of its transmission or distribution lines.

Employers who hire employees to operate power equipment, including cranes, must also develop and carry out an employee safety training program designed to inform employees of, and train employees in, standards for the safe operation of power equipment. The Commissioner may bring an enforcement action against persons who fail to comply with the written notice. Violators are guilty of a misdemeanor and are subject to a fine up to \$1,000.

3. **House Bill 644, State Apprenticeship Training Fund.** House Bill 644, codified at §17-601 *et. seq.* of the State Finance and Procurement Article of the Annotated Code of Maryland and effective as of October 1, 2009, creates the State Apprenticeship Training Fund and requires contractors and some subcontractors on public works contracts that are subject to the prevailing wage law to participate in an apprenticeship training program, make payments to a registered apprenticeship program or to an organization that operates registered programs for the purpose of supporting the programs, or contribute to the fund. Public works projects subject to the prevailing wage rate are those valued at more than \$500,000 and carried out by the State, or a political subdivision, agency, person, or entity for which at least 50% of the project cost is paid for by State funds. Subcontractors affected by this bill are those with contracts worth at least \$100,000 on eligible public works projects.

A contractor or subcontractor that elects to make payments to the fund must make payments, as determined by the Secretary of Labor, Licensing, and Regulation not to exceed 25 cents per hour for each employee in each covered craft. Payments to the fund are considered to satisfy any required apprenticeship program contributions under the prevailing wage determination, and may be deducted from the required prevailing wage rate that must be paid to an employee. An employer that has made willfully a false or fraudulent representation or omission regarding a material fact in connection with prevailing wage records is liable for a civil penalty of up to \$1,000 for each employee.

4. **Senate Bill 611 and House Bill 389, Minority Business Enterprise Programs-Prohibitions.** Senate Bill 611 and House Bill 389, codified at § 14-308 of the State Finance and Procurement Article of the Annotated Code of Maryland and effective as of October 1, 2009, prohibit contractors bidding on Maryland state construction projects from identifying a minority-owned business in a bid or proposal without first obtaining the minority business's approval to use its name in the bid or proposal or failing to use the minority owned business in the contractor's performance of the contract. The Bills also prevent a contractor from paying a

minority business solely for the use of its name in the bid or proposal. A contractor that fails to abide by the above requirements is guilty of a felony and on conviction is subject to a maximum imprisonment of 5 years and a fine not exceeding \$20,000.

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Massachusetts

Case Law

1. In ***John T. Callahan & Sons, Inc., et al. v. Worcester Insurance Co.***, 453 Mass. 447, 902 N.E.2d 923 (2009), a contractor's insurance provider prevailed in the declaratory relief action establishing another insurer's duty to defend the contractor. However, the Supreme Judicial Court held that the successful insurer was not entitled to an award of counsel fees incurred in prosecuting the declaratory judgment action. The Court stated that "[i]t is well settled that an insured is entitled to recover reasonable attorney's fees and expenses incurred in successfully establishing the insurer's duty to defend under the terms of the policy." *Id.* at 447. "The policy underlying the *Gamache* exception to the American Rule is not to punish wrongdoers or to reward those who act responsibly. Rather, it is a policy designed to protect the insured's right to receive the full benefit of its liability insurance contract." The Supreme Judicial Court refused to extend the above rule to cases where it was the insurer, not the insured, which had brought the action to establish the duty of another insurer to provide coverage and to defend the Insured in the underlying action. *Id.* at 451-52.

2. In ***Barletta Heavy Division, Inc. v. Erie Interstate Contractors, Inc.***, 620 F.Supp.2d 158 (D. Mass 2009), defendants, subcontractors on the "Pier Rehabilitation Project" in Boston, were sued by the general contractor for breach of contract after being terminated for default. Defendants moved for a preliminary injunction requiring the plaintiff to return equipment withheld by the plaintiff general contractor. The U.S. District Court for Massachusetts denied the defendants' request for a preliminary injunction because the defendants did not show irreparable harm or a likelihood of success on the merits. "That the defendants did not seek the return of that equipment for nearly one year (and then only in response to Barletta's lawsuit) belies the assertion that they are irreparably harmed." The Court reasoned that the "evidence currently before this Court does not support the conclusion that [plaintiff] Barletta breached any contract with the defendants. In particular, the letters attached to the plaintiff's complaint indicate that [defendant] Erie stopped performing the Subcontract on March 20, 2008, primarily because of a dispute over Barletta's non-payment of its Project-related costs and taxes. Such conduct on the part of Erie would constitute breach of the Subcontract which specifies that time is of the essence. Barletta was therefore justified in terminating the Subcontract and excluding Erie from the job site." *Id.* at 162.

3. In a subsequent proceeding in ***Barletta Heavy Division, Inc. v. Erie Interstate Contractors, Inc.***, ___ F.Supp.2d ___, 2009 WL 5201732 (D. Mass 2009), defendants filed a motion to dismiss the case based upon a forum selection clause in the subcontract. The forum selection clause provided:

"Any and all claims or disputes not specifically covered elsewhere in this Agreement arising out of or relating to this Agreement or breach thereof shall be decided, at the sole discretion of [Barletta], either by submission to (1) arbitration ... or (2) judicial decision by the Suffolk Superior Court in the Commonwealth of Massachusetts..."

The U.S. District Court denied the motion and found that this clause was unenforceable. Specifically, the Court found that “to enforce the Subcontract’s forum selection clause would be ‘unreasonable and unjust’ because 1) it is invoked way too late in the proceedings and 2) it would not result in the dismissal of the entire case.” *Id.* at *4.

4. In ***Fleming Brothers v. CMG., Inc.***, 2008 WL 5517640 (Mass. Appeals Court, Dec. 16, 2008), the Massachusetts Appellate Court held that mechanic’s liens are not subject to the \$25,000 jurisdictional threshold that applies to civil actions for damages, and, as a result, confirmed that all mechanic’s lien cases may be filed in the Massachusetts Superior Court. Prior to the decision in *Fleming Brothers*, there had been contradicting case law as to which statute prevailed: (1) G.L. c. 254, the mechanic’s lien statute, stating that a mechanic’s lien “shall be enforced by a civil action brought in the Superior Court for the county where such land lies or in the District Court,” or (2) G.L. c. 212, §3A, the statute requiring Statements of Damages in the Superior Court, which provides that potential damages must exceed \$25,000 to file in the Superior Court. *Fleming Brothers* clarifies this issue on the basis that a lawsuit brought to perfect a mechanic’s lien is an action against property, and therefore is not subject to the minimum damages requirement.

5. In ***Sun Fire Protection & Engineering, Inc. v. D.F. Pray, Inc.***, 73 Mass. App. Ct. 906, 899 N.E.2d 114 (2009), the Appeals Court further defined the circumstances under which a claimant on a public construction payment bond is entitled to recover its attorneys’ fees under M.G.L. c. 149, §29. The statute provides that a successful plaintiff is entitled to an award of attorneys’ fees for the prosecution of its bond action. Notwithstanding, previous court decisions in Massachusetts have held that attorneys’ fees incurred in an arbitration proceeding are not recoverable under the statute. In *Sun Fire*, a subcontractor sought recovery on a statutory payment bond claim under M.G.L. c. 149, §29. After prosecuting the claim before the Superior Court, by stipulation, the parties agreed to binding arbitration before the American Arbitration Association. At the conclusion of the arbitration, the arbitrator awarded the subcontractor/ a monetary amount for its work on the project, as well as its “pre-arbitration legal fees” – i.e., the attorneys’ fees it had incurred while the litigation was still before the Superior Court. Subsequently, the subcontractor moved to confirm the award, while the general contractor and the surety sought to vacate the part of the award relating to attorneys’ fees. The general contractor and surety argued that the arbitrator acted outside his authority in awarding pre-arbitration attorney’s fees because: (a) the agreement to arbitrate did not authorize the arbitrator to award attorney’s fees, and (b) in any event, the arbitrator was precluded from doing so because all of the claims were resolved in arbitration, rather than by the court. *Id.* The Appeals Court rejected this argument and ruled that it was proper for the arbitrator to award such fees. The Court confirmed the rule that fees spent in arbitration of a bond claim cannot be recovered, but, on the other hand, it held that arbitrators can include in their award fees that were incurred by the claimant to litigate the bond claim in court before arbitration was initiated. *Id.* at 908.

6. In ***J.R.J. Construction Company, Inc. v. D.A. Sullivan & Sons, Inc.***, 75 Mass.App.Ct. 1104, 913 N.E.2d 386 (Sept. 22, 2009) (unpublished), the Massachusetts Appeals Court held that the Superior Court acted correctly on the issue of liability but remanded the case for reconsideration on the issue of quantum. The Appellate Court found that although plaintiff subcontractor was entitled to recover on its claim for extra work, the Superior Court Judge erred in awarding the subcontractor the exact amount it had invoiced to the defendant general contractor. The Appeals Court found that, contrary to the lower court’s decision, the subcontract limited recovery for, among other things, the allowable rates for overhead and profit, wage rates for labor costs, and material unit prices.

7. In **RCS Group, Inc. v. Lamonica Construction Co., Inc.**, 75 Mass.App.Ct. 613, 916 N.E.2d 381 (2009), after a settlement fund was established to benefit a construction company's employee who fell from a warehouse roof at a job site, a dispute arose between the employer and the site's general contractor concerning responsibility for funding the settlement. The Massachusetts Superior Court ruled in favor of the general contractor on the ground that the employer had breached a contractual duty to buy liability insurance that included the general contractor as an additional insured. The Appeals Court reversed, finding that such reasoning was erroneous. The Appeals Court reasoned that the contract was ambiguous on the key issue in dispute. Reading that ambiguity against the drafter of the contract, the general contractor, the Appeals Court concluded that the contract did not require the employer to name the general contractor as an additional insured (or otherwise to provide it with direct coverage under its liability policy). The Appeals Court further stated that "[w]e see no unfairness in this result given that [the general contractor] expressly could have required that [the employer] include it as an additional insured, as is commonly done." *Id.* at 388.

8. In **Soarmar, Inc. v. Pinnconn**, Civil Action No. 08-1494B (Mass. Superior Court, Essex County, March 17, 2009), plaintiff who supplied labor and materials to a general contractor for a renovation project involving the defendants' property, filed suit against the defendants on a variety of counts, including the enforcement of a mechanic's lien. On motion, the Superior Court dismissed all of the plaintiffs' claims. With respect to the enforcement of the mechanic's lien, the Court acknowledged that case law "has proffered the possibility that a general contractor who contracts with a lessee for improvements may enforce a lien against the lessor-owner's interest if the lessor-owner consented to the tenant's improvements." "Mechanic's liens are created and governed purely by statute." However, in the current case, the Court declined to extend this theory of liability to a subcontractor who attempted to enforce a mechanic's lien against a lessor-owner.

9. In **Mecca Construction Corp. v. All Interiors, Inc.**, 26 Mass.L.Rptr. 197, 2009 WL 3416426 (Mass. Superior Court, Middlesex County, Oct. 16, 2009), the defendant general contractor moved for summary judgment based on the subcontract's "no damages for delay" clause, after the plaintiff subcontractor brought suit to recover costs allegedly caused by the defendant's lack of coordination of various trades. Mecca asserted that it was able to complete its work without any delay, despite the hindrances caused by the defendant. Mecca claimed that the defendant's failures affected its ability to complete the job "on budget, as opposed to affecting its ability to complete the job on time." "The question, then, [was] whether these hindrances which caused Mecca to complete the work piecemeal and thus to incur extra labor costs in excess of budget should be construed as 'delays' for purposes of the contract, or whether they are to be construed to be not 'delays' but rather 'hindrances,' for which Mecca should not be barred recovery." The Court reasoned that this question was a "very fact-specific determination, and to turn on the nature of the alleged damages which resulted from the 'hindrances'." The Court further reasoned that "no-damages-for-delay" clauses "are commonly used in the construction industry, and generally recognized as valid and enforceable. However, because of their harsh effects, these clauses are to be strictly construed." The Superior Court denied the defendants' motion, concluding that "at least some of plaintiff's damages here are alleged to be separate and distinct from any delay damages, but rather to be the result of damage to plaintiff's property and increased labor and other costs required to complete the job on time in light of the hindrances plaintiff allegedly encountered." The Court ruled that "recovery is not barred by the 'no-damages-for-delay' clause of the contract" to the extent that plaintiff could prove damages which are separate and distinct from any delays.

10. In **National Union Fire Insurance Company of Pittsburgh, PA v. Modern Continental Construction Company, Inc.**, Civil Action No. 08-2015-BLS1 (Mass. Superior Court, Suffolk County, Dec. 10, 2009), National Union, an insurance company for a contractor on the "Big Dig", sought a judgment declaring that it had no duty to defend the insured for

property damage resulting from the collapse of a “Big Dig” tunnel ceiling on which the insured worked. The Superior Court found that National Union did not meet its burden of proof that a policy exclusion completely precluded coverage of the complaints against Modern. Therefore, the Court held that National Union had a duty to defend Modern until it is determined that there is no possibility of coverage, i.e. that the only damage was to property on which Modern performed faulty work. Consequently, the Court rejected National Union’s request for declaratory relief.

11. In ***Advanced Kiosks v. LM Holdings, LLC***, 25 Mass.L.Rptr. 357, 2009 WL 1448948 (Mass. Superior Court, Middlesex County, April 16, 2009), a general contractor on a Massachusetts Bay Transportation Authority (“MBTA”) project entered into an agreement with Advanced Kiosks for the manufacture and delivery of electronic information kiosks to be installed in an MBTA station. Before any kiosks were delivered, but after Advanced Kiosks had supplied “shop drawings” for the project, the MBTA removed the kiosks from the project’s scope of work. Advanced Kiosks filed suit against the general contractor for breach of contract and unjust enrichment, and also made a claim on the contractor’s statutory payment bond under M.G.L. c. 149, § 29. Both defendants moved for summary judgment on each count. The surety argued that the bond did not cover Advanced Kiosk’s claim because the kiosks had not been delivered. The Superior Court, relying on *Dean Inc. v. Fireman’s Insurance Co.*, held that for recovery under a statutory payment bond the materials “need not have been actually incorporated into the as-built structure but need only have been, as here, ‘furnished by virtue of a contract.’” The Court held that this principle could possibly extend to the cost of preparing shop drawings for unused materials on a contract that was canceled. Moreover, the plaintiff contended it provided valuable shop drawings of the kiosks. The Court found, “[t]here is thus a question of fact as to whether CFP was unjustly enriched and, if so, in what amount.” Therefore, the Court denied the surety’s motion for summary judgment with respect to M.G.L. c. 149, § 29 liability.

Legislation

1. **Massachusetts Building Code Appendix 120.AA, the “Stretch Code.”** Effective January 1, 2010, all buildings in Massachusetts are required to meet the 2009 International Energy Conservation Code (“IECC”) standards. Although this IECC standard is now the “baseline” for Massachusetts, a recently adopted addendum to the state building code is more stringent than the 2009 IECC standard by 20 percent. Specifically, Massachusetts Building Code Appendix 12.AA, known as the “Stretch Code,” was adopted by Massachusetts in May 2009, as an optional appendix to the Massachusetts Building Code 780 CMR. The optional Stretch Code was developed in response to the call for developers to meet ever-increasing environmental sustainability standards. The adoption of the Stretch Code, will afford cities and towns the option of requiring new construction to comply with the heightened energy efficiency standards set forth in Appendix 12.AA – in place of the “baseline” IECC requirements. The new Stretch Code will affect new commercial construction as well as the construction of residential buildings.

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Michigan

Case Law

1. In ***Roberts v Saffell***, 483 Mich 1089 (2009), the Michigan Supreme Court affirmed that residential real estate sellers cannot be liable for innocent misrepresentations. In

Roberts, the seller in the Seller Disclosure Statement represented that his house did not have a history of any infestations; however, the house turned out to be infested with termites. The Supreme Court determined that seller would not be liable for any statement, even if it turns out to be false, if the statement was made by the seller without knowledge of its falsity. This language is consistent with the language in the Michigan Sellers Disclosure Act, MCL § 565.955(1).

Legislation

1. **Senate Bill No. 140:** Under the proposed Senate Bill No. 140, The Michigan Construction Lien Act, MCL 570 § 1107 would be amended to allow construction liens to be filed against “[r]eal property owned or leased by a government entity or as to which a government entity contracts for an improvement”. The proposed legislation has been sent to the Committee on Economic Development and Regulatory Reform. You can keep apprised of legislative developments at <http://www.legislature.mi.gov>.

2. **House Bills Nos. 5830-5835:** Proposed legislation was introduced in February 2010 which would eliminate the Michigan Homeowner Construction Lien Recovery Fund (the “Fund”). The Fund was created to protect innocent homeowners from construction lien foreclosure in the event the homeowner paid their licensed contractor, but the contractor failed to pay his/her subcontractors. Without the Funds projection, homeowners will be faced with significant exposure in the event a construction lien is filed against their property. The recent legislature is thought to be spurred by the Funds well documented financial crunch which has left it with little money to maintain operations, and to pay claims. You can keep apprised of legislative developments at <http://www.legislature.mi.gov>

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Minnesota

Case Law

1. In ***Day Masonry v. Independent School District 347***, 2009 WL 1182053 (Minn. Ct. App. 2009) (unpublished), (rev. granted July 7, 2009), a school district hired Lovering-Johnson to build a new school. The contract included a standard AIA arbitration provision. Lovering-Johnson subcontracted with Day Masonry for the masonry work. The school was finished in 1994; shortly thereafter, numerous leaks developed throughout the building. In 2004, an expert concluded that flashing problems caused water infiltration. In 2006, the district demanded arbitration. Day Masonry sought to stay the arbitration because the statute of limitations under Minnesota law was incorporated into the parties’ arbitration agreement and barred the district’s claims for breaches of contract and warranty.

The Court first determined that it had authority to decide whether the claims were barred. A Court is limited to determining the existence and scope of an arbitration agreement. When parties condition an arbitration agreement on compliance with a statute of limitations, that condition affects the scope of the agreement. When a Court is asked to stay arbitration, the Court also has authority to determine whether the party complied with the statute of limitations. Moreover, while issues of fact are normally for the arbitrator, the Court can determine “attendant factual issues” when determining whether a statute of limitations bars a claim brought in arbitration.

The Court then determined that the district's breach-of-contract claim was barred. Under Minnesota's statute of limitations, the district had two years after the "discovery of the injury" to sue for breach of contract. The two years begins when the breach-of-contract injury is discovered or, with due diligence, should have been discovered. Numerous school officials, including a building principal, were aware of the leaks as early as 1994. Therefore, the district's breach-of-contract claim was time barred.

However, the Court determined that the district's breach-of-warranty claim survived. The district could bring the warranty claim within two years of the discovery of the contractor's refusal to honor the warranty claim. The evidence revealed that the district did not discover the contractors' refusal to honor the warranty claim until 2004 and brought the arbitration within two years of that date. The contractors argued that the warranty claim was barred by Minnesota's ten-year statute of repose; however, the claim was governed by the pre-2004 version of the Minnesota statute that did not provide a repose period for warranty claims.

The Minnesota Supreme Court has accepted review of this case. Oral argument was heard on December 7, 2009.

2. In *Itron, Inc. v. WEB Construction, Inc.*, 2009 WL 113370 (Minn. Ct. App. 2009) (unpublished), Itron sought to arbitrate its claim for WEB's alleged defective construction. After the litigation started, the attorney for one of the subcontractors on the project accepted a position at the same law firm as the arbitrator. The arbitrator did not disclose the relationship or recuse himself, but rather the attorney was conflicted out of the representation. The arbitrator ultimately found for Itron.

The District Court and Court of Appeals both affirmed the arbitrator's award. Both Courts determined that there was not a connection between the arbitrator's failure to disclose the relationship between the subcontractor's lawyer and his law firm and the actual arbitration award; that the arbitrator's lack of disclosure did not impact the award; and that there was not a long-standing and repeated relationship between the arbitrator and Itron.

3. In *City of Morris v. Sax Investments, Inc.*, 749 N.W.2d 1 (Minn. Ct. 2009), a landlord was cited by the City of Morris for violating four standards within the City's Rental Licensing Ordinance. Rather than repair his property to comply with the city ordinance, the landlord challenged the four standards as violating the Minnesota State Building Code. The Minnesota Supreme Court agreed with him, invalidating three of the four provisions of Morris's ordinance at issue.

The Court based its decision on the State Building Code itself, which is codified in the Minnesota statutes and provides that a "municipality must not by ordinance . . . require building code provisions regulating components or systems of any residential structure that are different from any provision of the State Building Code." The Court interpreted this language to mean that cities may not impose different regulations on any components or systems of residential building if those components or systems are also addressed by the State Building Code. Importantly, the Court pointed out that municipalities may not even enact provisions that are "merely additional and complementary" to those in the State Building Code, because those would impermissibly "differ" from the Code.

For example, the city ordinance at issue had mandated ground fault interrupters at receptacles within six feet of a water supply. The state code did require ground fault interrupters at specific areas throughout dwellings, but did not have the same specific requirement and, importantly, exempted existing buildings from the regulations. That difference between the City's ordinance and the State Building Code was sufficient for the Court to find the provision invalid. Similarly, the city ordinance required bathrooms be ventilated either by a

window or a ventilation system connected to the outside. The State Building Code had the same requirement for new residential structures, but exempted existing residential buildings from that requirement. Therefore, the Court found the bathroom ventilation provision was invalid.

4. In *Malcolm, et al, v. Franklin Drywall, Inc.*, 2009 WL 690082 (D. Minn. 2009), the Franklins were the sole directors, officers, and shareholders of their own drywall companies. Plaintiffs were trustees of a number of union fringe benefit funds. Plaintiffs sought and were awarded a default judgment against Franklin Drywall and Master Drywall for \$1,194,179.30 for delinquent fringe benefit contributions and liquidated damages. Plaintiffs then attempted to hold the Franklins personally liable for the companies' debts.

There is a two-part test to determine whether an owner is personally liable for the debts of the company. First, the Court considers the relationship of the shareholder to the corporation, and the extent to which the corporation was operated as a separate legal entity. Factors to weigh include: insufficient capitalization; failure to observe corporate formalities; nonpayment of dividends; insolvency of debtor corporation at time of transaction in question; siphoning of funds by dominant shareholder; nonfunctioning of other officers and directors; absence of corporate records; and existence of corporation as merely façade for individual dealings.

If these factors weigh in favor of finding the shareholder personally liable, the second part of the test considers whether shielding the shareholder from personal liability will result in injustice of fundamental unfairness. The Court concluded that the company was sufficiently capitalized; did observe corporate formalities; did properly pay dividends; did not unjustly benefit from distributions during insolvency; and did not siphon funds. As such, the Court found no justification for holding the owners personally liable.

5. In *Brittle v. Shun*, 2009 WL 1047082 (Minn. Ct. App. 2009) (unpublished), Brittle hired Shun, a contractor, to build a detached garage. Work began on the project according to plan, and Brittle made two \$9,500 payments to Shun. Shortly after the payments were made, the relationship between Brittle and Shun began to deteriorate. In May of 2005, Brittle terminated the contract after growing dissatisfied with the progress of the project and after discovering that Shun's contractor's license had been suspended.

Brittle sued Shun for breach of contract in an attempt to recoup the amount that he had paid Shun. At trial, the District Court held that it was Brittle who breached the construction contract when he terminated the contract before the established completion date. Additionally, the Court held that Brittle failed to establish that the value conferred upon him by Shun was limited to \$7,024 instead of the \$19,000 he had already paid to Shun.

Brittle appealed the District Court's finding, arguing that Shun's loss of his contractor's license amounted to a breach of the contract, and that the value he received was limited to \$7,024. The Court of Appeals held that while the District Court did not explicitly say that holding a contractor's license was not a material term of the contract, it implicitly stated as much. Because the District Court ruled that Brittle breached first, even though Shun had already lost his license, the District Court was, in effect, holding that a contractor's license was not a material term of the contract. The Court of Appeals upheld this ruling and further stated that the getting a contractor's license could not reasonably be considered a "primary" purpose of the contract

Finally, the Court of Appeals held that the District Court's ruling regarding the damages owed to Shun needed to be upheld since Brittle failed to sufficiently prove that the value should have been lower. Brittle failed to meet his burden of proof, and absent a clear error by the

District Court, the Court of Appeals refused to alter the District Court's decision.

6. In **Gfrerer v. Lemcke**, 2009 WL 749584 (Minn. Ct. App 2009) (unpublished), Kimberly Lemcke ("Lemcke") and Anthony Gfrerer ("Gfrerer") began living together in Lemcke's home in 2005 with plans to eventually marry. Since both parties had children from prior relationships, they decided that Lemcke's home needed to be expanded to accommodate both families. Gfrerer and Lemcke agreed that since Gfrerer was previously a residential building contractor, he would oversee the remodeling of the home in return for being placed on the property title. Gfrerer took off several months from work to tackle the project.

As the project progressed, Lemcke paid expenses and materials. Gfrerer also provided invoices to Lemcke to establish the value of his services and to resolve any disputes regarding the project. In 2006, when the project was nearly complete, the relationship between Gfrerer and Lemcke fell apart, and Gfrerer stopped work and moved out of the home. When the parties could not agree on a settlement, Gfrerer filed a mechanic's lien on the home and then sued Lemcke for his uncompensated labor and expenses. Eventually the District Court awarded Gfrerer \$53,043.37, which reflected the Court's determination of the value of Gfrerer's labor and materials with adjustments for rent, improperly claimed interest and other matters. Lemcke appealed the decision.

The Court of Appeals decided that the Minnesota anti-palimony statutes did not prohibit Gfrerer's contract claim. The Court held that while the anti-palimony statutes prevent the enforcement of agreements where the sole consideration for the contract is sexual relations out of wedlock, the statutes do not preclude the enforcement of contracts that are supported by consideration independent of the couple's cohabitation. The Court decided that since Gfrerer and Lemcke agreed the work would be done in return for placing Gfrerer on the title to the property, adequate consideration was exchanged. The Court of Appeals also held that since the contract was terminated by mutual rescission, Lemcke had an obligation to compensate Gfrerer for his labor.

7. In **Legg v. Gauge Constr. Mgmt. and Dev., Inc.**, 2009 WL 1182041 (Minn. Ct. App. 2009) (unpublished), Daniel and Christina Legg contracted with Gauge Construction Management & Development, Inc. to construct a new home. In turn, Gauge hired several subcontractors. Foster & Foster Construction, Inc. was hired to install exterior siding and tongue-and-groove ceilings at the home. Foster was not licensed when it started working on the Leggs' home, but it became licensed in December 2003.

Although the home construction wasn't yet complete, the Leggs moved into the home in October 2003. Shortly thereafter, they began noticing problems with the home and defects with Foster's work. In 2004, the home construction was completed and the Leggs obtained an estimate of \$200,000 to repair the faulty construction.

The Leggs' complaint included claims against Gauge, Foster and other subcontractors for negligent construction. In 2007, all of the parties, except Foster participated in a mediation. The Leggs agreed to accept \$50,000 to settle their claims against Gauge and the other subcontractors, but preserved their claims against Foster. After the mediation, the Leggs obtained a default judgment against Foster for \$57,616. The county sheriff, however, was unable to locate Foster to serve the writ of execution so the Leggs submitted an application to the Commissioner of the Department of Labor and Industry ("Commissioner") for payment from the Minnesota Contractor's Recovery Fund ("Recovery Fund"). The Commissioner denied the Leggs' request so they pursued an order from the District Court directing the Commissioner to make a payment from the Recovery Fund. The District Court granted the Leggs' request.

On appeal, the Commissioner argued that the Leggs weren't entitled to payment from the Recovery Fund because: (1) Foster was a subcontractor for the Leggs, (2) the release made the Leggs responsible for subrogating the Recovery Fund's interest; and (3) the District Court erred in calculating the Leggs' allowable damages.

Outlining the purpose of the Recovery Fund, the Court of Appeals explained that a contractual relationship between the Leggs and Foster wasn't required for the Leggs to receive payment from the Recovery Fund. Instead, the Recovery Fund was designed to compensate any aggrieved owner of residential property who obtains a final judgment against a licensee on the grounds of their "failure of performance arising directly out of any transaction when the judgment debtor was licensed." The use of the word "transaction" simply means the "act of conducting business" and does not require a contractual relationship between the Leggs and Foster. The Court of Appeals affirmed that Foster's work for Gauge and on behalf of the Leggs constituted a "transaction" under the statute regulating the Recovery Fund.

Contrary to the Commissioner's assertion, the Court of Appeals explained that the release didn't preclude the Leggs from receiving payment from the Recovery Fund. The Commissioner argued that the Leggs became liable for any amount they couldn't collect from Foster because the release prevented the Leggs from reallocating fault or the uncollected balance back to Gauge and the other settling subcontractors. The Court of Appeals agreed that the release prevented recovery from Gauge and the other subcontractors, but it did nothing to prevent the Leggs from obtaining damages from the Recovery Fund.

Although the Leggs were allowed to recover from the Recovery Fund, the Court of Appeals reversed the District Court's damage award calculation. The District Court used the cost-to-repair measure for calculating the Leggs' damages. However, consistent with the statutory language, the Leggs were only entitled to recover their out-of-pocket costs, meaning the "difference between the actual value of the property [they] received and the price [they] paid for the property." Additionally, the Court of Appeals explained that the Leggs could only recover from the Recovery Fund for work that was performed while Foster was licensed. As such, the District Court needed to determine what damages were sustained by the Leggs during the period of time when Foster was licensed.

8. In ***Preusse v. Robert W. Rakow Construction***, 2009 WL 2366130 (Minn. Ct. App. 2009) (unpublished), Rakow Construction agreed to build a home for Preusse. The parties agreed to terminate the contract during construction. Preusse then sued Rakow for breach of contract. The Court dismissed the lawsuit.

Preusse's central argument was that Rakow did not complete construction within a reasonable time, asserting that Rakow assured construction would be finished within six months. But the contract did not provide a specific time for completion. A contract that is silent about the time for performance must be completed within the time necessary for a "reasonably prudent and diligent [contractor] to do, conveniently, what the contract or duty requires should be done." The project was prolonged because of legal issues with the property, the relocation of the home, the need for a silt fence, and weather. The existence of these problems, however, did not prove that the construction was unreasonably delayed.

Preusse also argued that Rakow breached the contract by changing the home's location and requesting additional costs for fill materials. The Court disagreed. Neither party complained about the final location of the home, and the contract did not indicate which party was responsible for determining the location. Furthermore, the contract's language did not provide that a breach occurred if Rakow requested additional payment for additional, unexpected costs.

9. In ***Valspar Refinish, Inc. v. Gaylord's, Inc.***, 764 N.W.2d 359 (Minn. 2009), Gaylord's had an agreement that it would purchase automotive paint exclusively from Valspar for five years, and in turn Valspar gave it a \$400,000 prepaid rebate. However, Gaylord's stopped buying from Valspar and instead purchased from another paint supplier during the five year period, because of issues with the color and quality of Valspar's paint. In response to Valspar's claim that Gaylord's breached the supply agreement, Gaylord's said that Valspar had delivered defective paint and Gaylord's was entitled to retain its rebate.

The Minnesota Supreme Court found Gaylord's had not taken the steps necessary to pursue its claim that it had received defective product. The contract allowed either party to terminate the agreement 60 days after providing written notice, if the defects were not cured. Gaylord's, however, had not given written notice but had only complained orally about the paint's performance.

Gaylord's failed to convince the Court that Valspar had waived the written notice requirement. A contract requirement can be waived by words or conduct inconsistent with the intent to enforce the requirement. The contract specified that it could only be changed in a written document signed by both parties, and the Court found Valspar did not intentionally give up its right to written notice when it worked with Gaylord's to try and resolve the product performance issues.

Finally, the Court dismissed Gaylord's claims that Valspar had made misrepresentations about the quality of the paint. It determined that Gaylord's claim that it had been fraudulently induced to enter the supply contract was appropriately dismissed because the alleged representations—Valspar's pre-contract promise to address the paint problems—concerned future acts. Statements about future events cannot be the basis of a fraud claim except in limited circumstances, none of which were present here. It also determined that any misrepresentations regarding Valspar's ability to remedy the problems were precluded by a Minnesota statute that precludes claims of misrepresentation against sellers of goods, unless the misrepresentation is intentional or reckless.

10. In ***Lester Building Systems v. Louisiana-Pacific Corporation***, 761 N.W.2d 877 (Minn. 2009), Louisiana-Pacific (LP) manufactured external siding used by Lester in the construction of livestock barns. Lester purchased \$3.4 million worth of siding for 2,600 barns. Lester began receiving complaints of moisture problems and switched products. LP initially funded Lester's repairs but then told Lester that LP would no longer fund repairs due to a national class-action settlement. Lester likewise stopped repairing its customers' barns and told its customers that recovery would be available only under the settlement. Eventually, the number of claims filed under the settlement outpaced LP's annual contributions, and Lester's customers were given the choice of a reduced payment or waiting indefinitely for full payment. Lester calculated that the total cost to repair its customers' barns was \$13.2 million, even though many of its customers took the reduced payment for a collective total of \$640,000.

Lester then sued LP for breach of contract, breach of warranty, and fraud. A jury awarded Lester \$29.6 million in damages: \$3.4 million for its purchase price, \$10.2 million for lost profits, \$2.8 million for restoring its goodwill, and \$13.2 million for the cost of repairs. After trial, Lester conceded that \$2 million of the \$13.2 million was for buildings not covered by the class action but that the remaining \$11.2 million was covered by the settlement. The trial Court disagreed and confirmed the \$29.6 million award.

The Minnesota Supreme Court disallowed \$11.2 million in repair-cost damages. A buyer may recover "consequential damages" if the seller breaches its warranties or commits fraud. Generally, a buyer that incurs actual out-of-pocket expenses to repair defective goods can recover those costs as direct damages for a breach of warranty or as consequential damages.

Additionally, a reseller can recover damages for future repair costs if the reseller is contractually liable to a third party for making those repairs. Under the class-action settlement, the Supreme Court concluded that Lester was not obligated to make any repairs for barns covered by the settlement, which constituted \$11.2 million of the \$13.2 million in repair costs awarded by the jury. The Supreme Court also rejected Lester's argument that it had a "business and practical obligation to make the repairs." Lester failed to prove with a reasonable certainty that its obligation to make repairs was the "normal procedure" or "accepted practice" in its industry.

11. In *Michael O'Byrne v. Lumber One, Avon, Inc.*, 2009 WL 671309 (Minn. Ct. App. 2009) (unpublished), a contractor successfully sued a lumber supplier for breach of contract. The District Court awarded the contractor \$115,275, primarily based upon testimony from a witness for the lumber company. The lumber supplier asked the Court of Appeals to reverse the decision, arguing that the lost profit calculations were unsupported and mathematically incorrect. The Court of Appeals found the evidence supported the damage award and that the District Court properly included a pass-through cost in both the total price and cost to the contractor when it calculated the profit per lot.

12. In *Noack v. Colson Construction, Inc.*, 2009 WL 305114 (Minn. Ct. App. 2009) (unpublished), homeowners sued Colson Construction alleging that Colson negligently constructed their home and breached statutory warranties. Colson sued 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 appropriately flash the windows and doors; and failure to comply with minimum thickness requirements for application of the stucco. 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 the construction defects caused structural damage to the home and code violations were present throughout the home. Two estimates, one for \$222,389.56 and another for \$240,139.00, were provided for the cost of the repairs, which included removal and replacement of all the stucco; installation of new sheathing and insulation; and installation of new windows. 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. Second, that the jury could consider the damages available to the homeowners if repairs 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 breached its statutory warranties. 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 jury instructions. The Court of Appeals upheld the Trial Court's decision on all issues.

Addressing the amount of the jury award, the Court of Appeals acknowledged that the \$55,000 award fell below the homeowners' repair estimates. The Court still found that the jury award was supported by the evidence because Colson offered a repair estimate of \$23,000 for localized repairs. Therefore, the actual award fell within the range of estimates with evidentiary support.

Next, the Court of Appeals upheld the Trial Court's exclusion of the homeowners' evidence relating to Colson's construction practices. The homeowners contended that the evidence showed Colson's habit or routine practice. Even if true, the Trial Court properly concluded that the evidence would likely confuse or mislead the jury.

Finally, the Court of Appeals affirmed the Trial Court's decision to deny the homeowners' requested jury instructions. Likewise, the Trial Court properly refused the homeowners' request for an 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 may choose the cost of repair or the difference in value of their home before and after the damages. If the homeowners introduce 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 remedy to be the cost of repairs rather than any potential lost value to their home.

13. In ***Sternberg & Son Development, LLC v. Marshall***, 2009 WL 3426772 (Minn. Ct. App. 2009) (unpublished), Contractor Sternberg & Son Development agreed to build Mary Jane Marshall a horse shelter. Marshall and Sternberg signed a contract that provided a detailed description of the building, the price, and the payment schedule.

Sternberg started work on the building in the fall of 2004 and finished in July of 2005. Marshall paid according to the schedule, with the exception of the final payment that was due on completion. Sternberg then filed a mechanic's lien on the property and attempted to foreclose the lien. Marshall counterclaimed by asserting that Sternberg did not perform the work according to the contract and caused other damage to her property.

After hearing from a witness who testified that Sternberg's plans and workmanship were substandard and inadequate, the Court ruled in Marshall's favor and dismissed the mechanic's lien. Among other things, the Court found that Sternberg breached the contract by not providing for proper footings. The Court awarded Marshall \$10,000.

Sternberg appealed the award, stating that the District Court incorrectly determined the damages Marshall should receive for the breach of contract. The Court of Appeals held that while the District Court correctly articulated the measure of damages for breach of a construction contract, the Court incorrectly used an estimate for a more costly type of footing than the contract specified. Because the record did not support the District Court's estimate, the Court of Appeals reversed the decision and sent the case back to the District Court.

14. In ***Riverview Muir Doran, LLC v. JADT Development Group***, 2009 WL 2928770 (Minn. Ct. App. 2009) (unpublished) (rev. granted Dec. 15, 2009), JADT Development Group hired KKE Architects to provide architectural services for the development of a housing project. JADT gave mortgages to two parties against the property they planned to develop, and these two mortgages were both recorded in March of 2005. However, before the two mortgages were closed, KKE had begun work on the development project. At the time of the mortgage closing, KKE presented 27 invoices for work completed and the closing company issued a check to KKE for the full amount presented in the invoices.

The check KKE received was accompanied by a partial lien waiver. This waiver provided KKE with an opportunity to identify all other architectural services work completed that they had not yet been paid for. The waiver clearly stated that KKE had been paid in full for all completed work, and in the event that KKE still had unpaid invoices, they needed to identify that

amount on the lien waiver. KKE did not list any outstanding balance that they were owed, nor did they communicate any to the closer or the mortgage holders. In November, 2006, when KKE served JADT with an initial mechanic's lien, there was no actual or visible beginning of improvement on the ground at the site of the development project. KKE eventually sought to foreclose its mechanic's lien, and the mortgage holders sought to foreclose on their mortgages.

The Court stated that for KKE's lien to have priority over the mortgages, either the mortgage holders had to have actual notice of KKE's claim for unpaid work, or there needed to be visible improvement at the work site. KKE admitted that they never provided any information to either the closer or the mortgagees about their claim for unpaid work and they failed to note the amount owed to them on the partial lien waiver. Given that they told none of the interested parties about their claim, the Court held that the mortgage holders did not have actual notice about debt owed to KKE.

Since actual knowledge of the lien was lacking, the Court turned to Minn. Stat. § 514.05, subd. 1 (2008) to see if the mortgagees could still be found to have been put on notice that KKE was owed money. The statute states that against a mortgagee without actual notice, a lien cannot attach before the actual and visible beginning of improvement on the ground. The Court found there was no visible work completed on the development site at the time the mortgages were closed, thus failing to provide notice under Minn. Stat. § 514.05, subd. 1 (2008). Since the mortgagees had no actual knowledge of the claim by KKE, or any way to have suspected there was a claim at all, the Court ruled in favor of the mortgagees.

15. In ***Donnelly Bros. Constr. Co., Inc. v. State Auto Prop. and Cas. Co.***, 759 N.W.2d 651 (Minn. Ct. App. 2009), Donnelly Brothers Construction Company performed stucco work on homes that later suffered damage from water intrusion. This work was performed between 1994 and 2003. Several homebuilders and a homeowner sued Donnelly claiming that its improper application of stucco was one of several construction and material defects that permitted the water intrusion.

Donnelly tendered its defense 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 before the start of its policy period in July 2004. Donnelly sought a declaration that State Auto was obligated to participate in its defense.

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. 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 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 if 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 there was a dispute 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 held that State Auto had a duty to defend Donnelly.

16. In **Grinnell Mutual Reinsurance Company v. Ripley**, 2009 WL 5088774 (Minn. Ct. App. 2009) (unpublished), Steven Ripley, a building contractor, had a commercial general liability (CGL) policy with Grinnell Mutual Reinsurance Company when he built a home for Gregory and Julie Waldvogel in 2005. The Waldvogels sued Ripley when water seeped into their home during the Spring thaw. Importantly, the damages sought by the Waldvogels were for reconstruction of the property to remedy the alleged defects.

The Court of Appeals held that the injuries alleged by the Waldvogels are arguably within the definition of "property damage" under the policy. However, the policy contained an exclusion for damage to the "particular part of real property on which [the insured] . . . or subcontractors working directly or indirectly on [the insured's] behalf are performing operations, if the 'property damage' arises out of those operations." This type of exclusion, according to the Court, incorporates the concept of the "Business Risk" doctrine. Under that doctrine, a contractor's liability to make good on products or work which is defective is not what the CGL coverages are designed to protect against.

Ripley challenged the exclusion from coverage on the ground that, in order for this exclusion to apply, the property damage had to arise out of the insured or its subcontractor's work while they were performing the work on site. The Court held that the property damage at issue is the defective construction, "which necessarily occurred while construction operations were ongoing."

17. In **Tony Eiden Co. v. Auto-Owners Ins. Co.**, 2009 WL 233883 (Minn. Ct. App. Jan. 26, 2009) (unpublished), Tony Eiden Company 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 an 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 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.

Court of Appeals found State Auto had no 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.

18. In ***Crown Equipment Rental Co., Inc. v. J.B. Builders, LLC***, 2009 WL 2447606 (Minn. Ct. App. 2009) (unpublished), Crown was owed a debt by J.B. Builders as a result of a prior judgment. J.B. was eventually awarded a lien against property owned by Primesite Investments as the result of an unrelated litigation, and Crown attempted to garnish that lien.

A District Court entered a personal garnishment judgment against Primesite in favor of Crown on summary judgment. Primesite appealed the ruling to the Minnesota Court of Appeals. In evaluating the claim, the Court of appeals noted that a garnishment summons attaches to all nonexempt indebtedness, money, and other property that is either "due or belonging to the debtor and owing by the garnishee" or is "in the possession or under the control of the garnishee."

However, the Court found that since a lien is neither an estate nor an interest in the land to which it attaches, and because it cannot be held by the owner of the property, the lien could not actually be "in possession or under the control" of Primesite. Furthermore, the Court held that while the lien belonged to J.B., the debtor, it was not "owing by" Primesite because a lien is distinct from the owed payment's underlying debt-security. Since neither prong of the test could be satisfied, the Court of Appeals held that Crown could not attach J.B.'s lien against Primesite's real property and reversed the lower Court's decision.

19. In ***Eischen Cabinet Co. v. Happe***, 2009 WL 1374594 (Minn. Ct. App. 2009) (unpublished), Hansen was the president of a finance company (CoPar) that financed a construction project on which Eischen was one of several subcontractors. Eischen commenced a mechanic's lien action after not being paid for its work, naming CoPar as one of the defendants. Eischen personally serviced Hansen, as president of CoPar. CoPar did not answer the complaint, and Eischen moved for default judgment. At the same time, other subcontractors brought similar actions and CoPar failed to answer those complaints as well.

During this period, CoPar was served with four separate mechanic's lien foreclosure actions, but Hansen mistakenly believed they all related to the same lawsuit. As a result he only gave his attorney one summons and complaint, assuming the attorney would handle all of the litigation. Once he discovered his mistake, Hansen moved to vacate the default judgments. However, because CoPar failed to answer the complaint, and because Eischen followed the proper procedures for its default judgment, the District Court denied CoPar's motion.

On appeal, the Court of Appeals determined that the District Court could relieve CoPar from default judgment if CoPar demonstrated: (1) a reasonable defense on the merits; (2) a reasonable excuse for its failure or neglect to act; (3) due diligence after notice of entry of judgment; and (4) absence of substantial prejudice to the opponent. Although CoPar presented some strong arguments, the Court of appeals determined that CoPar's own neglect led to entry of the default judgment. As such, the Court upheld the judgments against CoPar.

20. In *EnComm Midwest, Inc. v. Larson*, 2009 WL 173318 (Minn. Ct. App. 2009) (unpublished), EnComm filed a mechanic's lien on Larson's property in the amount of \$111,661.93. Larson counterclaimed for a breach-of-contract based on defects in the construction. EnComm prevailed on its mechanic's lien but not some of the counterclaims. Pursuant to its mechanic's lien victory, EnComm then sought over \$102K in attorneys' fees for 366.25 hours of work at \$305 per hour.

The Court determined that 250 hours at \$200 per hour was more appropriate because EnComm 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. The Court calculated EnComm's award by starting with the lien, which included the breach of contract damages, then subtracted the Larson's breach of contract damages, then adding back attorneys' fees and cost-and-disbursements.

On appeal, Larson challenged the District Court's award of attorneys' fees to EnComm, arguing the amount should be reduced for various reasons. The Court of appeals quickly rejected each argument. EnComm argued the district Court abused its discretion in reducing the claimed hourly rate from \$305 to \$200. The Court of Appeals could not determine whether the District Court considered relevant factors, and reversed and remanded the case to the District Court to explain its reason for the decision.

21. In *Imperial Developers, Inc. v. Calhoun Development, LLC*, 2009 WL 4573728 (Minn. Ct. App. 2009) (unpublished), Calhoun Development, LLC separated a parcel of land into eight lots in December 2004. Each lot was issued a certificate of title from the Hennepin Country Registrar of Titles. Calhoun then issued a warranty deed to Lind Homes, LLC, conveying to them Lots 3, 4, and 5. On June 27, 2005, Lind executed two mortgages on the lots, one to BankFirst and the other to Calhoun.

The next day, both mortgages were filed with the Registrar, which assigned document numbers to them and time-stamped the filing as occurring on June 28, 2005. However, the Registrar only issued a new certificate of title memorializing the mortgages for Lot 5, and not for Lots 3 or 4.

In October of 2005, Lind contracted with Scherer Brothers Lumber Co. and Southview Design and Construction for materials and services. Scherer's first contribution to the property occurred on October 13, 2005. Scherer filed a mechanic's lien on the property with the Registrar on September 21, 2006. Southview's first work occurred on May 17, 2006 and they eventually filed a lien on August 29, 2006. On September 20, 2006 the Registrar jointly issued a final new certificate of title for Lots 3, 4, and 5 which memorialized the BankFirst and Calhoun mortgages as having been filed back in June of 2005.

One of Lind's other subcontractors, Imperial Developers Inc., initiated a mechanic's lien foreclosure action. Both Scherer and Southview filed motions for partial summary judgment seeking a declaratory judgment that their liens were superior to the mortgages held by BankFirst and Calhoun. The district court granted summary judgment for the mortgagees, concluding that their mortgages were validly registered and that the lien holders had actual notice of the mortgages.

On appeal, the Court of Appeals reversed the decision and remanded it to district court. The court held that Minn. Stat § 508.55 is clear and unambiguous in what is required for a mortgage to be considered registered: the document creating the interest must be filed by the Registrar, and the Registrar must memorialize the interest on the certificate of title. Since there was no argument from either party that the mortgage interests were actually memorialized for lots 3 and 4, the court held that the mortgages for those lots were not “of record” since they did not comply with the statute. Since the lienholders commenced work on the property prior to September 20, 2006 (the date that the mortgages were actually memorialized for lots 3 and 4), their liens attached before the mortgages were “of record.” Additionally, the court decided that while the lienholders could possibly have had constructive notice of the mortgage interests, that did not amount to actual notice, which would be required if the interests were not “of record.” Since the mortgages were not “of record” and since the lienholders lacked actual notice, the interests of the lienholders had priority.

The court did acknowledge that a failure to properly register an interest could occur solely because of the fault of the Registrar and through no fault of the interest holder. While the court sympathized with this situation, it noted that the Minnesota Supreme Court had chosen to carve out a very narrow exception where it would apply equitable principles. Since this case did not fall into that exception, and since the Torrens Act establishes an assurance fund for parties that are aggrieved by an error of the Registrar, the court chose not to rule for the mortgage holders based on equitable grounds.

22. In ***Installed Building Solutions, LLC, v. Allenburg***, 2009 WL 5090337 (Minn. Ct. App. 2009) (unpublished), the Allenburgs contracted with Warner Building and Remodeling, LLC, for the construction of a new home at the contract price of \$617,000. Several subcontractors worked on the project before the Allenburgs terminated the contract with Warner for nonperformance. On August 8, 2007, two months before termination of the contract, the homeowner and builder amended the building contract price to \$575,000.

Early in the construction process, the Allenburgs received a prelien notice from Warner, and they made a payment of \$440,000. They later received prelien notices from subcontractors, including one from Mike’s Electrical Contracting (“MEC”). According to the stipulation of the parties, MEC provided labor and materials between January 17, 2007 and September 14, 2007. MEC served the homeowners with a prelien notice on January 24, 2007, within the required 45 day limit of his first contribution to the home. MEC served its mechanic’s lien statement on the builder and homeowner, and filed it with the county registrar, on September 14, 2007.

Minn. Stat. § 514.03, subd. 2(c) limits the total amount of money that is to be paid to lien claimants on a building contract to the contract price, minus certain deductions provided for in the statute, called the “lien cap” by the parties. In calculating the lien cap, the district court first determined the contract price to be the amount of the contract at the time of the first subcontractor prelien notice. Since the court decided this occurred on November 13, 2006, the contract price was set at \$617,000. After making the deductions allowed by the statute, the district court determined that \$86,000 was left to make up the lien cap, and that MEC’s lien of \$9,527.50 was valid and should be paid. The district court also awarded MEC attorney fees of \$25,947.50.

On appeal, the homeowners claimed that the term “contract price” in Minn. Stat. § 514.03, subd. 2(c) is ambiguous, and its determination should have resulted in a lower amount, given that the contract price was adjusted and that the builder failed to complete the contract. The court of appeals disagreed, holding that the district court was correct to determine the contract price based on what it was before the first subcontractor prelien notice was served.

The appeals court quoted the decision of the district court, when it said that “to find otherwise would allow homeowners and contractors to reduce liability after subcontractor work had been completed.” By fixing the contract price at the time the first prelien notice is filed, subcontractors are better protected.

The appeals court also stated that the contract price should not be reduced because the builder failed to complete the building of the home. While the Minnesota Supreme Court has stated that in cases dealing with a single contractor, a lien for the full “contract price” can be reduced to the reasonable value of the work the contractor provided, the court of appeals held that this does not apply to situations with multiple subcontractors’ liens. The previous rulings by the supreme court only apply to situations with single contractors and do not apply to the lien cap calculations required by subdivision 2(c) where multiple contractors are allowed.

Additionally, the court of appeals ruled that the district court correctly calculated the lien cap. Minn. Stat. § 514.03, subd. 2(c) allows for only three possible deductions from the contract price in determining the lien cap: payments made to the contractor before receiving any lien notice, payments made to discharge the liens, and any payments that are made for valid lien waivers. The Allenburgs argued that other payments they made (other than ones specifically enumerated by the statute as reducing the lien cap) should be recognizable deductions, including payments for other materials, payments to new contractors, and payments to have the remaining work on the house completed. The court held that the Allenburg’s attempts to reduce the lien cap should fail because they were not included in the statute as permissible deductions.

Finally, the court of appeals ruled that the district court was within its right to award MEC reasonable attorney fees. The court noted that Minnesota law supports that a prevailing lien claimant is entitled to attorneys fees, even when those fees exceed the amount of the lien itself. For MEC, this meant that even though the attorneys fees totaled \$25,947.50, more than twice the amount of the valid lien, the fees were reasonable given the complexity of the case.

23. In *Premier Bank v. Becker Development, LLC*, 767 N.W.2d 691 (Minn. Ct. App. 2009), (rev. granted September 16, 2009), a developer hired a general contractor to perform the initial site, street, and sewer work for a 40 acre residential development. Before the general contractor’s first **day** of work, the developer had taken out a \$3.2 million development mortgage for site work. After the general contractor began work, the same bank modified the development mortgage, so that it released three lots where model homes would be built. Those lots were released from the development mortgage and became subject to new mortgages.

In 2007, the developer ran into financial trouble and could not pay either the bank or the general contractor. In February, the contractor filed a blanket mechanic’s lien claim against the entire property for about \$267,000, the amount of its unpaid work on the first phase of the development. In late 2007, the bank started foreclosure proceedings against the developer, and the general contractor fought to preserve its lien and obtain payment.

The District Court found that, because the bank’s development mortgage was recorded before the general contractor first performed visible work, the general contractor could not stop the bank from foreclosing the majority of the properties. The District Court, however, found that for the three properties where the bank had released its initial mortgage and left the general contractor as the senior lienholder, the general contractor could foreclose the entire amount of its lien.

The Court of Appeals affirmed the District Court, noting that whether the full amount of a blanket lien could be foreclosed on a few lots was an issue of first impression and that the statutes were ambiguous. The question was whether the lien amount would be prorated among all lots or whether the entire amount of the lien was chargeable to each lot. The Court noted

that the equities favored the contractor's request that the full amount of the contractor's lien be satisfied from the proceeds of the sale of the three properties, just a fraction of the 40 acres that the contractor's work had improved. The two factors that persuaded the Court to decide in favor of the contractor were: (1) the bank is a sophisticated entity, and never required the general contractor to remain a junior lienholder after the loans were modified; and (2) the purpose of the lien laws is to ensure that contractors are paid for their work, and it was undisputed that the general contractor was owed the entire \$267,000.

The Minnesota Supreme Court has granted the bank's petition for further review. A decision is expected in 2010.

24. In ***Shaw Acquisition Corp. v. Shannon***, 2009 WL 817667 (Minn. Ct. App. 2009) (unpublished), six subcontractors or suppliers sought to foreclose their mechanic's liens, but the banks holding mortgages on the property opposed the foreclosure.

In response to each of the liens, the banks argued that the liens were overstated, and therefore void under Minnesota law, which says a lien is void if the claimant knowingly demands more than is due. However, the banks had not raised that affirmative defense when they answered the complaints, and therefore the Court found it had been waived.

As a second defense to each lien, the banks submitted the affidavit of a bank officer with no construction expertise. Despite that lack of credentials, he set forth reasons why each subcontractor or supplier did not deserve the full amounts of their liens. For example, the bank officer attested that: the custom trim provider delivered \$19,000 in "extra" trim, but he had no basis for that assertion; some pavers in the driveway were cracked, so the driveway must have been constructed in a less than workmanlike manner; and a few doors did not shut properly, which should nullify the \$38,000 lien of the trim supplier. The Court made clear that the unsupported affidavit of a bank officer, with no construction expertise nor any personal knowledge of the construction, was not sufficient to raise questions of fact about the liens.

Finally, the Court affirmed an award of about \$49,000 in attorney fees incurred by one of the subcontractors, despite the fact that the particular subcontractor's lien had only been \$79,000. In addition to showing that subcontractor's attorney had done the majority of the legal work for all six subcontractors and suppliers, the Court noted that the reasonableness of a fee award cannot be determined by simply comparing the fees with the lien amount recovered.

25. In ***S.M. Hentges & Sons, Inc. v. Mensing***, 759 N.W.2d 229 (Minn. Ct. App. 2009), petition for further (rev. granted March 31, 2009), the Mensings entered a into purchase agreement whereby the Land Geeks would purchase certain land. Land Geeks contracted with SEH for various surveying and engineering services in connection with Land Geeks' proposal to plat and construct residential lots on the Mensings' property and also contracted with Hentges to make various improvements to the property and street. The Mensings and Land Geeks later amended the agreement so the Land Geeks could assign its interest to Hentges. Eventually, the Mensing served Notice of Cancellation of the purchase agreement. Hentges and SEH initiated a mechanic's lien foreclosure action against the property. SEH had not given the Mensings prelien notice; Hentges did provide prelien notice.

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

With respect to SEH's argument that it was exempt from the statutory prelien notice requirement, the Court of Appeals concluded that there was no significant reason to distinguish between an owner whose property improvement consists of a five-unit condo or townhome complex and an owner whose property consists of a five lot residential development. Therefore, the prelien notice was not required. The Court determined that District Court erred by invalidating SEH's mechanic's lien based on SEH's failure to provide prelien notice. Minnesota Supreme Court granted a petition for review. The case has been submitted and a decision is pending.

Regarding the equitable ownership question, the Court of Appeals noted that "possession is important" and that Mensings' granting Hentges access to the property for the purpose of making improvements pursuant to the contract with Land Geeks did not qualify as possession. The Court affirmed the District Court's determination that Hentges' equitable interest in the property did not preclude Hentges from filing a mechanic's lien.

26. In ***T.A. Schifsky & Sons, Inc. v. Bahr Construction***, 2009 WL 3379128 (Minn. 2009) (unpublished), Consolidated Lumber Company ("Consolidated Lumber") sought to foreclose four mechanic's liens against Bahr Construction, LLC. Premier Bank challenged the validity of the mechanic's liens by arguing that they were invalid because they failed to properly identify the property. The District Court held that the liens were valid even though they contained an incorrect section number, because they did correctly identify the street address. After determining the fair and reasonable value of the mechanic's liens, the Court held that Consolidated Lumber was entitled to reasonable attorneys' fees and costs.

The District Court eventually determined the amount of fees and costs to be awarded to Consolidated Lumber, and an order was entered on July 24, 2008. Premier Bank filed an appeal that referenced both the initial judgment and the order for attorneys fees. After a hearing on the issues, the Court of appeals ruled that Premier Bank's appeal was untimely because they had missed their 60-day window to bring an appeal.

Upon review, the Supreme Court of Minnesota decided that Premier Bank's appeal of the initial judgment did come too late. However, the Court held that it was untimely because the later award of attorney's fees did not extend the allowable time that a party can appeal. The Court held that Minn. R. Civ. P. 54.02 applies only to lawsuits based on more than one claim or cause of action. While the District Court awarded Consolidated Lumber attorney's fees, that award did not make the suit one based on multiple claims. Instead, the Court held that once a Court rules on the claim at issue and rules on any post-trial motions, the finality of a judgment shouldn't be delayed or effected by the later determination of a costs and fees award. The 60-day time for appeal begins once the judgment is entered, and is not delayed or extended by a later insertion of costs and disbursements. Therefore, the judgment against Premier Bank was appealable at the beginning of February and Premier's appeal in June was too late.

27. In ***Haldeman v. Zacher Excavating, Inc.***, 2009 WL 2151153 (Minn. Ct. App. 2009) (unpublished), Scenic Lodging Corporation installed a rainwater catch-basin system for a large commercial building. Each basin was initially covered with a plastic cover attached with screws. After Scenic Lodging covered the basins, however, a tenant of the commercial building decided that the basin covers should be removed and replaced with metal grates. On behalf of the tenant, a welder removed the covers to take measurements for the metal grates, but failed to replace one of the covers.

A construction worker fell into the uncovered basin and sued Scenic Lodging, alleging that it was negligent in selecting and supervising the designer of the system and in supervising the construction site. The Trial Court concluded that Scenic Lodging did not owe the

construction worker a duty of care that would make it liable for the worker's injury. On appeal, the injured worker contended that he was owed a duty of care because Scenic Lodging was the general contractor or a subcontractor on the project, and either status made it a "possessor of the land" which imposed a duty of care under law. The Court of Appeals rejected the injured worker's arguments.

No evidence supported the injured worker's claim that Scenic Lodging had any legal possessory interest in the land. A general contractor who retains authoritative control and supervision over a construction project can be charged with the duty of care owed by a possessor of the land. Here, however, Scenic Lodging did not act as the general contractor, nor did it assume any particular control over the project or engage in any supervisory conduct. In fact, deposition testimony from several parties involved with the construction of the commercial building revealed that there was no general contractor on the project.

Next, the injured worker claimed that Scenic Lodging, as the subcontractor, could be liable for creating a dangerous condition on the land and be subjected to the same liability as a possessor of the land. The record failed to support the injured worker's claim. Although Scenic Lodging installed the catch-basin system, it was a building tenant that ordered the removal of the protective covers. No evidence suggested that Scenic Lodging's initial installation of the protective covers was negligent or that the company held any supervisory responsibilities over the tenant's alterations to the original covers. As such, there was no evidence that Scenic Lodging "did anything or failed to do something that would bring it within the ambit" of liability.

28. In **Sayer v. Minn. Dept. of Transp.**, 769 N.W.2d 305 (Minn. Ct. App. 2009) (rev. granted October 20, 2009), The Minnesota Department of Transportation (MnDOT) sought to replace the I-35W bridge after it collapsed. To do so, the Transportation Commissioner used a design-build best-value procurement process. The commissioner issued a request for qualifications from contractors interested in the project, and selected five qualified contractors to whom the commissioner sent a request for proposal (RFP). Bids would be evaluated by a Technical Review Committee (TRC). The commissioner later issued instructions to proposers that stated the contract would be awarded only to a proposal that met the standards established by MnDOT and described the weighted criteria by which the proposals would be evaluated. The winning bid (Flatiron) had the highest price and tied with another company for the longest delivery time, but after all the scores were adjusted, Flatiron had the lowest adjusted score and thus represented the "best-value" for the project.

Sayer sued, alleging the winning proposal was nonresponsive and thus the contract was awarded illegally. Sayer also moved for a temporary restraining order to prevent MnDOT from incurring additional expenses under the contract. The District Court found for Flatiron, and Sayer appealed.

On appeal, the Court explained that under traditional public bidding rules the commissioner should award contracts to the lowest responsible bidder. The public agency has a duty to reject proposals that vary substantially from the advertised specifications, which divests public officials of any discretion in the selection process and avoids fraud or favoritism.

However, the Legislature enacted Minn. Stat. §§ 161.3410-.3428 in 2001, which authorized the commissioner to solicit and award a design-build contract for a project on the basis of a "best value" selection process for work on trunk highways. The best-value selection process allows public agencies to consider factors other than cost in awarding contracts and allows a single contract with a contractor for both the design and construction of the project.

When the commissioner selects the best-value method, the commissioner must appoint at least five members to the TRC to review the bids. The TRC is required to score the technical proposals using selection criteria defined in the RFP, submit a technical score for each bid, and reject nonresponsive bids.

The Court concluded that the RFPs did not prohibit proposals that required additional right-of-way in other areas, and rejected Sayer's argument that Flatiron's proposal was nonresponsive because it involved additional right-of-way on Second Street. The Court also concluded that the RFP required a minimum of three webs per direction of traffic for concrete-box bridge designs, not three webs per concrete-box girder. Flatiron's proposal, then, exceeded the minimum requirement. As such, the Court found that Sayer failed to show the TRC's findings were arbitrary and capricious or not supported by substantial evidence.

Petition for review by the Minnesota Supreme Court has been granted.

29. In *LeMaster Constr., Inc. v. Woeste*, 2009 WL 1048194 (Minn. Ct. App. 2009) (unpublished), the Woestes hired LeMaster to repair and clean their home after a fire. The Woestes terminated the arrangement after the work performed was shoddy and incompetent, and asked for the return of their personal property still in LeMaster's possession. LeMaster refused to return the property in an effort to get back on the job, failed to send an invoice for the work performed; and filed a mechanic's lien against the home for \$357,670.84. The Woestes paid \$55,000, not knowing about the lien, and LeMaster filed an Amended Complaint for \$302,670.84. Later, LeMaster filed suit to foreclose the lien, seeking damages in excess of \$400,000.00. The Woestes counterclaimed alleging breach-of-contract, slander-of-title, and conversion. The District Court found for the Woestes and LeMaster appealed.

The Court of Appeals reviewed the four elements to a slander-of-title claim: (1) a false statement that was made concerning the real property owned by the plaintiff; (2) the false statement was published to others; (3) the false statement was published maliciously; and (4) the false statement concerning title to the property caused the plaintiff pecuniary loss in the form of special damages.

The Court reiterated that filing an instrument known to be inoperative qualifies as a false statement that, if done maliciously, constitutes slander-of-title. Malice, in addition, requires a reckless disregard concerning the truth or falsity of a matter despite a high degree of awareness of probable falsity or entertaining doubts as to its truth. The Court of appeals agreed with the District Court that the liens were prepared sloppily and carelessly by an employee who was grossly incompetent to perform that function; that the invoices were inflated to the degree they qualified as overtly fraudulent; and that LeMaster acted in bad faith, thus finding slander of title.

30. In *Vitelli v. Knudson*, 2009 WL 910846 (Minn. Ct. App. 2009) (unpublished), Michael and Jody Vitelli were the second purchasers of a home constructed by Carlson Custom Homes, Inc. ("CCH"). CCH constructed the home, along with a drainage swale, on a lot that had been purchased from a land developer "as is." On behalf of the Vitellis, Halla Nursery landscaped the lot and installed a downspout.

On September 4, 2005, a storm dumped almost 4.9 inches of rain and the Vitellis experienced water intrusion into the lower level of their home. One month later, on October 4, the Vitellis' counsel sent a letter to CCH advising it of the water damage to the home from the September storm, and asking CCH or its insurance company to contact the Vitellis' counsel to discuss the matter. Ms. Vitelli conveyed the same information to Halla Nursery. A representative of Halla Nursery visited the lot and detached a gutter downspout from the drain tile in an attempt to alleviate any future drainage problems. CCH didn't contact the Vitellis or their counsel, and didn't conduct an inspection of their home or lot.

On October 4, 2005, a second storm dumped more than four inches of rain and caused additional water intrusion into the Vitellis' home. To determine the extent of their problems, the Vitellis had their drain tile scoped on October 10, 2005. The Vitellis' lawyer sent a second letter to CCH on October 13, 2005, informing CCH of the additional damage to the Vitellis' home from the October storm and advising CCH that its insurance company needed to be involved because the scope showed damage that occurred during CCH's construction process. Over the next several weeks, the Vitellis renovated the affected areas of their home by replacing the original drain tile, re-grading the backyard, and installing new sheetrock and a new exterior drain.

In March 2006, the Vitellis sued CCH, Halla Nursery and the land developer. The Trial Court dismissed the negligence claim against the land developer. On appeal, that decision was upheld.

In dismissing the suit against the land developer, the Trial Court commented that many intervening events occurred after CCH bought the lot from the land developer. Those events may have caused the water intrusion. Additionally, the Trial Court observed that CCH could not have received any representations or warranties from the land developer because the lot was sold "as is." As such, direct responsibility for the drainage, location and final elevation of the home rested with CCH, not the land developer. Focusing on the direct responsibilities of CCH, the Court of Appeals confirmed that the land developer did not owe the Vitellis a legal duty. Consequently, the first element of a negligence claim – the existence of a duty of care – could not be established by the Vitellis and the negligence claim against the land developer had to be dismissed.

31. In ***Calhoun Place Condo. Ass'n v. Turnstone Calhoun, LLC***, 2009 WL 3574641 (Minn. Ct. App. 2009) (unpublished), Turnstone Calhoun, LLC converted apartments into condominiums and created Calhoun Place Condominium Association to take control of the condominiums in 2004.

In 2005, one of the condominium residents sued Turnstone and the Association, alleging that mold in her condominium unit had been caused by a defective HVAC system; that Turnstone should have known about the problems; and that the Association should have investigated the defects. The claims were settled in mediation and a settlement agreement was created that purported to release Turnstone from future claims related to the "alleged Environmental Condition or Contamination," which included claims for the growth of mold or fungi.

In 2008, the Association sued Turnstone, claiming that problems with the exterior insulation and finish system led to significant water intrusion and structural damage. While the original complaint filed by the Association alleged that an inspection revealed several defective conditions that caused water damages as well as the growth of mold, mildew and fungi, the Association's amended complaint dropped the phrase "growth of mold, mildew and fungi."

The Trial Court concluded that the release prevented the Association from making later claims, including ones unrelated to the growth of mold, mildew and fungi. The Minnesota Court of Appeals disagreed, noting that the scope of the release was limited to claims related to the original lawsuit– claims connected to Environmental Conditions or Contamination. The Court interpreted the scope of the release to only include those claims related to the original action, which centered on the Environmental Conditions. Since the Appeals Court held the second action to be outside the scope of the release, and that no other releases in the original settlement prevented the second claim, the second lawsuit was permitted to proceed.

32. In *Miller v. Lankow*, 2009 WL 4910258 (Minn. Ct. App. 2009) (unpublished), Lankow placed her home on the market for sale in 2003. A subsequent mold test revealed fungal growth in the home. Lankow paid to have the home inspected and eventually repaired. After repairs were made, Lankow attempted to sell her home again, with disclosures indicating that there had been moisture intrusion and mold growth. In 2004, Lankow sold the home to Miller, who acknowledged being aware of the previous problems. In September of 2005, Miller discovered moisture intrusion and mold in some of the same areas that had been remediated.

Miller contacted the contractors responsible for the previous repairs. The contractors visited the house to explain their previous involvement and to offer opinions about what was happening. After the meeting, Miller felt as if the contractors were not going to do any further work to fix the problem.

In December of 2005, Miller's first attorney sent letters to the contractors and Lankow alleging that the previous repair work was defective. The letter also provided notice of a possible breach of warranty claim. In the letters, the attorney stated that the parties should inspect the property and contact him before January 9th, 2006, to avoid legal action. None of the parties responded before the deadline, but one contractor did stop by the house several weeks later to inspect the damage.

In March of 2007, Miller's new attorney sent letters to Lankow and the contractors instructing the parties to immediately schedule any further inspections of the home because Miller planned to proceed with the necessary repairs beginning March 22, 2007. The court found that Miller had actually hired someone to begin repairs in January of 2007 and that, by March 23, 2007, when a representative of one of the contractors visited the home, the entire exterior of the home had been removed.

In April, 2007, Miller sued Lankow and several contractors. The district court found that spoliation occurred and sanctioned Miller by excluding all physical evidence of the alleged damage to the home and any related expert reports. The court decided that, without this evidence, Miller could not present a genuine issue of material fact to support his claims, and summary judgment was awarded for the defendants.

On appeal, Miller argued that while evidence was destroyed, the destruction occurred only after he provided the defendants with sufficient notice to avoid spoliation sanctions. The court considered each communication between Miller and the defendants and held that they failed to serve as notice because Miller initially failed to inform the contractors that he believed they were responsible for the damage to the house, and then because Miller failed to disclose his plans for repair. The court relied on the rule from *Hoffman v. Ford Motor Co.*, 587 N.W.2d 66 (Minn. Ct. App. 1998), which states that a party can avoid sanctions for spoliation of evidence if sufficient notice of a breach or claim is given to the opposing party, giving them an opportunity to correct the defect, prepare for litigation and prevent claims from being made after it is too late to investigate them. The court held that the communications failed to provide adequate notice because they did not provide "actual notice of the nature and timing of any action that could lead to destruction of evidence and afford a reasonable amount of time from the date of the notice to inspect and preserve evidence."

A dissenting opinion argues that adequate notice was provided to the owner and the contractors. The dissent states that all Minnesota law requires is that the "spoliation notice must reasonably notify the recipient of a breach or a claim." The dissent states that, in their ruling, the majority is holding parties must comply with a new additional requirement: that parties must also inform the opposing party of the plan to remediate and repair the problems. The dissent argues that this is not required by *Hoffman* and is unsupported in Minnesota law.

33. In *Buscher v. Montag Dev., Inc.*, 770 N.W.2d 199 (Minn. Ct. App. 2009), A homeowner hired various contractors to perform a remodeling project. Several years after the remodeling project was finished, the homeowner began to experience numerous water-related problems. After repairs were attempted, the homeowner hired an air quality expert to assess the air quality of the home. While the expert found most results to be within a normal range, there were elevated levels of mold in some parts of the house that went beyond what the expert considered to be safe. The expert discussed this with the homeowner and provided the homeowner with a written report that detailed his findings.

Two years after repairs were attempted and the air quality expert issued his report, the homeowner discovered a water leak in the master bedroom and evidence of water between the exterior and interior walls. The homeowner hired several companies to assess and investigate the problems, which ultimately led to the discovery of major mold and water damage. It was not until more than a year after this discovery that the homeowner hired an attorney and sued several contractors who had worked on the remodeling project.

During the lawsuit, the homeowner provided several thousand documents to the attorneys for the contractors, including the air quality expert's report. However, the report was incorrectly labeled, making the document difficult to find. Furthermore, the homeowner failed to produce the report when specifically asked for it, and according to the Court, tried to mislead the Court regarding when the homeowner first discovered his injury by filing misleading pleadings. The contractors won dismissal because the Court found that the expert's air quality report put the homeowner on notice of a serious issue, and that by waiting several years to sue the contractors, the homeowner's claim was barred by the statute of limitations. The Court also awarded large monetary sanctions in favor of the contractors and against the homeowner and his attorneys for misleading and wasting the time and money of the Court and the contractors.

A key fact for the contractors was the time that had passed before the homeowner sued. As often happens in cases regarding a construction defect, a central issue is when the statute of limitations begins to run. Minnesota Courts have consistently held that the two-year statute of limitations provision in Minn. Stat. § 541.051, subd. 1(a) begins to run when an actionable injury is discovered, or when an actionable injury should have been discovered using due diligence. It does not matter whether the precise nature, cause or extent of the defect is known at the time of discovery. The Court held that the statute of limitations started when the expert report was written and delivered to the homeowner. Even though the report did not detail the defects that were present, the Court found that the homeowner was put on notice of a defect that could have, through reasonable effort and diligence, been discovered at that time. The homeowner had the responsibility to investigate further.

However, the Court reiterated an important point that contractors need to keep in mind: the statute of limitations will not bar a claim against a contractor when the contractor has made representations to the injured party that repairs will be made, but then fails to do so.

The Court severely sanctioned against both the homeowner and his attorney. for misleading the Court and the opposing party about when the homeowner discovered his injury, thus triggering the statute of limitations. The attempts to mislead the Court included affidavits to omit reference to the expert report, as well as the exaggeration of later investigations by the homeowner. To deter this type of behavior, the Court awarded thousands of dollars in sanctions against the homeowner and awarded attorneys' fees and costs to the contractors.

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Legislation

1. **Minnesota Statutes Chapter 327A. Housing; Statutory Warranties.**

Minnesota Statutes chapter 327A was amended to require that contractors include the existing statutory implied residential construction warranties as express warranties in all contracts for new home construction and in all contracts for home improvements entered into on or after August 1, 2009. Contractors who fail to provide owners with these statutory warranties in writing may be subject to an enforcement action by the Minnesota Department of Labor and Industry. Section 327A.08(d) provides that “the warranties required by sections 327A.01 to 327A.08 must be set forth as written warranty instruments and must be included as part of the construction contract and conveyed to the owner,” and that failure to comply with this paragraph is a violation of section 326B.84.

Minnesota Statutes sections 327A.01 to 327A.08 provide owners with protection from construction defects caused by faulty workmanship and defective materials. The one-year, two-year, and ten-year statutory warranties cover different kinds of construction defects. The “warranty date” is the date from and after which the statutory warranties are effective. For new home warranties, the warranty date is the earliest of either the date of the initial purchaser’s first occupancy of the home or dwelling, or the date on which the initial purchaser takes legal or equitable title to the home or dwelling. For home improvements, the warranty date is the date on which the home improvement work was completed.

Minnesota Statutes section 327A.02, subdivision 1 sets forth the warranty requirements for every sale of a completed home or dwelling and every contract for the sale of a home or dwelling to be completed. The term “dwelling” refers to a new building, not previously occupied and constructed for the purpose of habitation. Section 327A.02, subdivision 1 requires that the contractor warrant to the purchaser that:

- (a) during the one-year period from and after the warranty date, the dwelling shall be free from defects caused by faulty workmanship and defective materials due to noncompliance with building standards;
- (b) during the two-year period from and after the warranty date, the dwelling shall be free from defects caused by faulty installation of plumbing, electrical, heating, and cooling systems due to noncompliance with building standards; and
- (c) during the ten-year period from and after the warranty date, the dwelling shall be free from major construction defects due to noncompliance with building standards.

Minnesota Statute section 327A.02, subdivision 3 sets forth the warranty requirements for home improvement work involving major structural changes or additions to a residential building. The term “home improvement” refers to the repairing, remodeling, altering, converting, or modernizing of, or adding to a residential building. Section 327A.02, subdivision 3 requires that the contractor warrant to the owner that:

- (a) during the one-year period from and after the warranty date, the home improvement shall be free from major construction defects due to noncompliance with building standards;
- (b) during the two-year period from and after the warranty date, home improvement work involving plumbing, electrical, heating or cooling

systems shall be free from defects caused by the faulty installation of the system or systems due to noncompliance with building standards; and

- (c) during the ten-year period from and after the warranty date, the home improvement shall be free from major construction defects due to noncompliance with building standards.

The term “building standards,” as used in the one-year and two-year warranties for new homes and home improvements, refers to the materials and installation standards of the State Building Code in effect at the time of the construction or remodeling. The term “major construction defects,” as used in the ten-year warranties for new homes and home improvements, refers to actual damage to the load-bearing portion of the dwelling or home improvement which affects the load-bearing function and is likely to affect use of the dwelling or home improvement for residential purposes.

In order to make a warranty claim under Minnesota Statutes chapter 327A, the owner must report the loss or damage at issue to the contractor in writing within six months of its discovery. An owner may bring suit against a contractor for breach of any of the new home warranties or home improvement warranties and seek recovery of damages arising out of the breach or an order for specific performance requiring that the contractor fulfill its obligations under the statutory warranties. Damages for breach of the new home warranties are limited to either the amount to remedy the defect or breach, or the difference between the value of the dwelling without the defect and the value of the dwelling with the defect. Damages for breach of the home improvement warranties are limited to the amount necessary to remedy the defect or breach.

Contractors may comply with the new requirements in Minnesota Statutes chapter 327A by writing the text of Minnesota Statutes sections 327A.01 to 327A.08 directly into their residential construction contracts, or by attaching the statutory warranties to their contracts and incorporating the attachment into their contracts by reference.

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2. **International Building Code.**

On March 2, 2009 the Minnesota Department of Labor and Industry informed Code Officials, Design Professionals and other interested parties, that 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

Case Law

1. In ***Windham v. Latco***, 972 So. 2d 608, 2008 Miss. LEXIS 44 (Miss., 2008), the Mississippi Supreme Court held that a defendant architect, contractor, or engineer seeking to invoke the defense of the six year statute of repose in Mississippi Code Annotated § 15-1-141 is

equitably estopped from raising the bar of the statute if the plaintiff establishes that the defendant fraudulently concealed the cause of action. “The fraudulent-concealment exception of Mississippi Code Annotated Section 51-1-67 applies to the statute of repose in Mississippi Code Annotated 51-1-141.” The plaintiff must show that some affirmative act or conduct was done and prevented discovery of a claim and that due diligence was performed on plaintiff’s part to discover the fraud. The court also held that application of the statute of repose “is not barred if the fraudulent concealment was known, or with due diligence could have been discovered, within the six-year period.”

2. In ***Puckett v. Gordon***, 16 So. 3d 764, 2009 Miss. App. LEXIS 535 (Miss. Court of Appeals, 2009), the court held that Mississippi Code Annotated § 73-59-9(3) of the Mississippi Residential Builders and Remodelers Act barred an unlicensed roofer from obtaining a judgment for breach of contract against a homeowner who had failed to pay the contract balance otherwise owing. The statute provides that a residential builder or remodeler who does not have a license issued by the State Board of Contractors “may not bring an action, either at law or in equity, to enforce any contract for residential building or remodeling or to enforce any sales contract.” The Court of Appeals reversed the judgment of the lower court in favor of the roofer on the grounds that the roofer was not licensed when he entered into the contract and performed the work.

3. In ***Lutz Homes, Inc. v. Weston***, 2009 Miss. LEXIS 390 (Miss., 2009), homeowners filed an action to declare void their contract with a residential builder which had been unlicensed when the contract was signed and the work performed, although the individual owning the company was licensed and had previously notified the Board of Contractors that he was doing business in a corporate form. Mississippi Code Annotated § 73-59-9(3) of the Mississippi Residential Builders and Remodelers Act provides that a residential builder or remodeler who does not have a license issued by the State Board of Contractors “may not bring an action, either at law or in equity, to enforce any contract for residential building or remodeling or to enforce any sales contract.” The construction company obtained its contracting license after performing the work and before suit was filed. The trial court and court of appeals interpreted the statute to require that a residential contractor be licensed when the work was performed. The Mississippi Supreme Court reversed, holding that Mississippi Code Annotated § 73-59-9(3) requires only that a residential builder obtain a license prior to bringing an action.” (N.B. The decision in this case was handed down two days after the Court of Appeals handed down the Puckett decision, *supra*.)

4. In ***Transocean Enterprise, Inc. v. Ingalls Shipbuilding, Inc.***, 2009 Miss. LEXIS 448 (Miss., 2009), the indemnitee shipyard company sought to enforce the terms of an indemnity agreement with the indemnitor ship owner. The shipyard company had contracted to install a 20-story drill derrick on a ship which had been constructed in Spain and sailed to Mississippi to be outfitted. When an employee of a subcontractor sued the vessel owner and the shipyard company for injuries sustained while working on the vessel, the shipyard company claimed the benefit of the indemnity agreement. On appeal, the Mississippi Supreme Court held that Mississippi law applied to the indemnity agreement and that maritime law did not apply because the vessel was still under construction and therefore a “non-vessel” for purposes of maritime law. The court then held that Mississippi Code Annotated § 31-5-41, an anti-indemnity statute applicable to construction contracts in Mississippi, voided the indemnity provision in favor of the shipyard company to the extent that it provided for indemnification of the shipyard company for its own negligence.

5. In ***J. Criss Builder, Inc., v. White***, 2009 Miss. App. LEXIS 698 (Miss. Court of Appeals, 2009), the parties disputed the date on which the six-year statute of repose in *Mississippi Code Annotated § 15-1-4* began to run. The statute provides that “no action may be brought more than six (6) years after written acceptance or actual occupancy or use, whichever

occurs first, of such improvement by the owner thereof.” The statute also provides that “[t]his limitation shall not apply to any person... in actual possession and control as owner... of the improvement at the time the defective and unsafe condition of such improvement causes injury.” Criss, a licensed builder, owned JCB, Inc., a construction company which had never obtained its own separate license from the State Board of Contractors. JCB, with Criss as its president, built a house on a lot owned by JCB. Then Criss bought the house and lot, lived in the house for a year, and sold the property to the Whites. After purchasing the property, the Whites experienced foundation problems with the house. Within six years of purchasing the property from Criss but more than six years after Criss had purchased the property from JCB, the Whites filed suit against Criss, JCB, and the architect who had designed the house for damages for defective construction or design. Criss and JCB and the architect each interposed the statute of repose, contending that suit had been filed more than six years after Criss had bought the property from JCB. The trial court dismissed the architect from the suit but not Criss and JCB. On appeal, the Mississippi Court of Appeals sustained the judgment obtained by the purchasers against Criss and JCB, holding that where the builder and the owner are the same person, the statute of repose does not begin to run until the owner, i.e. Criss, was no longer in possession. According to the majority opinion, the jury reasonably found that Criss had acted in her individual capacity in building the house and not as an officer of JCB and that the trial court properly denied Criss’ motion to dismiss her individually from the case because JCB did not have a contracting license when the house was built and therefore could not have been the builder. Two judges dissented, noting that the case cited by the majority for its interpretation of the statute was easily distinguished and that the majority had created a situation where the statute of repose began to run on two different dates depending on whether the claim was against the builder-owner or the architect who had designed the house.

6. In ***United Plumbing & Heating Co. v. AmSouth Bank***, 2009 Miss. App. LEXIS 443 (Miss. Court of Appeals, 2009), the court held (a) that under Mississippi Code Annotated § 31-3-15, the contractor did not have the appropriate certificate (license) issued by the State Board of Contractors for the work which it contracted to perform, and, therefore, the contract between the contractor and daycare center owner was null and void; (b) that there was no privity of contract between the contractor and the bank which had financed the construction of the project and, therefore, the bank could not be liable to the contractor for breach of contract; (c) that the contractor’s negligence claim against the bank was invalid as a matter of law because the bank had no duty to protect the contractor from an unreasonable risk of damage by the owner-borrower failing to pay the contractor; and (d) that the duty of reasonable diligence applicable to a construction lender seeking to enforce the priority of its lien over the statutory lien of an unpaid contractor applies only to lien priority disputes and does not create a common law duty between banks and contractors.

7. In ***Mississippi Transportation Commission v. Engineering Associates***, 2009 Miss. App. LEXIS 254, (May 12, 2009, Decided); Rehearing, en banc, denied by Mississippi Transportation Commission v. Engineering Associates, 2009 Miss. App. LEXIS 689 (Miss. Court of Appeals, Oct. 13, 2009), the Mississippi Transportation Commission and the City entered into a Memorandum of Understanding regarding the construction of a highway interchange. Pursuant to the MOU, the City contracted with Engineering Associates to design the interchange. Unfortunately, MTC failed to file the necessary paperwork to obtain federal funding for the project. In 2005, MTC decided that the only way to get federal funding was to start over with a new engineering firm. MTC rescinded the MOU with the City and selected a different engineering firm. Engineering Associates filed a statutory appeal of that decision with the circuit court which voided the decision of MTC to rescind the MOU and reinstated the City’s agreement with the plaintiff engineering firm. On appeal by MTC from the adverse decision of the circuit court, the Mississippi Court of Appeals held (a) that the engineering firm properly employed the statutory appeal process to challenge MTC’s decision to rescind the MOU; (b) that MTC was not an inferior tribunal from whose decisions an aggrieved party is required to file a writ of certiorari

as opposed to a statutory appeal; (c) that the decision of MTC to terminate the MOU with the City was administrative in nature and not judicial or quasi-judicial; and, (d) that MTC's decision to rescind the MOU was arbitrary and capricious.

8. In ***Great American Insurance Company v. Lowery***, 576 F.3d 251; 2009 U.S. App. LEXIS 15862 (5th Cir. 2009), the insured had filed a claim under a builder's risk insurance policy for wind damage sustained in Hurricane Katrina by a condominium tower under construction on the Gulf Coast at the time of the storm. *Mississippi Code Annotated § 83-5-28(1)* requires that notice of a cancellation, reduction in coverage or nonrenewal of liability insurance coverage, fire insurance coverage or single premium multi peril insurance coverage is not effective unless notice is mailed or delivered to the insured at least thirty days prior to the effective date of such cancellation, reduction or nonrenewal. Although the original policy had not contained the exclusion for wind coverage, the renewal policy in effect at the time of the damage did exclude loss for damage caused by wind. The question was whether the notice of the change in coverage given by the insurer to the agent of the insured satisfied the statutory requirement of written notice to the insured. The district court held that the insurer had failed to comply with the provisions of the Mississippi notice statute and allowed the case to go to the jury. On appeal, the Fifth Circuit reversed the judgment against the insurer because, on the facts of the case, the insured had delegated complete authority over insurance matters to its agent and therefore written notice by the insurer to the agent of the reduced coverage in the renewal policy was notice to the insured.

9. In ***Corban v. United Services Automobile Association***, 2009 Miss. LEXIS 481 (Miss. 2009), the Mississippi Supreme Court agreed with earlier decisions of the federal courts applying Mississippi law in the interpretation of insurance policy language that the various exclusions in the policy for "water damage" such as "flood" or "wind driven water" or "tidal wave" encompassed "storm surge." However, the Mississippi Supreme Court declined to follow the lead of the Fifth Circuit Court of Appeals in the interpretation of the meaning of the anti-concurrent clause in the insurance policy. In Hurricane Katrina, many properties along the coast were damaged first by wind and then further damaged, if not completely obliterated down to the foundation, by a storm surge up to 28 feet high. The anti-concurrent clause in the policy provides that the policy does not insure for loss caused directly or indirectly by any of the excluded causes and that "[s]uch loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss." The Fifth Circuit had interpreted the anti-concurrent clause to exclude loss from a covered risk (wind) if there had also been loss from an excluded risk (storm surge), whether before, after, or at the same time as the covered risk. The Mississippi Supreme Court held that an insured was entitled to be reimbursed for loss caused by a covered risk (wind) even though shortly thereafter an excluded risk (storm surge) caused additional loss to the covered property. "Only if it can be proven that the perils (wind and flood) contemporaneously converged, operating in conjunction to cause loss, that the 'concurrent' provision will apply. In that circumstance the policy clearly excludes coverage." The decision also explains which party bears the burden of proof on which issues.

10. In ***Sawyers v. Herrin–Gear Chevrolet Co., Inc.***, 2010 Miss. LEXIS 16 (Miss. January 7, 2010), the plaintiff filed an interlocutory appeal of the decision of the trial court granting the defendants' motion to compel arbitration. On appeal, defendant Herrin–Gear argued, pursuant to the Federal Arbitration Act, that the court lacked jurisdiction to consider the merits of the appeal because the trial court's order granting arbitration was interlocutory in nature and not a final, appealable order. The Mississippi Supreme Court held that an order compelling arbitration which either disposes of all issues before the trial court or orders the entire controversy to be arbitrated is a final decision which can be immediately appealed.

11. In ***Architex Association, Inc. v. Scottsdale Insurance Company***, 2010 Miss. LEXIS 71 (Miss. February 11, 2010), the Mississippi Supreme Court held that faulty workmanship by a subcontractor may constitute an “occurrence” under a CGL policy depending on the facts of the case. “[T]he term “occurrence” cannot be construed in such a manner as to preclude coverage for unexpected or unintended ‘property damage’ resulting from negligent acts or conduct of a subcontractor, unless otherwise excluded or the insured breaches its duties after loss.”

Legislation

1. Miss. Code Ann. § 31-7-13, Bid requirements and exceptions; public auctions.

a. The statute provides differing procedures for purchases by public bodies depending on the amounts involved. Under the prior law, the bid procedure for purchases over \$5,000.00 but not over \$25,000.00 did not require posting or publishing an advertisement so long as two competitive written bids were obtained. The 2009 amendment increased to \$50,000.00 the top end of the range for public purchases without the requirement for posting or publishing an advertisement for two weeks. As amended, the statute requires that public purchases over \$50,000.00 be made only after advertisement for competitive bids has been made once a week for two weeks.

b. A subsection on insurability of bidders for public construction or other public contracts was added. Where the contract requires insurance of not less than one million dollars, bidders shall be permitted either to submit proof of current insurance in the specified amount or to demonstrate the ability to obtain the required coverage if awarded the contract.

2. Miss. Code Ann. § 31-11-35, Adoption of rules and regulations regarding energy performance of state-funded buildings; etc.

a. Department of Finance and Administration has responsibility for much of the construction undertaken by the State of Mississippi other than construction handled by the Mississippi Department of Transportation. In 2008, the Legislature tasked DFA with adopting rules and regulations regarding energy performance of state-funded buildings and authorized it to adopt national standards for “major facility projects.” The 2009 amendment added the provision that the term “major facility projects” includes projects funded by community development block grants.

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Missouri

Case Law

1. In ***Thomas v. A.G. Electrical, Inc.***, ___ S.W.3d ___, 2009 WL 4279374 (Mo. App. E.D. 2009), the Missouri Eastern District Court of Appeals held that workers on a public-works project could bring suit to recover their unpaid prevailing wages from the bonding company that issued two bonds on the project. Prior to the commencement of the project, the general contractor purchased two bonds, a performance bond and a payment bond, to insure its work on the project. The plaintiffs performed work and were paid, but did not receive the prevailing wage for their work on the project. The plaintiffs made alternative claims on the performance bond and the payment bond to recover the prevailing wages. The bonding company filed its motion to dismiss the workers’ claims, arguing that the performance bond did

not insure payment of the prevailing wage and that their claims against the payment bond were not made within the ninety-day notice requirement set forth in the bond. The trial court granted the bonding company's motion to dismiss, and the appeal followed.

On appeal, the Eastern District highlighted that the public policy of Missouri mandates that no less than the prevailing wage be paid to workers employed in any public-works project, as set forth in the Missouri Prevailing Wage Act. The court noted that the Act requires that all contractor's bonds guarantee payment of the prevailing wage. Moreover, workers on public-works construction projects have the right to sue on any bond that covers the project on which they worked. Consequently, as a surety, the bonding company's liability is coextensive with that of the general contractor.

With respect to the performance bond, the Court of Appeals determined that the plain language of the Missouri Prevailing Wage Act mandates that all contractors' bonds guarantee the payment of the prevailing wage. The court rejected the bonding company's argument that the payment bond was furnished to insure payment of the prevailing wage. The court concluded that "all bonds are all bonds," and the Act mandates that all contractors' bonds guarantee payment of the prevailing wage. Therefore, the trial court erred in dismissing the action against the performance bond.

Regarding the notice requirement on the payment bond, the Court of Appeals acknowledged that the workers' claim against the bond was untimely, but concluded that the trial court erred in dismissing their claim because the bonding company failed to show prejudice resulting from the workers' delayed notice. The court noted that absent a showing of prejudice by the bonding company, it cannot defeat liability under the bond. In a footnote, the Eastern District opined that "[a] surety may be hard-pressed to show prejudice in a prevailing-wage-act case because the nature of the wrong—an underpaid employee—does not become more difficult to investigate over time despite a lack of prompt notice."

2. In *Fire Sprinklers, Inc. v. Icon Contracting, Inc.*, 279 S.W.3d 230 (Mo. App. E.D. 2009), the Missouri Eastern District Court of Appeals addressed what damages a general contractor could recover from a subcontractor as a result of a breach of contract. In this matter, the trial court entered judgment in favor of defendant, the general contractor, for \$58,668 on its counterclaim. Defendant had entered into a subcontract agreement with plaintiff, pursuant to which plaintiff agreed to design and install a foam fire protection system. During the installation, it was discovered that plaintiff installed the wrong sized pump, which would affect the entirety of the system being installed. Defendant demanded that correct pump be installed, but plaintiff failed to correct the problem. Eventually, defendant terminated the agreement and hired another subcontractor to complete the installation.

Plaintiff filed a claim in quantum meruit against defendant, who in turn filed its counterclaim for breach of contract. The trial court determined that plaintiff was not entitled to recover its contract retainage of \$46,588. The court proceeded to award defendant damages for the costs it incurred in hiring another subcontractor, plus contract retainage. Plaintiff appealed, challenging the trial court's calculation of the damages. Plaintiff argued that the court erred in both discharging defendant's remaining payment obligations and in charging defendant's costs of completion.

The Court of Appeals affirmed the trial court's finding that defendant was relieved of its obligation to perform under the contract and had no obligation to pay the contract retainage. With respect to the counterclaim, the court noted that the proper standard for assessing damages is to take the amount of the loss suffered as a result of the breach, less the amount saved by not having to complete its performance under the contract (i.e. the contract retainage).

Thus, the court concluded that the trial court failed to deduct the amount saved by defendant, and therefore reduced its award to \$12,080.

3. In *Carver v. Pemiscot County Memorial Hospital*, ___ S.W.3d ___, 2009 WL 5126644 (Mo. App. S.D. 2009), the Missouri Southern District Court of Appeals examined whether workers were required to be paid in accordance with the Prevailing Wage Law when the work performed was properly classified as “maintenance work” and not as “construction work.”

Carver arises from the decision of the Pemiscot County Memorial Hospital to repair the interior of its nursing center to restore its dilapidated condition and to make it attractive to prospective residents. The work to be performed consisted of replacing various fixtures, including walls, sinks, and toilets, replacing damaged ceiling and floor tiles, and repainting. After the work on the nursing center was completed, the Missouri Department of Labor and Industrial Relations, Division of Labor Standards conducted an investigation into whether the workers should have been paid at the prevailing wage rate. The Division determined that the work done on the nursing center was “construction work”, and that the workers should have been paid prevailing wages. The workers sued the hospital to recover the unpaid wages, and summary judgment was granted in favor of the hospital because the work performed constituted “maintenance work.”

In affirming the trial court’s decision, the Court of Appeals noted that the key issue is whether the work performed for the hospital was considered “maintenance work”, as that type of work is expressly excluded from that required to be paid at the prevailing wage. The court noted that “maintenance work” consists of: (1) work that is repair, not replacement; (2) in an existing facility; and (3) there is no change or increase in the size, type, or extent of the existing facility. In ruling that the prevailing wage act did not apply, the court emphasized that the work did not change or increase the size, type or extent of the nursing center. Furthermore, the court rejected the workers’ argument that every wall, door, sink or toilet constitutes a “facility” concluding that such an interpretation is unreasonable.

Legislation

1. **H.B. 390** was passed and repealed and replaced R.S.Mo. 292.675. That section now requires contractors on public works projects, and any subcontractor, to such contractor to provide a ten-hour OSHA safety program for their on-site employees, unless such employees have previously completed the required program. All employees who have not completed the program are required to complete it with sixty days of beginning work on such construction project. All on-site employees must complete the ten-hour training program or they must hold documentation of prior completion of the program. The statute assesses a \$2,500 penalty for the failure to comply with this requirement, plus an additional \$100 a penalty for each calendar day such employee is employed without the required training.

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Montana

Case law

1. In *Rohrer v. Knudson*, 2009 MT 35, 349 Mont. 197, 203 P.3d 759 (2009), on an issue of first impression, the Montana Supreme Court defined the term “unfair act or practice” as the term is used in the Montana Consumer Protection Act (“MCPA”). The plaintiff homeowners

filed suit against a developer for negligence, negligent misrepresentation, and violations of the MCPA for alleged misrepresentations regarding the subsurface conditions of their residential real estate lot. They claimed that the developer had misrepresented to them that the lot contained suitable soils on which to build their home. After construction, plaintiffs began to notice structural cracking and other damages associated with differential settlement in the home.

At trial, the parties could not agree on the definition of “unfair act or practice” under the MCPA, however the trial court combined the parties’ proposed definitions to develop a jury instruction. At the conclusion of the trial, the jury found no violation of the MCPA. On appeal, the plaintiffs requested that the Montana Supreme Court provide a definition of the term “unfair act or practice.” In an issue of first impression, the Court surveyed several other jurisdictions and came to the conclusion that an “unfair act or practice” as the term is used in the MCPA means, “one which offends established public policy and which is either immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.” The Court then reversed the jury verdict and remanded the case for a new trial.

2. In ***Sudan Drilling v. Anacker***, 2009 MT 14, 349 Mont. 42, 202 P.3d 778 (2009), the Montana Supreme Court reversed an entry of summary judgment in favor of a lien foreclosure defendant on the grounds that there were still genuine issues of material fact which needed to be determined. Sudan Drilling filed a construction lien against the Anacker’s residence for amounts attributable to a water well which had been dug in the wrong location. There was no dispute that the well was drilled in the wrong location, however there was an issue as to whether the Anackers’ agent instructed Sudan to drill it in the wrong location or if Sudan’s operator drilled it on his own. It was further undisputed that Sudan later drilled a new well in the correct location for which the Anackers paid Sudan. The case arose out of a dispute over payment for the drilling services related to the first well. Although the district court granted summary judgment in favor of the Anackers, the Montana Supreme Court reversed, noting that there were still issues of fact as to why Sudan drilled the first well in the wrong place.

Of importance in this case is the concurrence written by Justice Cotter and joined by Justice Nelson where both justices questioned why the case was being brought under the construction lien statutes. As Justice Cotter stated, “The [construction lien] statutory scheme was not intended, it seems to me, to provide a forum for litigating factual disputes over who must pay for work that was clearly **not** satisfactorily completed in the first instance.” She later stated, “Unfortunately, over the years, courts have implicitly condoned the utilization of the construction lien statutory scheme as a tool to resolve not only disputes over payment for satisfactory and complete work, but also as a mechanism to litigate disagreements over unsatisfactory work . . .” It will be interesting to follow the Court’s construction lien jurisprudence in the coming years to see if the Court limits the use of the construction lien statutes to cases involving issues over payment for work satisfactorily performed.

Legislation

1. **Mont. Code Ann. §§ 28-2-2201, -2202, Residential Construction – Disclosure and Warranty Requirements.** The Montana Legislature recently passed a bill requiring that all contracts between a general contractor and owner for the construction of a new residence be in writing and contain the following provisions:

A disclosure that the general contractor has a current general liability policy;

A disclosure that the general contractor has a workers’ compensation policy or is an independent contractor without employees;

A provision setting out the billing cycle establishing the payment schedule to be followed by the owner;

A provision establishing procedures for handling change orders by the owner;

A statement setting forth all inspections or tests the general contractor will perform and that the owner is entitled to receive the results of any such tests or inspections;

A statement that the owner is entitled to have any inspections or tests conducted at the residence, at the owner's expense; and

A statement that the general contractor provides an express warranty of at least one year from completion of the construction project. The statement must provide detailed descriptions of what is and is not included in the warranty, the length of the warranty, and the process for making warranty claims.

It is interesting to note that the statute does not provide for an express penalty for a general contractor's failure to abide by the terms of the statute.

2. **Mont. Code Ann. § 27-5-116, et. seq., Fairness in Arbitration Act.** Under the "Fairness in Arbitration Act," arbitrators are now required to disclose information concerning their involvement with their past arbitration decisions and to disclose any potential conflicts of interest with any of the parties involved in the proposed arbitration. Arbitrators are now required to disclose the following information concerning any arbitrations they have conducted within the five years prior to the scheduled arbitration: 1) date of the arbitration award; 2) identification of the prevailing party; 3) names of the parties' attorneys; and 4) amount of monetary damages awarded, if any.

3. **Mont. Code Ann. § 25-10-304, Paralegal Fees as Component of Attorneys Fees.** Based on this statute, a court is now given discretion to award paralegal fees as a component of any attorney fee award.

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Nebraska

Case Law

1. In ***State ex rel. Wagner v. Gilbane Bldg. Co.***, 276 Neb. 686, 757 N.W.2d 194 (2008), the Nebraska Supreme Court held that payments by an insolvent surety to a contractor, the obligee under a performance bond, were made in satisfaction of an antecedent debt and thus were voidable transfers under the Nebraska Insurers Supervision, Rehabilitation and Liquidation Act ("NISRLA"). In so holding the Court rejected the contractor's arguments that (1) it was just a conduit for payment and thus not a creditor and (2) the payments were made for a current expense in the ordinary course of business. In light of the fact that the contractor was the sole obligee named in the performance bond and the contractor used the funds it received from the surety to pay a replacement subcontractor, the Court concluded that the "transfers were both to and for the benefit of [contractor]." The Court further declined to read into NISRLA an exception for payments made in the ordinary course of business.

2. In ***Pavers, Inc. v. Board of Regents***, 276 Neb. 559, 755 N.W.2d 400 (2008), the Nebraska Supreme Court held that where actual quantities were increased substantially from the quantities estimated in the owner's bid proposal and rather than filing a change order or construction change directive an owner directs the work to continue, the owner is not entitled to an equitable adjustment of the agreed unit price after work is complete. Absent the owner's

proof of entitlement to an equitable adjustment the contractor was entitled to recover the full amount of the contract according to the agreed unit prices.

3. In **Lexington Ins. Co. v. Entrex Communications Services, Inc.**, 275 Neb. 702, 749 N.W.2d 124 (2008), the Nebraska Supreme Court held that a waiver of subrogation provision is effective to bar gross negligence claims and is not a violation of public policy. In Lexington, an owner hired a contractor to improve one of its antennas on a tower. Five months later, the tower collapsed, damaging the antenna, the tower, the transmission building on which the tower was located, and personal property within the building. In all, approximately \$6.2 million in damages resulted. The damage caused to the “work” (*i.e.*, the antenna) was approximately \$470,000, while the remaining \$5,730,000 was caused to the “non-work” (*i.e.*, everything else). The owner’s insurer paid the owner for all of the damages less the owner’s deductible. The insurer wanted to recoup its payments under the policy from the contractor, alleging that the contractor was grossly negligent. However, the contractor argued that the waiver of subrogation provision within the parties’ agreement barred any claim against it that was covered by the owner’s insurance. The parties’ contract was based on the AIA standard form agreement A101-1997 and incorporated the general conditions within the AIA’s A201-1997. Under this agreement, the contractor was required to maintain liability insurance for damage caused to “non-work” property, and the owner was required to maintain liability insurance at least equal to the value of the work being completed. To meet the insurance requirements, the owner relied upon an existing “all risk” policy that applied to both “work” and “non-work.” Additionally, both the owner and the contractor waived all rights for damages against each other, and each other’s subcontractors, to the extent that the other’s property insurance covered a claim.

4. In **9th Street Apt. L.L.C. v. DRA Anderson Constructors Co.**, 2009 WL 3260661, No A-08-1276 (Neb. App. Oct. 6, 2009) (unpublished opinion), the Nebraska Court of Appeals held that a mutual waiver of consequential damages is effective to bar claims for damages caused by gross negligence. The Court reasoned that while a waiver of consequential damages “is neither a true exculpatory clause nor a traditional waiver of subrogation” it is more similar to a waiver of subrogation specifically given the fact that the waiver at issue was mutual.

5. In **State ex rel. Wagner v. Gilbane Bldg. Co.**, 276 Neb. 686, 757 N.W.2d 194 (2008), the Nebraska Supreme Court held that payments by an insolvent surety to a contractor, the obligee under a performance bond, were made in satisfaction of an antecedent debt and thus were voidable transfers under the Nebraska Insurers Supervision, Rehabilitation and Liquidation Act (“NISRLA”). In so holding the Court rejected the contractor’s arguments that (1) it was just a conduit for payment and thus not a creditor and (2) the payments were made for a current expense in the ordinary course of business. In light of the fact that the contractor was the sole obligee named in the performance bond and the contractor used the funds it received from the surety to pay a replacement subcontractor, the Court concluded that the “transfers were both to and for the benefit of [contractor].” The Court further declined to read into NISRLA an exception for payments made in the ordinary course of business.

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7. In *Lexington Ins. Co. v. Entrex Communications Services, Inc.*, 275 Neb. 702, 749 N.W.2d 124 (2008), the Nebraska Supreme Court held that a waiver of subrogation provision is effective to bar gross negligence claims and is not a violation of public policy. In Lexington, an owner hired a contractor to improve one of its antennas on a tower. Five months later, the tower collapsed, damaging the antenna, the tower, the transmission building on which the tower was located, and personal property within the building. In all, approximately \$6.2 million in damages resulted. The damage caused to the “work” (*i.e.*, the antenna) was approximately \$470,000, while the remaining \$5,730,000 was caused to the “non-work” (*i.e.*, everything else). The owner’s insurer paid the owner for all of the damages less the owner’s deductible. The insurer wanted to recoup its payments under the policy from the contractor, alleging that the contractor was grossly negligent. However, the contractor argued that the waiver of subrogation provision within the parties’ agreement barred any claim against it that was covered by the owner’s insurance. The parties’ contract was based on the AIA standard form agreement A101-1997 and incorporated the general conditions within the AIA’s A201-1997. Under this agreement, the contractor was required to maintain liability insurance for damage caused to “non-work” property, and the owner was required to maintain liability insurance at least equal to the value of the work being completed. To meet the insurance requirements, the owner relied upon an existing “all risk” policy that applied to both “work” and “non-work.” Additionally, both the owner and the contractor waived all rights for damages against each other, and each other’s subcontractors, to the extent that the other’s property insurance covered a claim.

8. In *9th Street Apt. L.L.C. v. DRA Anderson Constructors Co.*, 2009 WL 3260661, No A-08-1276 (Neb. App. Oct. 6, 2009) (unpublished opinion), the Nebraska Court of Appeals held that a mutual waiver of consequential damages is effective to bar claims for damages caused by gross negligence. The Court reasoned that while a waiver of consequential damages “is neither a true exculpatory clause nor a traditional waiver of subrogation” it is more similar to a waiver of subrogation specifically given the fact that the waiver at issue was mutual.

9. In *Copple Construction, L.L.C. v. Columbia Nat’l Ins. Co.*, 279 Neb. 60, 776 N.W.2d 503 (2009), the Nebraska Supreme Court reversed the district court and found that the business risk exclusion applied to exclude a contractor’s claim for coverage under a general liability policy. The contractor had been hired to patch holes in a large polyethylene tarp covering a lagoon at a wastewater treatment plant. In the process of heating a hot-air blower to fuse the patch the contractor sparked a fire that destroyed one-third of the tarp. The contractor sought coverage for the cost of replacing the tarp. The insurer relied on the business risk exclusion which provided that “[t]his insurance does not apply to . . . [t]hat particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the ‘property damage’ arises out of those operations.” The Court found that because the tarp was very large and essentially immovable it was a fixture and thus, real property. The contractor argued that its operations were only directed at a small, four feet by four feet area of the tarp which it believed should be “[t]hat particular part”. The Court disagreed and found that it was not possible to segregate the tarp into smaller sections and “[t]hat particular part” meant the entire tarp upon which operations were being conducted.

Legislation

1. **LB403, Require verification of lawful presence in the United States for certain public benefits, public employment, contracting with public bodies, and tax incentive programs.** The Nebraska Legislature enacted broad legislation requiring state agencies and political subdivisions in the State of Nebraska to verify the lawful presence of persons in the United States prior to providing public benefits. Of particular note, codified at Neb. Rev. Stat. § 4-114, are additional requirements that all public employers and public

contractors register with the federal immigration verification system (i.e. E-verify) to determine work eligibility status of new employees performing services within the state of Nebraska. Contracts between public employers and public contractors are also required to contain a provision requiring the public contractor to use E-Verify to verify work eligibility. The bill was approved by the governor on April 9, 2009 and was operative as of October 1, 2009.

2. **LB204, Revisions to the Contractor Registration Act (Neb. Rev. Stat. § 48-102 et seq.).** The primary aim of LB204 was to extend the requirement of registration with the Department of Labor to all contractors doing **business** in Nebraska. Prior the revisions the registration requirements applied only to contractors doing business in counties with populations of over one hundred thousand. LB204 also increased the earnings necessary to be subject to registration from \$1,000 annually to \$5,000 annually. The bill was approved by the governor on February 7, 2008

3. **LB552, Adopt the Nebraska Construction Prompt Pay Act.** LB552 addresses three facets of construction law in Nebraska: (1) prompt pay; (2) presentation of claims to political subdivisions; and (3) voids certain contract provisions.

Prompt Pay. Under the Nebraska Construction Prompt Pay Act, virtually all commercial construction contracts, public and private, are now subject to prompt pay requirements. The Act only applies to residential construction when residence consists of five or more residential units. The Act does not apply to the State of Nebraska, which is already subject to separate prompt pay requirements. Owners are required to pay contractors within thirty days after receipt of payment request. The Act includes a provision which provides that subject to performance of work according to specifications and all conditions precedent to payment, contractors and subcontractors must pay subcontractors and sub-subcontractors within 10 days after it receives payment from upstream owner or contractor.

Payment can only be withheld: (1) For retainage; (2) If allowed in the contract when (a) reasonable evidence shows that the contractual completion date will not be met due to unsatisfactory job progress; (b) third party claims are filed or there is reasonable evidence that such a claim will be filed; or (c) contractor fails to make timely payments; or (3) after substantial completion in amount not to exceed 125% of estimated cost to complete remaining work.

The failure to comply results in accrual of interest on the unpaid balance beginning on the day following the payment due date at 1% per month. Interest is due only after (sub)contractor first notifies the person to be charged of the prompt pay provisions.

The Act applies to contracts and subcontracts entered into on or after October 1, 2010.

Claims Against Political Subdivisions. LB552 standardizes the previously varied claims process for claims against political subdivisions under construction contracts. Claims must be made 180 days after substantial completion and must be filed with the appropriate clerk, or other office designated by the political subdivision in the contract. The political subdivision must make its decision within 90 days or the claim is deemed denied. A claim that is denied in whole or in part can be raised in an original civil action in district court within two years after denial. Either party may appeal the district court's decision.

Void Contract Provisions. LB552 provides that certain contract provisions in contracts for construction work performed within Nebraska against public policy, void and unenforceable, including: (1) provisions that waive, release or extinguish rights to file claims against payment or performance bond, except that waivers or releases for payment received are allowed; (2) provisions making the law of another state applicable to or governing the contract; and (3)

provisions purporting to require that venue for court or arbitration hearing be held outside of Nebraska. LB552 was approved by the Governor on February 11, 2010.

4. **LB563, Contractor Employee Classification Act.** Presently before the Unicameral, the Contractor Employee Classification Act (the “Act”) also would increase enforcement against employers that misclassify employees as independent contractors. If an employer misclassifies an employee, that employer would be liable to the misclassified employee not only for the taxes that would have been paid if the employee had been properly classified, but also for the **difference** in the amount actually paid to the employee as compared to the “average prevailing rate of compensation for like work, as determined by the Department of Labor,” attorney fees and costs, and all legal and equitable relief appropriate in the case of unlawful retaliation. Under the Act, it would be unlawful to retaliate “through discharge or in any other manner” against any individual who makes a complaint to the employer or a governmental agency, who brings an action under the Act, or who participates in an investigation of an alleged violation of the Act.

In determining whether misclassification has occurred, LB 563 establishes two key presumptions. The first presumption is that an individual is presumed to be an employee unless the individual:

- (1) is free from control or direction in how the service is performed;
- (2) is engaged in an independently established business;
- (3) makes his or her services available to the general public;
- (4) furnishes his or her own tools and equipment needed to perform tasks; and
- (5) is not represented by the employer as an employee to customers.

In contrast, there are situations where an individual will be presumed to be an independent contractor, including where the individual registered under Nebraska’s Contractor Registration Act at least six months prior to commencing construction work for a contractor. The presumption will also apply if the individual has been assigned a combined tax rate or is listed on the Nebraska Department of Revenue’s (“DOR”) Revenue Contractor Database under *Neb. Rev. Stat. § 77-2753(3)*. The Revenue Contractor Database applies only in situations involving a construction contractor or subcontractor.

The Act requires that the employer (termed a “contractor” under the Act) post the following notice in both Spanish and English in a conspicuous location at the job site:

- (1) Every individual working for a contractor has the right to be properly classified by the contractor as an employee rather than an independent contractor if the individual does not meet the requirements of an independent contractor under the state law known as the Contractor Employee Classification Act;
- (2) If you as an individual working for a contractor have been improperly classified, you may bring a lawsuit against the contractor under the state law known as the Contractor Employee Classification Act. Your lawsuit may include claims for:
 - a. The amount of combined tax, with interest, that should have been paid by the contractor under the Employment Security Law as provided in such state law;
 - b. The amount of state income tax that should have been withheld by the contractor as provided in such state law;
 - c. The difference in the compensation paid to you as compared to the average prevailing rate of compensation for like work;

- d. In the case of unlawful retaliation by the contractor against you, all legal and equitable relief as may be appropriate; and
 - e. Your expenses for attorney's fees and court and other costs relating to the lawsuit.
- (3) It is a violation of the state law known as the Contractor Employee Classification Act for a contractor, or an agent of the contractor, to retaliate through discharge or in any other manner against you for exercising any right granted under the act. Rights granted under such state law include making a complaint to the contractor or a governmental agency, bringing an action under the act, or participating in an investigation of an alleged violation of such state law; and
- (4) If you believe you have not been properly classified as an employee by the contractor you work for, contact an attorney, the Department of Labor, or the Department of Revenue.

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Nevada

Case Law

1. ***WMCV Phase 2, LLC v. Hamilton & Spill, Ltd.***, No. 2:2009cv00882 (D. Nev. 2009). The Court determined that an intentional misrepresentation claim premised on the theory that a party intentionally misrepresented its agreement to perform the contract is barred by the economic loss rule. Because the misrepresentation is not a duty under law that is extraneous to the agreement, the economic loss rule barred the tort claim.

2. In ***Terracon Consultants Western, Inc. v. Mandalay Resort Group***, 206 P.3d 81 (Nev. 2009), the Nevada Supreme Court held that “in a commercial property construction defect action in which the plaintiffs seek to recover purely economic losses through negligence-based claims, the economic loss doctrine applies to bar such claims against design professionals who have provided professional services in the commercial property development or improvement process.” This holding arises out of a question certified under NRAP 5 from the United States District Court for the District of Nevada.

The underlying case pending in Federal District Court

To complete the Mandalay Resort and Casino, Mandalay hired Terracon Consultants Western, Inc. and a related entity to provide geotechnical engineering advice about subsurface soil conditions and to recommend a foundation design. It also hired Lochsa, LLC and Klai-Juba Architects, Ltd. to provide engineering and architectural services to design the resort's structure. Mandalay had a written contract with Terracon and oral agreements with Lochsa and Klai-Juba. None of these design professional played a role in the resort's physical construction.

Mandalay alleged that Terracon's soil settling analysis was wrong and that the amount of settling which actually occurred exceeded Terracon's projections. Clark County required Mandalay to repair and reinforce the foundation before it could complete construction. Mandalay sued Terracon for damages, alleging that the deficient engineering advice cause the

foundation problems and that Terracon was liable for breach of contract, breach of the covenant of good faith and fair dealing, and professional negligence. Terracon filed a third-party complaint against Lochsa and Klai-Juba for negligence, contribution, and equitable indemnity.

Terracon moved for partial summary judgment arguing that the economic loss doctrine barred Mandalay's professional negligence claim. Lochsa and Klai-Juba also moved to dismiss Terracon's negligence claims against them on the same basis. The U.S. district court denied the motions without prejudice and certified the economic loss question to the Nevada Supreme Court.

The question addressed by the Nevada Supreme Court

The Nevada Supreme Court answered the following question: "Does the economic loss doctrine apply to preclude negligence-based claims against design professionals, such as engineers and architects, who provide services in the commercial property development or improvement process, when the plaintiffs seek to recover purely economic losses?" The Court answered, "Yes."

Generally, a plaintiff may not recover on a negligence claim for "purely economic losses"

The Court delved into the history of the economic loss doctrine. In short, the doctrine marks the boundary between contract law and tort law, and it ultimately "bars unintentional tort actions when the plaintiff seeks to recover 'purely economic losses.'" See *Calloway v. City of Reno*, 116 Nev. 250, 256, 993 P.2d 1259, 1263 (2000), *overruled on other grounds by Olson v. Richard*, 120 Nev. 240, 241-44, 89 P.3d 31, 31-33 (2004); *Local Joint Exec. Bd. v. Stern*, 98 Nev. 409, 411, 651 P.2d 637, 638 (1982).

The Court reiterated that "unless there is personal injury or property damage, a plaintiff may not recover in negligence for economic losses." In general, purely economic losses are those that result from losses related to the parties' agreement and not from personal injury or property damage.

The policies behind application of the economic loss doctrine are to ensure that useful economic activity is not deterred by fear of unlimited liability beyond contract-based recovery. It also reduces the cost of tort actions by providing potential tort victims with a less-expensive alternative such as insurance.

Some exceptions

The Court noted that countervailing policy considerations have led to exceptions to the bar created by the economic loss doctrine. For example, negligent misrepresentation and professional negligence actions against attorneys, accountants, real estate professionals, and insurance brokers still are viable claims.

For negligent misrepresentation claims, it is necessary to create sufficient financial pressure to avoid such negligence, which isn't created by simply allowing a breach of contract claim. Additionally, for claims against attorneys, accountants, etc., those professionals tend to owe duties, such as fiduciary duties, whether statutory based or common-law based, that extend beyond their contracts with their principals. Accordingly, there is an incentive to impose on those professionals additional liability beyond contract claims when they breach their professional obligations.

Additionally, the Court was careful to acknowledge the continued rule from *Olson* that allows residential property owners to assert negligence claims in construction defect actions brought under NRS Chapter 40, even when purely economic losses are at stake.

The economic loss doctrine bars Mandalay's negligence claim against Terracon

None of the exceptions applied to Terracon, Lochsa, or Klai-Juba. The Court concluded that the duties of such design professionals are governed by their contracts and any breach of duty results in only a breach of the contract. If Mandalay's allegations are true, it suffered purely economic loss as a result of Terracon's breach of its duties arising under the contract between it and Mandalay. Therefore, the Court concluded that the economic loss doctrine bars Mandalay's negligence-based claims against Terracon.

It is also important to note that the economic loss doctrine also continues to bar recovery on negligence claims for purely economic losses against contractors and subcontractors in non-Chapter 40 cases.

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New Hampshire

Case Law

1. In ***General Insulation Company v. Eckman Construction***, __ N.H. __, __ A.2d __, 2010 WL 308748 (2010), the New Hampshire Supreme Court held that under NH RSA 447:18, a claimant on a bond for a public works project must send a copy of the petition to enforce the claim to the principal and surety on the project, in addition to whatever notice is ordered by the Court. A claimant must issue the required notice even if it means that two sets of the identical notice are served on the principal and surety; the petition will be dismissed if the claimant does not comply. The Court further held that claims arising out of this construction context alleging unjust enrichment and *quantum meruit* must be pled with sufficient predicate facts to avoid dismissal.

2. In ***Bedard v. Town of Alexandria***, __ N.H. __, __ A.2d __, 2010 WL 455277 (2010), the New Hampshire Supreme Court held that commercial excavation activities regulated by NH RSA 155-E:1, II, encompassed slopes created for any purpose, and did not include an exception for slopes created for reclamation purposes.

3. In ***Ferson-Lake, LLC v. City of Nashua***, 986 A.2d 476 (N.H. 2009), the New Hampshire Supreme Court held that local planning boards may inquire into a builder's site plans to determine whether they are capable of compliance with applicable New Hampshire human rights commission regulations, and deny approval based upon a negative determination.

4. In ***New Hampshire v. Lake Winnepesaukee Resort, LLC***, 159 N.H. 42, 977 A.2d 472 (2009), the New Hampshire Supreme Court held that the doctrine of *nullum tempus occurrit regi* ("no time runs against the king") permitted the state of New Hampshire to bring suit for monetary penalties arising out of environmental violations incurred during the construction of a golf course, rendering the statute of limitations defense unavailable as against the sovereign.

Legislation

N.H. Rev. Stat. Ann. § 21-I:81-a, b (2009 SB 78)

In July of 2009, legislation was passed which increased contractor accountability and disclosure in competitively bid public works projects in New Hampshire.

Taking effect on September 14, 2009, N.H. Rev. Stat. Ann. § 21-I:81-a, I, requires that the general contractor or construction manager awarded a contract for the construction, maintenance, renovation or repair of any building by a state agency, the community college system or the university system performed through the competitive bidding process, disclose the names and addresses of its CEO, CFO, or other principals and those of “each subcontractor to be used in the performance of the contract as soon as is practicable” after the award of the contract to the awarding agency, and prior to “the date on which the subcontractor begins work on the project”.

Subsection II of this provision dictates that the disclosure standards mandated by N.H. Rev. Stat. Ann. § 21-I:81-a, will operate as a minimum disclosure standard, but permits the agencies, community college system or the university system to enact more rigorous standards for disclosure.

At the commencement of work on any such project, N.H. Rev. Stat. Ann. § 21-I:81-b requires the general contractor or construction manager to provide the awarding agency with a list of all subcontractors and independent contractors the general contractor or construction manager has “agreed to use on the job site,” along with a record showing the entity with whom each subcontractor or independent contractor directly contracted. Additionally, this provision requires that the general contractor or construction manager provide the awarding agency with name of the worker’s compensation insurance carrier for each such subcontractor or independent contractor. To the extent that it is determined that any subcontractor or independent contractor is present on the job site without having provided the required information, the general contractor or construction manager must require the relevant subcontractor to provide the necessary information within 36 hours or suspend that party until the required information is provided. The general contractor or construction manager must post the list containing this information on the job site and update the list as necessary.

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New Jersey

Case Law

1. In ***Fixture Specialists, Inc. v. Global Construction, LLC***, 2009 WL 904031 (D.N.J. 2009), the United States District Court for the District of New Jersey held that a pay if paid provision is valid and enforceable under New Jersey. The Court found that the unambiguous language of the sub-contract established that the payment from the owner to the general contractor was a condition precedent to the subcontractor’s right to payment. The Court further found that the general contractor’s payment bond surety was also entitled to assert the pay if paid defense. The Court reasoned that under New Jersey law a surety’s liability is only triggered if its principal is liable. Thus, since the contractor was not yet paid, it was not obligated to pay the subcontractor, and therefore the surety was not required to pay on the payment bond claim.

2. In an unpublished bench memorandum issued in the matter of ***Brolley Electrical Inc., v. Ernest Bock and Sons, Inc.***, GLO-L-1097-04, the Superior Court of New Jersey, Law Division, granted summary judgment in favor of the general contractor on the limited issue of the pay if paid provisions between the general contractor and a subcontractor. The Court enforced the pay if paid clause and held that a general contractor is not obligated to pay a subcontractor until payment is made by the owner to the general contractor. The Court found that the subcontract contained unambiguous “pay when paid” and “condition precedent” provisions. The *Brolley* Court distinguished prior interpretations of “pay when paid” because the subcontract stated that payment by the owner to the general contractor was as a “condition precedent” to the subcontractor’s right to payment.

3. In ***D.R. Horton, Inc., v. J.J. DeLuca Company, Inc.***, 2009 WL 3644290 (Ch. Div. 2008) affirmed 2009 WL 3364623 (App. Div. 2009), the Superior Court of New Jersey, Appellate Division, upheld a Chancery Division finding that the *New Jersey Arbitration Act* does not confer the court with exclusive jurisdiction to decide whether arbitrations should be consolidated. Rather, the Court concluded that the *Act* vests the court with the authority to decide consolidation issues where there is no procedure under the parties’ arbitration agreement. In this matter, the Court found that the AAA Construction Industry Arbitration Rules expressly provide a mechanism, consistent with fundamental fairness for resolving the issue of whether two or more pending arbitration proceedings should be consolidated. Thus, under the AAA Rules, an arbitrator is vested with the authority to determine whether arbitration proceedings should be consolidated.

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New Mexico

Case Law

1. In ***City of Albuquerque v. BPLW Architects & Engineers, Inc.***, NM Court of Appeals Docket No. 27,837, this case involved an indemnification claim by the City of Albuquerque against their engineers in a lawsuit arising from injuries sustained by a pedestrian tripping over a curb. BPLW had been the engineers on an improvement at the Albuquerque International Airport and had designed and constructed the curbs in accordance with standard design specifications issued by the City. When the pedestrian sued the City, the City filed a cross-claim against BPLW for defense and indemnification. On appeal, the parties challenged whether BPLW had a duty to defend the City from the claims asserted against the City. BPLW contended that since the complaint alleged direct negligence by the City, and there were no allegations that the City was vicariously liable for the negligence of BPLW, no defense was required. The Court ruled that BPLW had a contractual duty to defend the City, even for the City’s own negligence, as long as the City’s negligence arose from BPLW’s design or construction of the facility.

2. In ***Tafoya v. Rael***, 2008-NMSC-57, 193 P.3d 551 (2008), this case involved a wrongful death lawsuit by the widow of a subcontractor against the general contractor. The general contractor was hired to renovate a garage. During the course of the project, the local government required that project connect directly to the city’s sewer main adjacent to the highway. The general contractor hired Phillip Tafoya, decedent, to perform the utility excavation. Decedent was self-employed and conducted business as Phillip R. Tafoya Bobcat and Dump Truck Service. During the course of the utility excavation, decedent failed to dig the

trench in accordance with OSHA regulations, or otherwise perform his work in accordance with code, with the result being that the utility trench collapsed burying decedent. Decedent's wife, as personal representative of the estate, brought suit against the general contractor for the wrongful death of decedent as the general contractor was aware that decedent was not properly licensed. The Supreme Court held that since a general contractor could be held liable to third parties for negligently hiring an unqualified subcontractor, there was no reason that the general contractor could not similarly be held liable to the subcontractor himself if he should suffer personal injury or property damage as a result of the work performed on behalf of the general contractor.

3. In **Romero v. Parker**, 2009-NMCA-47, 207 P.3d 350 (Ct. App. 2009), this case involved a claim for compensation for work performed by an unlicensed contractor. Romero was an unlicensed subcontractor performing work for Parker, for which Romero was only paid for a portion of the work performed. Romero brought suit against Parker for breach of contract in failing to pay the remainder of the contract, and Parker counterclaimed for disgorgement of the funds paid to Romero as an unlicensed contractor. The Court held that, as an unlicensed contractor, Romero could not bring a suit for compensation. The Court, however, held that, unlike the situation where an owner hires an unlicensed contractor, a contractor may not obtain disgorgement of funds paid to an unlicensed contractor as the contractor is under a duty to perform reasonable investigation before hiring the subcontractor to determine that they are properly licensed.

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New York

1. In **Huen New York, Inc. v. Board of Educ. Clinton Central School Dist.**, 67 A.D.3d 1337, N.Y.S.2d 748 (4th Dep't 2009), a contractor was able to pursue a claim against an owner despite the fact that it seemingly did not comply with the notice provisions of the contracts. Even though the project was months behind schedule, the contractor did not submit its first delay claim until after it achieved completion. It then filed its complaint for breach of contract against the owner. The trial court granted the owner's motion for summary judgment on the grounds that the contractor did not comply with the notice provisions of the contracts. The notice provisions that the owner relied on provided that "[c]laims by either party must be initiated within 21 days after the occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later." The section in question further provided that "[c]laims must be initiated by written notice to the Architect and the other party" and that "[a]n initial decision by the Architect shall be required as a condition precedent to . . . litigation" of any claim.

The Appellate Division reversed and reinstated the complaint on the grounds that these notice provisions did not pertain to delay claims. The Court put a lot of emphasis on the fact that during the drafting phase the parties deleted a provision that specifically provided that time impact claims would be subject to the notice provision quoted above. The parties replaced this provision with one dealing with delays. The Court concluded that this demonstrated that the parties did not want delay claims subject to the notice provision. The Court also concluded that the claim for delay damages sought relief "wholly outside the scope of the contracts."

2. **Penava Mechanical Corp. v. Afgo Mechanical Services, Inc.**, 2010 NY Slip Op 1999, 2010 N.Y. App. Div. LEXIS 1973 (1st Dep't March 16, 2010) reaffirmed and applied the line of cases that has held that "[u]nder New York law, oral directions to perform extra work,

or the general course of conduct between the parties, may modify or eliminate contract provisions requiring written authorizations or notice of claims.” *Barsotti's, Inc. v Consolidated Edison Co. of N.Y.*, 254 AD2d 211, 680 N.Y.S.2d 88 (1998). In *Penava*, the Court held that the general contractor was liable for overtime payments to its subcontractor, despite the fact that the subcontractor did not submit written tickets or change orders and was required to do so under the contract. Specifically, there was a “no-oral modification” clause in the prime contract that the general contractor claimed was incorporated into the subcontract.

The Court held that even if this clause was incorporated into the subcontract, the general contractor could not rely on this provision due to oral statements made by its representatives to the subcontractor. Testimony from depositions revealed that representatives of the general contractor directed the subcontractor to work overtime and to not bother submitting written tickets for the time. Ultimately, the Court refused to grant summary judgment for either party because an issue of fact existed as to whether the actual overtime payments were made.

3. In *Schmidt & Schmidt, Inc. v. Town of Charlton*, 68 A.D.3d 1314, 890 N.Y.S.2d 693 (3d Dep’t 2009), the court held that a contractor was entitled to pursue a claim of tortious interference of a contract against the project engineer. This holding was consistent with the nationwide trend of courts allowing contractors to pursue actions directly against design professionals. The contractor was terminated by the owner before the completion of the project based upon the architect’s recommendation. The architect cited the contractor’s failure to perform its work and to supply enough properly skilled workers and materials. Along with its action against the owner and the owner’s representative, the contractor commenced an action against the architect for tortious interference with its contract with the owner.

The contractor alleged that the architect interfered with its contract “by making arbitrary and erroneous determinations with respect to the requirements of the contract and recommending the termination of the contract without just cause or reasonable grounds.” More specifically, the contractor alleged that the architect brought the project to a stop by failing to respond to submittals and requests for interpretation. The contractor also alleged that the architect was motivated by a desire to deflect attention away from its design errors and the prospect of selling its services to the surety after the contractor was terminated. The Court held that this amounted to a cognizable claim for tortious interference with a contract and reversed the trial court’s judgment that granted the architect’s motion to dismiss.

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North Carolina

Legislation

1. **House Bill 1135 (ratified as Session Law 2009-554; N.C.G.S. Chapter 1, Article 52)** An Act to Deter and Punish Persons Who Make False or Fraudulent Claims for Payment by the State and to Provide Remedies in the Form of Treble Damages and Civil Penalties When Money is Obtained From the State by Reason of Such Claims.

This 2009 legislation enacts the North Carolina False Claims Act, similar to the Federal False Claims Act. Highlights:

Becomes effective January 1, 2010, and applies to acts committed on or after that date

“Claims” are defined as any request or demand, whether under a contract or otherwise, for money or property and whether or not the State has title to the money or property that:

- o is presented to an officer, employee or agent of the State; or
- o is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the State’s behalf and if the State either

Provides or has provided any portion of the money or property that is requested or demanded; or

Will reimburse such contractor, grantee, or other recipient for any portion of the money or property that is requested or demanded

Acts constituting a false claim include:

- o Knowingly presenting or causing to be presented a false or fraudulent claim for payment or approval
- o Knowingly making or using a false record or statement material to a false or fraudulent claim
- o Having possession, custody or control of property or money used or to be used by the State and knowingly delivering or causing to be delivered less than all of the property or money
- o Making or delivering a document certifying receipt of property used or to be used by the State and, intending to defraud the State, making or delivering the receipt without completely knowing that the information on the receipt is true
- o Knowingly making or using a false record or statement material to an obligation to pay or transmit money or property to the State, or knowingly concealing or knowingly and improperly avoiding or decreasing an obligation to pay or transmit money or property to the State

Defines “knowing” or “knowingly” as including:

- o Having actual knowledge of the information
- o Acting in deliberate ignorance of the truth or falsity of the information
- o Acting in reckless disregard of the truth or falsity of the information

Proof of specific intent to defraud is not required

Enforcement of the Act may be by the Attorney General or by a private citizen through a *qui tam* action

Includes whistler blower protection for employees, agents and contractors

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North Dakota

Case Law

1. In *Hager v. City of Devils Lake*, 773 N.W.2d 420 (N.D. 2009), the North Dakota Supreme Court affirmed the dismissal, on statute of limitations grounds, of a negligent design and construction claim by the owners of a residential subdivision against a municipality. The owners of the subdivision claimed that the city had negligently designed and constructed a sewer system on the subdivision property and that the sewer system damaged the landowners by improperly diverting storm water onto their property. The supreme court ruled that the landowners' cause of action accrued when the first harm occurred. The court also ruled that when water is diverted onto real property by construction or operation of a permanent structure, there is only one cause of action and successive suits may not be maintained. Accordingly, the court affirmed dismissal of the landowners' claims based on the three-year statute of limitations for actions against a political subdivision.

Legislation

1. Senate Bill No. 2250 (ratified as Session Law 2009, Chapter 293, Section 5) AN ACT to create and enact a new section to chapter 35-27 of the North Dakota Century Code, relating to attorney's fees under construction liens; to amend and reenact sections 28-01-17, 28-05-09, 35-15-06, 35-21-01, 35-27-02, 35-27-04, 35-27-13, 35-27-14, 35-27-16, 35-27-18, 35-27-22, 35-27-24, 35-27-25, and 47-18-04 of the North Dakota Century Code, relating to mechanic's and construction liens; and to repeal sections 35-27-05, 35-27-11, 35-27-12, and 35-27-26 of the North Dakota Century Code, relating to outdated mechanic's lien provisions. This 2009 legislation amends the North Dakota mechanic's lien statute. Highlights:

Becomes effective August 1, 2009

Creates a new section regarding costs and attorney's fees under N.D.C.C. 35-27. The new section provides that an owner who successfully defends a construction lien lawsuit in district court "must" be awarded the full amount of all costs and reasonable attorney's fees it has incurred.

Changes references to "mechanic's lien" in the North Dakota Century Code to "construction lien."

Amends section 35-27-02 to require written notice that a construction lien will be claimed to be given to the owner of the real estate by certified mail at least ten days before recording of the lien.

Amends section 35-27-13 to require a lienor, in order to properly record a construction lien, to describe the dates of the first and last contribution of labor or materials and the person with which the claimant contracted.

Amends section 35-27-14 to prohibit filing of a lien more than three years after the date of the first item of material is furnished.

Amends section 35-27-24 to remove personal property from reference to the property that might be sold to satisfy the lien.

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Ohio

Case Law

1. In ***Complete General Construction Company v. Kard Welding, Inc.***, 182 Ohio App. 3d 119, 911 N.E.2d 959 (Ohio Ct. App. 2009), the state department of transportation (“DOT”) solicited bids for the construction of a highway ramp. Complete General Construction Company (“Complete General”), a general contractor, solicited quotes from subcontractors. On the eve of the DOT’s bid deadline, Kard Welding, Inc. (“Kard”) faxed Complete General a quote for the steel component of the contract. The quote stated that it was “FIRM FOR 30 DAYS.” Complete General deducted \$89,390 from its bid and submitted it to the DOT. The DOT awarded the contract to Complete General.

Over the next several weeks, Complete General and Kard negotiated over the terms and conditions that would govern the subcontract. During the negotiations, Complete General realized that Kard was using a price that was higher than the amount listed in the original quote. Complete General discovered that this higher price was from a revised quote that Kard faxed to Complete General 30 minutes before the bid was due to the DOT. Complete General did not receive the revised quote.

After learning of the revised quote, Complete General entered into a subcontract with a different subcontractor. Complete General then sued Kard claiming breach of contract, promissory estoppel and detrimental reliance. The trial court denied Complete General any relief. Before the Court of Appeals, Complete General argued that Kard’s original quote was a firm offer and that Kard violated Section 1302.08 of the Ohio Revised Code by attempting to revoke the quote by fax the next day. Section 1302.08 of the Ohio Revised Code codifies Ohio’s version of the UCC’s “firm offer rule,” which requires that a signed written offer by a merchant to buy or sell goods be kept open for a reasonable time. The Court of Appeals assumed, without deciding, that the firm offer rule applied and that the quote was a firm offer, but found that Complete General’s claim still failed because Complete General had not accepted either the original or revised quote. Instead, Complete General and Kard were engaged in negotiations regarding the terms that would govern any eventual contract.

The Court of Appeals rejected Complete General’s argument that it should be excused from acceptance because any acceptance would have become a vain act since Kard never intended to honor the original quote. The Court held that because Complete General was unaware of the revised quote during the negotiations regarding the contract terms and never acted to accept the original quote, price was not an issue until after the 30-day period of irrevocability provided by Section 1302.08 of the Ohio Revised Code had expired and the price discrepancy played no role in Complete General’s failure to accept the quote.

The Court of Appeals also affirmed the trial court in dismissing Complete General’s detrimental reliance promissory estoppel claims. First, the Court of Appeals noted that detrimental reliance is not an independent cause of action under Ohio law but only an element of certain causes of action. In this case, the Court of Appeals held that the relevant allegations for both claims were nearly identical and discussed them together as a claim for promissory estoppel.

Second, in discussing the promissory estoppel claim, the Court distinguished *Drennan v. Star Paving Co.*, 51 Cal.2d 409 (1958). Promissory estoppel provides that a promise which the promisor should reasonably expect to induce action or forbearance is binding if injustice can be avoided only by enforcement of the promise. *Drennan* addressed a situation where a

subcontractor submitted the lowest bid for a portion of a construction contract, which the general contractor incorporated into its bid. After the general contractor was awarded the contract, the subcontractor refused to honor its bid. The *Drennan* Court applied the doctrine of promissory estoppel and found that the general contractor's reliance on the subcontractor's bid implied a promise by the subcontractor that it would not revoke its offer for a reasonable time. The reliance served to hold the subcontractor to its offer until the contractor had an opportunity to accept it. The general contractor, however, was still obligated to accept the offer in order to bind the subcontractor. Similarly, two Ohio cases stand for the proposition that a subcontractor is bound to perform according to the terms of its quote only if the general contractor accepts the subcontractor's offer within a reasonable time in order to prevent the injustice that results from requiring a subcontractor to continue to stand ready to perform in accordance with a quote where the general contractor is not obligated to award the contract to the subcontractor.

As a result, the Court of Appeals held that Complete General relied on Kard's original quote and Kard was obligated to keep that quote open for reasonable period of time. The Court of Appeals, however, also found that Complete General did not accept Kard's quote. A general contractor's mere use of a subcontractor's quote does not mean that the general contractor has accepted the subcontractor's offer. Some affirmative evidence of acceptance is required. The fact that Complete General sent Kard a copy of Complete General's standard terms and conditions with a note asking Kard "to review and advise" demonstrated that there was no meeting of the minds and no acceptance.

The Court of Appeals also rejected Complete General's argument that Kard was bound by promissory estoppel to honor its original quote as long as the terms Complete General proposed were reasonable. Because Kard's original quote stated that it was "expressly made conditional on assent to the terms and conditions" in the quote, Complete General's proposal of materially different terms constituted a counteroffer, not an acceptance.

The Court of Appeals also supported its decision by noting that Complete General engaged in "bid shopping" by negotiating with other subcontractors even after including Kard's quote in its bid to the DOT. Promissory estoppel is an equitable doctrine and courts have declined to apply it in certain situations where the person seeking to invoke the doctrine was not acted with equity itself, including where bid shopping has occurred.

2. In *Maghie & Savage, Inc. v. P. J. Dick, Inc.*, No. 08APP-487 (Ohio Ct. App. May 5, 2009), P. J. Dick, Inc. ("PJD"), one of several prime contractors on a building project, entered into two subcontracts, one for the installation of windows and glass exteriors, and another for the installation of drywall and ceiling tiles. The windows subcontractor, Blakely Corporation ("Blakely"), did not receive the windows from its supplier until mid-winter, months after it was scheduled to commence work. As a result, and because the prime contractor insisted that all of its subcontractors remain on schedule to avoid liability for delays, the drywall subcontractor, Maghie & Savage, Inc. ("M&S") was forced to proceed with the interior drywall installation in cold, wet weather. M&S sent a series of letters to PJD indicating that M&S could not warrant the quality of its work despite the building's enclosure with plastic insulation and the use of temporary heaters.

Several months later M&S notified PJD that M&S had incurred nearly \$250,000 of losses due to extra labor costs and lost productivity during the previous winter's drywall installation. PJD refused to respond to the claim and did not reimburse M&S for its losses.

M&S sued PJD and Blakely, asserting breach of contract and unjust enrichment claims against PJD and a claim against Blakely as a third-party beneficiary to Blakely's subcontract with PJD. The trial court granted summary judgment to Blakely on M&S' third-party beneficiary claim and granted motions for directed verdicts to PJD on M&S' breach of contract and unjust enrichment claims.

M&S' subcontract with PJD required M&S to provide to PJD, within two business days, written notice of any delay, acceleration, or compression of work or any other adverse impact on M&S' performance. M&S gave no such notice to PJD, instead sending only the series of letters indicating M&S could not warrant drywall installation done during winter. As a result, M&S' breach of contract claims against PJD depended upon finding a means to negate the notice requirement.

First, M&S argued that the subcontract only required notice that there had been an impact on M&S' work and did not also require identification of that impact. The terms of the subcontract, however, clearly contradicted M&S' argument. The written notice was required to contain "a brief statement of the impact to the [subcontractor's] Work" when a claim was based on time impact.

Second, M&S argued that its letters disclaiming the warranty of the drywall installation done during the winter satisfied the notice requirement. Those letters, however, failed to mention loss of efficiency or productivity. Consequently, M&S claimed that its loss of efficiency occurred not during the winter, but during the spring months, when it was forced to accelerate its work schedule to compensate for the earlier delays. This argument was undermined by the facts that M&S completed most of the drywall installation by the end of March and did not submit the required notice of delay during the spring, either.

Third, M&S argued that PJD had waived the notice requirement. The Court of Appeals held that an informal suggestion by PJD's representative to an M&S representative that M&S could submit a claim according to the subcontract did not amount to a clear and unequivocal waiver of the notice requirement. It simply demonstrated that M&S was referred to in the contractual procedures for asserting claims. Additionally, PJD's failure to respond to M&S' claim did not constitute a waiver because the subcontract imposed no duty on PJD to respond to claims in writing.

Finally, M&S was not excused from compliance. The Court of Appeals held that PJD did not breach the contract by ordering M&S to perform in adverse weather conditions. Since no breach occurred, M&S was not relieved from compliance with the contract's requirements, including the notice requirements.

Noting that in the absence of bad faith or fraud, an action for unjust enrichment will not lie when the subject of the claim is governed by an express contract, the Court of Appeals upheld the directed verdict on M&S' unjust enrichment claim because the basis for the claim was within the scope of the subcontract. Despite M&S' contention that PJD's order to proceed with drywall installation in conditions contrary to the project specifications took the unjust enrichment claim outside the subcontract's scope, the Court of Appeals held that the conditions were irrelevant and that the installation of drywall was clearly within the subcontract's scope, especially since the subcontract provided a mechanism for M&S to assert claims for changed conditions.

The Court of Appeals also held that summary judgment was proper on M&S' third-party beneficiary claim against Blakely. A third-party beneficiary is one for whose benefit a promise has been made but who is not a party to the contract. For a third party to be an intended beneficiary, with enforceable rights under a contract, the contracting parties must enter into the contract with the intent to benefit the third party. The PJD-Blakely subcontract specifically disclaimed any intent on the part of either PJD or Blakely to benefit third parties, and Ohio courts generally give effect to such clauses. As a result, there was no evidence in the Blakely subcontract that M&S was an intended beneficiary of the PJD-Blakely subcontract. Nor did M&S' own subcontract with PJD permit a third-party claim based on language permitting PJD to act as a "conduit to provide Subcontractor with contractual privity for access to . . . other contractors[.]" The language of M&S's subcontract was irrelevant to M&S's status as a third-

party beneficiary under Blakely's subcontract, and when read in concert with the disclaimer in the Blakely subcontract, the Court of Appeals held that this language did not demonstrate an intent that M&S be entitled to maintain a claim against Blakely.

3. In *Ohio Concrete Construction Ass'n v. Ohio Dept. of Transportation*, No. 08AP-905 (Ohio Ct. App. May 21, 2009), the state department of transportation ("DOT") solicited bids for a 3.65-mile highway construction project. Initially, the DOT announced to prospective bidders that asphalt was the preferred paving material, but the Ohio Concrete Construction Association ("OCCA") protested the asphalt specification. In response, the DOT required all interested prime contractors to submit alternative bids for the use of **either** asphalt or concrete; interested subcontractors were not required to submit alternative bids to the prospective prime contractors.

The DOT awarded the prime contract but conditioned the contract award on the use of asphalt as the paving material. The prime contractor selected a subcontractor which had submitted a subcontract quote for the asphalt specification only.

OCCA and Harper Co. ("Harper"), which had submitted a subcontract quote for the concrete specification to the prime contractor, sought declaratory and injunctive relief including a declaration that the paving specification was void for illegality and for being in contravention of public policy. The trial court held that OCCA and Harper lacked standing and dismissed.

On appeal, OCCA and Harper relied on *Connors v. Ohio Dept. of Transportation*, 8 Ohio App.3d 44, 455 N.E.2d 1331 (Franklin App. 1982). The *Connors* Court set forth four categories of groups with standing to bring claims about bidding issues:

A contractors' association whose members either are qualified to bid with the [DOT] and who did bid on such construction projects, or whose members sought to obtain work as subcontractors on such projects;

Contractors qualified to bid on [DOT] projects who purchased plans and who did bid as **prime** contractors;

Contractors qualified to bid on [DOT] projects who purchased plans and sought to obtain contracts as **sub**contractors; and

Taxpayers of the state of Ohio who are specially affected by the bid conditions.

OCCA and Harper argued that Harper had standing (1) as a subcontractor who sought to obtain work on the project and (2) as a taxpayer with a special interest in the funds to be used on the project.

The Court of Appeals disagreed. First, it noted that *Connors* did not involve a challenge to a DOT decision after a contract had been awarded. The *Connors* plaintiffs had challenged the bid specifications by suing **before** any contract was awarded and had obtained a restraining order preventing the DOT from opening any bids. Here, however, OCCA and Harper had waited to sue until **after** the contract was awarded and Harper was rejected as a subcontractor. As a result, Harper fell "squarely among the disappointed prospective subcontractors who are subject to the general rule that a party must have submitted a bid on the project to have standing to challenge the contract awarded on a public construction project."

Second, the Court of Appeals held that Harper did not have standing as a specially interested taxpayer. The Plaintiffs relied on *Connors* for the rule that a taxpayer's "special interest" can be presumed when public contracts are awarded in violation of statutory

requirements. *Connors*, however, held that a special interest may be presumed in only certain circumstances, including when a public contract is not awarded to the lowest bidder. In *Connors*, the challenged requirement prevented the potentially lowest bidders from bidding on the contract; in this case, the DOT had actually awarded the contract to the lowest bidder.

Nor did Harper have standing as a taxpayer due to a “special interest” in the funds to be used on the highway project. The appeals court rejected Harper’s argument, based on *Masterson v. Ohio Racing Commission*, 162 Ohio St. 366, 123 N.E.2d 1 (1954), that Harper’s **own** property rights were jeopardized, which would have entitled it to bring an action to enjoin the use of public funds on the highway project. *Masterson* held that private citizens could not restrain official acts unless they proved damages to themselves different in character than those suffered by the public generally Harper argued that its injury was unique because it was the lowest concrete bidder to the winning prime contractor. Harper, however, had no property right in jeopardy because it had no right to be awarded the subcontract. Only if Harper “had been specifically named in the bid or held an enforceable letter of intent” would it have demonstrated an injury to a property right different from that suffered by the general public. Further, cases holding that *Masterson*’s “special interest” requirement is satisfied when a taxpayer challenged a public expenditure from that state’s general revenue fund were inapplicable because the highway project was to be paid for with federal funds.

Finally, since Harper itself had no standing, OCCA also had no standing. A trade association must establish that its members have suffered actual injury. Since Harper failed to establish it suffered any injury, OCCA had no basis for standing.

4. In ***Sheet Metal Workers’ International Ass’n, Local Union No. 33 v. Gene’s Refrigeration, Heating & Air Conditioning, Inc.***, 122 Ohio St. 3d 248, 910 N.E.2d 444 (Ohio 2009), Gene’s Refrigeration, Heating & Air Conditioning, Inc. (the “Contractor”) was awarded a contract to construct a fire station. The project qualified as a “public improvement” for purposes of Ohio’s prevailing wage laws. Sheet Metal Workers International Association, Local Union No. 33 (the “Union”) obtained the written authorization of an employee in the Contractor’s off-site fabrication shop to file a complaint asserting prevailing wage violations by the Contractor. Based on that single authorization, the Union asserted claims on behalf of all the employees. The trial court held that the Union had standing to pursue claims only on behalf of the employee who authorized the Union to represent him and that the prevailing wage requirement did not apply to the employee’s off-site work. The appellate court reversed, stating that the Union had standing to represent all of the Contractor’s employees and that the prevailing wage requirement applied to off-site employees that fabricated materials to be used in or in connection with a public improvement. The Ohio Supreme Court accepted a discretionary appeal to decide the two issues.

The first issue the Court decided was whether the employee’s written authorization allowing the Union to represent him was sufficient to impute standing to the Union for the entire project and all of the Contractor’s employees. Ohio’s prevailing wage law authorizes an “interested party” to file a complaint with the state’s director of commerce alleging violations of prevailing wage requirements.

Section 4115.03(F)(3) of the Ohio Revised Code states that one type of “interested party” is an “*organization of labor which . . . is authorized to represent employees . . .*” The Court noted that the employee’s written authorization only stated that the Union was permitted “to represent me in all matters pertaining to my claims regarding any and all prevailing wage issues.” The Court concluded that allowing the Union to bring a complaint on behalf of employees who did not authorize it to do so would violate those employees’ right to select their own attorney or labor representative. As a result, the Court held that a labor organization that

obtains authorization to represent only one specific employee does not have standing to pursue violations of the prevailing wage law on behalf of any other employee.

The second issue the Court decided was whether the prevailing wage law applied to an employee who worked off-site fabricating materials to be used on-site. The Court began its analysis by noting that its prior decision in *Clymer v. Zane*, 128 Ohio St. 359 (1934), held that off-site workers in a gravel pit owned by a public improvement highway project's contractor were not entitled to a prevailing wage.

The Court concluded that since the Ohio prevailing wage statute did not specify where the work must be performed, it was ambiguous and the Court was required to construe the statute to effectuate the intent of the General Assembly. The Court of Appeals had focused on the portion of Section 4115.05 of the Ohio Revised Code which states:

The prevailing rate of wages to be paid for a legal day's work, to laborers, workers, or mechanics, upon any material to be used in or in connection with a public work, shall be not less than the prevailing rate of wages payable for a day's work in the same trade or occupation in the locality within the state where such public work is being performed and where the material in its final or completed form is to be situated, erected, or used.

The Court of Appeals had held that the phrase "upon any material to be used in or in connection with a public work" meant that off-site employees were entitled to prevailing wages under the statute. In reversing the Court of Appeals, the Ohio Supreme Court noted that other portions of Section 4115.05 of the Ohio Revised Code state that the prevailing wage shall be paid to employees "upon public works" and that every contract for "a public work" must contain a provision that employees "about or upon such public work" be paid the prevailing wage. Similarly, Section 4115.10(A) of the Ohio Revised Code allows employees "upon any public improvement" to recover for violations of the prevailing wage laws, and Section 4115.10(B) of the Ohio Revised Code allows employees "upon any public improvement" to file a complaint pursuant to the prevailing wage laws. Finally, Section 4115.032 of the Ohio Revised Code refers to construction "on" a project and employers that work "on such projects." After reviewing all of this statutory language, the Court concluded that only those working on the job-site are entitled to a prevailing wage under Ohio law.

To support its interpretation of the language of the statute, the Court noted that the custom and practice in the construction industry was to pay prevailing wages only to employees working on the site of the project. In addition, the Court rejected a test created by the Court of Appeals that would have applied the prevailing wage laws to workers who fabricated materials specifically for the project. The Court of Appeals sought to apply an "intimate connection" test to determine when a prevailing wage should be paid to off-site workers. In rejecting the test, the Ohio Supreme Court stated that it would "interject uncertainty" into standard industry practice

5. ***Northwestern Ohio Building & Construction Trades Council v. Ottawa County Improvement Corp.***, 122 Ohio St. 3d 283, 910 N.E.2d 1025 (Ohio 2009) involved Fellhauer Mechanical Systems, Inc. ("Fellhauer"), a private, for-profit corporation, that leased space for its business in Ottawa County until the opportunity arose to purchase its building. Fellhauer decided to buy the building and new office equipment and to renovate part of the building.

Fellhauer applied for and received loans from both the Ohio Department of Development ("ODOD") and the Ottawa County Improvement Corporation ("OCIC"). The ODOD loan, itself comprised of federal block grant funds to state governments, was procured on Fellhauer's behalf by the Ottawa County Commissioners. These two loans were used only to purchase the building, including the land on which it was located, and new office equipment. Renovations to

the building were paid for with Fellhauer's own funds or moneys obtained through loans from private lenders.

The Northwest Ohio Building and Construction Trades Council ("Northwest") and Kevin J. Flagg ("Flagg"), sued for preliminary and permanent injunctive relief, arguing that prevailing wage laws should apply to any contracts associated with Fellhauer's renovations.

The trial and appellate courts both declined, on different grounds, to hold that the prevailing wage laws applied to Fellhauer's project. The trial court held that although both Ottawa County and OCIC satisfied the statutory definitions of "public authority" and "institution," respectively, the project did not constitute a "public improvement" because it benefitted only a private enterprise. The appellate court, meanwhile, concluded that neither Fellhauer nor OCIC met the statutory definition of "institution" and that the public funds were used only for the purchase of the building, not its renovation.

The Ohio Supreme Court started its analysis by noting that prevailing wages apply to construction projects that are public improvements, and that to qualify as a public improvement, a project must be constructed by a public authority or must benefit a public authority. Section 4115.03(A) of the Ohio Revised Code provides that a public authority is defined as "any officer, board, or commission of the state, or any political subdivision of the state, authorized to enter into a contract for the construction of a public improvement or to construct the same by direct employment of labor, or any institution supported in whole or in part by public funds and said sections apply to expenditures of such institutions made in whole or in part from public funds." The Court rejected Northwestern's argument that "public institutions" were to be treated differently from other public authorities. The Court's view of the statutory language was that the legislature wanted to stress that institutions, which have both public and private sources of funding, are required to comply with the prevailing wage laws, even if some expenditures come from private sources, not to require institutions to pay prevailing wages every time they expend funds on any project.

The Court explained that requiring payment of a prevailing wage anytime that an "institution" spent public funds would "unjustifiably expand the scope of prevailing wage to include projects that are not public improvements, that are not constructed by a public authority, or that do not benefit a public authority." The Court held that the prevailing wage laws apply only when a public authority, including an "institution," spends public funds to construct a "public improvement," which by definition must be constructed by or benefit a public authority.

The Fellhauer project did not trigger the prevailing wage laws because it was not a public improvement. The publicly-funded portion of the project, the purchase of land and equipment, is not included in the definition of "public improvement." Section 4115.03(C) of the Ohio Revised Code includes only "buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, and all other structures or works." Additionally, the purchase of the land and equipment was also not "constructed" or "by or for a public authority" as is also required by Section 4115.03(C) of the Ohio Revised Code. The only part of the project which could be said to have been "constructed" was the renovation which was by or for Fellhauer, a private entity, using only private funds. Ultimately, the Ohio Supreme Court held that the prevailing wage laws did not apply to the Fellhauer project because no public funds were used to finance any actual construction of a public improvement that benefits a public authority, and clarified that projects which have only some characteristics of a public project will not be subject to prevailing wage laws.

6. In *Monroe v. Steen*, No. 24342 (Ohio Ct. App. Sept. 30, 2009), the owner of a building ("Steen") contracted with a commercial roofing business ("Monroe") to repair the building's leaking roof. After Monroe repaired the roof, Steen noticed imperfections in the roof and requested that they be patched. Monroe applied the patches but the leaks continued.

When Steen did not pay the remaining balance on the contract, Monroe filed a lawsuit seeking the unpaid balance. Steen counterclaimed, in tort and contract, that the roof was not completed in a workmanlike manner.

The trial court found that Monroe did not complete the work in a workmanlike manner and did not allow it to recover the balance due on the contract. The trial court, however, focusing solely on the contract claim, dismissed Steen's counterclaim because Steen only presented evidence of damages based on the costs of repairing the roof and not on the diminution in the building's value.

Previous case law held that for a claim that a commercial construction contract was performed in an unworkmanlike manner, the party seeking damages for the restoration cost must also present evidence of the diminution in value so that the amounts could be compared. *South Shore Cable Constr., Inc. v. Grafton Cable Communications, Inc.*, 2004-Ohio-6077, (Summit Cty. 2004). The same analysis had been extended to contracts for residential construction in *Martin v. Design Constr. Services, Inc.*, 2007-Ohio-4805 (Summit Cty. 2007).

Recently, however, the Supreme Court of Ohio overruled the *Martin* decision, holding that a party seeking to recover for a temporary injury to real property was not required to prove diminution in value before it could recover for restoration costs. *Martin v. Design Constr. Services Inc.*, 121 Ohio St.3d 66, syllabus (2009). While the Ohio Supreme Court had limited its decision to noncommercial real estate, the Summit County Court of Appeals decided to extend the holding to commercial real estate because the Court reasoned that there was no important difference between commercial and noncommercial real estate in this context.

The Court of Appeals reversed the trial court and held that failing to provide evidence of the diminution of the building's market value did not prevent a court from awarding damages for restoration costs. The Court of Appeals noted that either party may still produce evidence of the reduction in market value which the failure to perform in a workmanlike manner had caused. Such evidence, however, is no longer a prerequisite to recovering for the cost to repair the damage to real property caused by unworkmanlike performance of a commercial construction conduct.

7. In ***Garfield Heights, ex rel. Kozelka v. Garfield Heights***, No. 92511 (Ohio Ct. App. Sept. 24, 2009), the Ohio Environmental Protection Agency ("OEPA") issued a set of orders in March 2005 which authorized a developer to complete construction of a shopping complex on the site of two closed landfills that had been solid waste disposal facilities. The orders required "proper management and capping of the solid wastes disposed at the landfills, control of contaminated runoff (leachate), and control of any landfill gas generated at the site." The orders were also signed by the mayor of the City of Garfield Heights (the "City"), the municipality in which the site was located.

From March 2005 to July 2008, OEPA and the Cuyahoga County Board of Public Health issued approximately 20 notices to the developer that it was failing to comply with its obligations under the orders. In July 2008, OEPA brought a 25-count enforcement action against the parties to the orders seeking to remedy violations of Ohio's environmental laws. Shortly thereafter, Raymond Kozelka ("Kozelka"), a Garfield Heights resident, brought a taxpayer suit pursuant to Section 733.59 of the Ohio Revised Code against the City and the OEPA Director contending that the orders were invalid because the mayor of the City had executed them in contravention of state and local law. Kozelka's suit was then consolidated with the enforcement action.

The parties to the enforcement action resolved their claims and the case was dismissed when the developer agreed to comply with all environmental laws and follow all other requirements contained in the orders. The trial court then dismissed Kozelka's taxpayer suit

because the claims against the city were barred by the one year statute of limitations in Section 733.60 of the Ohio Revised Code and because the court did not have jurisdiction over the claims against OEPA. Kozelka timely appealed the court's ruling that his suit was barred.

The Court of Appeals explained that Section 733.56 of the Ohio Revised Code authorizes a city law director to apply for an injunction to, among other things, restrain "the execution or performance of any contract made in behalf of the municipal corporation in contravention of the laws or ordinance governing it, or which was procured by fraud or corruption." Section 733.59 of the Ohio Revised Code authorizes a taxpayer to maintain a suit on the behalf of the municipality, if the taxpayer has requested the law director to file suit and the law director fails to commence the suit. The Court of Appeals also noted that taxpayer suits of this nature are governed by the statute of limitations in Section 733.60 of the Ohio Revised Code, which provides that an action pursuant to Sections 733.56 - 733.59 of the Ohio Revised Code to enjoin the performance of a contract must be brought within one year of the execution of the contract.

Kozelka claimed that the one-year limitation only applied to actions for injunctive relief and since his action asserted four claims for declaratory judgment relief, the one-year limitation period did not apply. The Court of Appeals rejected this argument. First, the Court noted that Kozelka's letter to the law director demanded that he "file an action for injunctive relief" to "enjoin performance" of the contract. Second, the Court held that while Kozelka's claims might be labeled as declaratory actions, they were brought under a statute that made injunctive relief the exclusive remedy.

Finally, the Court rejected Kozelka's claims that the discovery rule should apply to his claims because he was unaware that the mayor had executed the orders. The Court examined the Complaint, which did not allege that: (a) the statute of limitations should have been tolled; (b) that Kozelka was unaware that the orders had been signed by the mayor; or (c) the date that Kozelka had discovered the existence of the orders. Consequently the Court of Appeals determined that Kozelka's Complaint failed to allege any facts which supported application of the discovery rule and held that the trial court properly dismissed the case against the City.

The Court of Appeals also found that dismissal of the action against OEPA for lack of jurisdiction over the case was proper. The Court of Appeals noted that Section 3745.04(B) of the Ohio Revised Code states that any person "who was a party to a proceeding" may appeal an action of the OEPA Director, but only to Environmental Review Appeals Commission ("ERAC"). As a result, ERAC was vested exclusive original jurisdiction of any appeal of the orders about which Kozelka complained. Kozelka argued that the statute did not apply to him because he was not a party to the proceeding that resulted in the orders, but the Court cited several cases in which similarly situated persons had been permitted to appeal to ERAC

8. In ***Painting Co. v. Ohio State University***, No. 09AP-78 (Ohio Ct. App. Oct. 29, 2009), the Court applied a statute establishing the time period for determination of claims by the State to the applicable statute of limitations. Ultimately, the Court held that dismissal of the complaint filed by the Painting Company ("Painting Co.") was proper because it was time-barred. Painting Co. filed a complaint against Ohio State University ("Ohio State") for breach of a contract to provide painting and wall covering as part of a construction project. The contract was executed on May 7, 2003.

Disputes arose about increased labor costs, delays and additional work. The contractual claim process was commenced on January 27, 2005. At the first stage of the process, the project administrator rejected all of the claims. An August 23, 2005 appeal by Painting Co. to the State Architect resulted in a November 30, 2005 meeting.

The meeting culminated in a January 6, 2006, letter from the State Architect which stated “there is insufficient information in your presentation and submission to justify additional compensation.” After a series of communications, the State Architect informed Painting Co. on October 3, 2007, that the January 6, 2006, letter had been the State’s final decision. Painting Co. filed its complaint in the State’s Court of Claims on July 29, 2008.

Under the portion of Section 2743.02(A)(1) of the Ohio Revised Code (“ORC”) applicable here, civil actions against the State are to be commenced within 2 years after the date of accrual of the cause of action. In addition, ORC Section 153.12(B) provides that a contractor may bring an action in the State’s Court of Claims after administrative remedies are exhausted. Finally, ORC Section 153.16(B) provides that any claim under a State public works contract “shall be resolve within one hundred twenty days,” and that after conclusion of that period, “the contractor shall be deemed to have exhausted all administrative remedies for purposes of” ORC Section 153.12(B).

The Court held that under ORC 153.16(B) a claim is deemed rejected at the end of the 120-day period, notwithstanding a later “final decision” letter. Consequently, Painting Co.’s cause of action accrued on December 21, 2005, *i.e.*, 120 days after the August 23, 2005, filing of its appeal to the State Architect, and Painting Co. had an additional 2 years, until December 21, 2007, to file a complaint in the State’s Court of Claims. Because the complaint was not filed until July 29, 2008, it was barred by the statute of limitations, ORC 2743.02(A)(1). The Court noted that a contrary interpretation would nullify the purpose of ORC 153.16(B): “to ensure a remedy against the state for claimants such as [Painting Co.] by defining when administrative remedies are exhausted, the cause of action accrues, and a cause of action may be filed”

9. In ***Gildner v. Accenture, L.L.P.***, No. 09AP-167 (Ohio Ct. App. Oct. 6, 2009), the Court clarified the law of standing in common law taxpayer actions. Ultimately, the Court held that Plaintiffs Lance and Joanne Gildner (the “Gildners”) did not have standing and dismissed their complaint. The Gildners filed a taxpayer action seeking to invalidate a settlement agreement between the Ohio Department of Jobs and Family Services (“ODJFS”) and Accenture L.L.P. (“Accenture”). Accenture and ODJFS had entered into a series of contracts for a computerized information system. The system proved by unworkable and was ultimately scrapped. Improprieties in the contracting process resulted in the Director of the predecessor agency to ODJFS pleading guilty to having an illegal interest in a public contract. ODJFS and Accenture settled the claims between and entered into a settlement agreement.

The Gildners filed suit against ODJFS and Accenture claiming that the original contracts and the settlement agreement were procured by fraud. The trial court found the at the Gildners had standing as taxpayers, but granted summary judgment against them. The Gildners appealed.

The Court of Appeals started by noting that the landmark case of *State, ex rel. Masterson v. Ohio State Racing Commission*, 162 Ohio St. 366, 123 N.E.2d 1 (Ohio 1954), held that, in the absence of statutory authority, a taxpayer lacks standing to challenge the expenditure of public funds unless the taxpayer has some special interest in the expenditure because it jeopardized the taxpayer’s property rights.

. . . [i]n other words, private citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally.

Id. at 386. Because *Masterson* involved any expenditure of moneys which were not part of the State’s general revenue fund derived from taxes, it can be read to hold simply that the taxpayer

had no standing because the taxpayer had not paid any of the revenues from which the expenditure was derived.

In *Andrews v. Ohio Building Authority*, No. 75AP-121 (Ohio Ct. App., Sept. 11, 1975), the Court focused on the time the expenditure was made and held that the taxpayer did not have standing because the expenditure was made from the proceeds of a loan, even though the loan would eventually be repaid from rental payments from state agencies which in turn were derived from the State's general revenue fund. In *State ex rel. United McGill Corp. v. Hamilton*, 11Ohio App. 3d 102, 463 N.E.2d 405 (Ohio Ct. App. 1983), the Court concluded that the *Andrews* Court had misapplied *Masterson* and found that an unsuccessful bidder who had contributed to the State's general revenue fund met the special interest requirements of *Masterson*. The *United McGill* court, however, did not address *Masterson's* requirement that the taxpayer was required to have damages different in character from those sustained by the public generally.

Consideration of the "different damages" requirement proved pivotal in *Ohio Concrete Construction Ass'n v. Ohio Dept. of Transportation*, No. 08AP-905 (Ohio Ct. App. May 21, 2009), however, as the Court denied standing to a taxpayer who failed to allege any damage distinct from the general public. Most significantly, the Ohio Supreme Court addressed the requirement in two related cases. In the first, the Court cited *Masterson* for the proposition that a taxpayer lacks legal capacity unless the taxpayer has some special interest in the public funds at issue. *State ex rel. Dann v. Taft*, 110 Ohio St. 3d 1, 850 N.E.2d 27 (Ohio 2006). In the second, the Court denied standing as general taxpayer, stating:

Ohio law does not authorize a private Ohio citizen, acting individually and without official authority, to prosecute government officials suspected of misconduct based on the citizen's status as a taxpayer of general taxes

State, ex rel. Dann v. Taft, 110 Ohio St. 3d 252, 254, 853 N.E. 2d 263, 266 (Ohio 2006). The *Gildner* court concluded from the *Dann* cases that the Ohio Supreme Court did not permit a taxpayer who pays taxes into the State general revenue fund to have standing.

The *Gildner* court found further support in *Brinkman v. Miami University*, No. CA2006-12-313 (Ohio Ct. App. Aug. 27, 2007), which denied standing to a taxpayer and reasoned that a broad rule of standing would subject most government actions to suit. Such a result would violate the policy that public officials should be subjected to constant judicial interference. Consequently, the *Gildner* court adopted the reasoning of the *Brinkman* case, overruled *United McGill* and held that the taxpayers lacked standing.

Legislation

1. Sub. H.B. No. 318 (128th General Assembly), Construction Reform Demonstration Projects

The provisions of Sub. HB 318 which relate to construction reform are contained in Section 8. The provisions permit demonstration or pilot projects to explore delivery methods other than the statutorily mandated multiple prime contractor method. One project at each of 3 different state colleges or universities is to be designated as a Construction Reform Demonstration Project. Section 8 of Sub. HB 318 shall expire on the date all of the Construction Reform Demonstration Projects have been completed or January 1, 2014, whichever is later.

The criteria for selection of the Projects are:

- (1) Geographic distribution;
- (2) The extent to which the Projects:
 - (a) Represent different types of projects, such as new construction, building renovation and infrastructure replacement,
 - (b) Will have different uses,
 - (c) Are of different sizes, and
 - (d) Will utilize different methods of construction delivery;

To be eligible to be designated as a Construction Reform Demonstration Project, the state college or university must demonstrate all of the following:

- (1) The Project is amenable to and would use one of the alternative construction delivery methods described below;
- (2) The state college or university has a funding plan that does not rely upon any subsequent state capital money;
- (3) The state college or university has satisfied all of its internal requirements necessary to allow bidding on the project to begin before the end of fiscal year 2010 (June 30, 2011);
- (4) The state college or university has a plan for meeting or exceeding the EDGE Contracting Goal for the project through the expected provision of contracts to Encouraging Diversity Growth and Equity ("EDGE"); contractors in accordance with Ohio Revised Code Section 123.152; and
- (5) The project will qualify for LEED certification.

The alternative construction delivery methods are:

- (1) Construction Manager at Risk
 - (a) A person (i) with substantial discretion and authority to plan, coordinate, manage, direct, and construct all phases of a project for the construction, demolition, alteration, repair or reconstruction of any public building, structure or other improvement, and (ii) who provides the state college or university a guaranteed maximum price utilizing an open book method which provides the state college or university all books, records, documents and other data in the possession of the construction manager at risk related to itself, its subcontractors and its material suppliers pertaining to the bidding, pricing or performance of the construction management contract.
 - (b) The construction manager at risk shall be selected using a qualifications based selection process, including best value criteria. Best value criteria include (i) technical approach, (ii) quality of proposed personnel, (iii) management plan and (iv) other factors determined to derive or offer the greatest value to the state college or university.
- (2) Design Build
 - (a) Services that form an integrated delivery system for which a person is responsible to the state college or university for both the design and construction, demolition, alteration and repair or reconstruction of the project.

- (b) The design-builder shall be selected (i) using a qualifications based selection process, including best value criteria, and (ii) using a bridging design delivery in which the state college or university utilizes a criteria or concept architect to develop the program of requirements and the preliminary project scope and to validate that the state college or university's design intent is implemented.
- (3) General Contracting
 - (a) Contracting that is exempt from the multiple prime requirements.
 - (b) For a project up to \$600,000 in total project value.
 - (4) Design Assist
 - (a) The procurement method by which, prior to completion of design, a construction contract may be awarded on a best value basis pursuant to which a contractor provides design assistance to the architect or engineer of record through a design professional separately retained by a contractor.
 - (b) This method may also be used in conjunction with any of the other methods listed above.

The Construction Reform Demonstration Projects are not exempt from:

- (1) Prevailing wage;
- (2) Bonding;
- (3) EDGE;
- (4) Prompt pay;
- (5) Equal employment opportunity and affirmative action construction compliance;
- (6) Domestic steel; and
- (7) Public notice and advertising.

For each Construction Reform Demonstration Project, EDGE is to be maximized based upon percentage goals determined as follows:

- (1) The Demonstration EDGE Percentage shall be established by taking into consideration the Technical Assistance Guide for Federal Construction Projects for the county in which the Project will be located and any other factors deemed relevant by the Department of Administrative Services Equal Opportunity Division ("EOD");
- (2) EOD shall apply the Demonstration EDGE Percentage to the total project cost to establish the Project's EDGE Contracting Goal;
- (3) All business enterprises certified as minority business enterprises are considered EDGE business enterprises;
- (4) EOD shall assist the state college or university in maximizing utilization of EDGE contractors as follows:
 - (a) At each of the following EDGE compliance checkpoints, EOD shall certify that the Project is in reasonable attainment of the EDGE Contracting Goal;
 - (i) Prior to each contract being awarded, based on the submission of a reasonable, credible plan for meeting the Goal;

- (ii) Once monthly for each contract awarded for work on the project.
- (b) EOD may undertake onsite inspections and review any contractor records related to the Project that EOD deems necessary.
- (c) No payment to a contractor shall be made without the EOD certification under (a).
- (d) EOD shall establish a stakeholder advisory panel, including 2 members of the Ohio Legislative Black Caucus, 2 minority contractors and the Chancellor of the Ohio Board of Regents (the "Chancellor"), to advise EOD (i) regarding reports to the Governor, the Senate and the House and (ii) on strategies for maximizing participation of EDGE contractors and ways that EOD can provide problem-solving assistance.

The state colleges and universities undertaking Construction Reform Demonstration Projects shall pay the Department of Administrative Services an aggregate of \$150,000/year in each year that any Project is uncompleted for the staff and other expenses associated with EOD's responsibilities. The portion to be paid by any of the state colleges or universities shall be based on the expenditures of its Project compared with the other Projects, as determined by EOD.

The state colleges and universities undertaking Construction Reform Demonstration Projects shall cooperate with and provide the Chancellor with all requested information in order to facilitate the Chancellor's study of the cost effectiveness and efficiencies associated with the alternative construction delivery methods. The Chancellor shall prepare for the Governor, the Senate and the House semi-annual reports and a final report. The state colleges and universities may transfer funds to assist in covering the costs of the study and reports.

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Oklahoma

Case Law

1. In ***Consolidated Grain & Barge Co. v. Structural Systems, Inc.***, 2009 OK 14, ___ P.3d ___, 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 (Okla. Stat. tit. 12, § 109). Unlike most states, Oklahoma's "borrowing" statute (Okla. Stat. tit. 12, § 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' 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 it 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, 193 P.3d 970, 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.

3. In *Farrell v. Concept Builders, Inc.*, 2008 OK CIV APP 34, 208 P.3d 483, the Court of Civil Appeals reviewed whether the parties to a home construction contract had an agreement to arbitrate. The parties had signed a “Contract” with an attached “Supplemental Agreement” (for “premium” upgrades), neither of which contained any arbitration agreement. When the homeowners signed the Contract, however, they also received a “Warranty” from the homebuilder, which did contain a mandatory arbitration clause. The Court of Civil Appeals used ordinary contract interpretation principles to affirm the trial court’s ruling that no arbitration agreement existed. First, the Contract specifically mentioned in multiple clauses that the parties could pursue “any” legal remedy. Second, the Contract could only be modified by a signed writing and the Warranty was not signed by either party. Third, the Warranty was not incorporated by reference into the Contract. Accordingly, at best, there was an ambiguity as to arbitration, which, under Oklahoma law, is construed against the builder, which had drafted the various agreements.

4. In *Kirby v. Jean’s Plumbing Heat & Air*, 2009 OK 65, 222 P.3d 21, the court held that installing a new sewer line to an existing home consists of more than “normal” repair or replacement, thus placing the installation within Oklahoma’s ten-year statute of repose for tort claims relating to “improvements to real property” (Okla. Stat. tit. 12, § 109). The Oklahoma Supreme Court also reaffirmed its prior holdings that the “discovery rule” does not toll statute of limitations for breach of a construction contract.

5. In *Carter v. Schuster*, 2009 OK 94, ___ P.3d ___, which can be applied to construction contracts, the court held that an individual signing a contract with an arbitration clause as the agent for a business entity cannot be personally compelled to arbitrate without the existence of an equitable theory (e.g., “alter ego” liability, equitable estoppel) that allows such a direct claim.

Legislation

1. **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 Senate in different forms and is in conference. (Prediction is final passage, Governor will veto and override will fail.)

2. **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. The law would cap retainage at 10% during the first half of a construction project, followed by 5% during the second half.

Upon issuance of a certificate of substantial completion, all but 150% of the punch list completion cost must be released from the retainage.

3. **S.B. 1012, Private Construction Prompt Payment Act:** This legislation would require clear contract terms relating to time for payment. Where such terms do not exist, the law will impose prompt payment requirements (within 21 days from owners to general contractors followed by 7 days to subcontractors) on private projects, except certain residential projects, with a right to suspend or terminate a contract, if violated.

4. **Okla. Stat. tit. 12, § 19, “Tort Reform” Act:** As relevant to the construction industry, this enactment added a new statutory provision that requires the plaintiff in a professional negligence action to attach an affidavit to the petition attesting that the plaintiff has obtained a written opinion from a qualified expert that a reasonable interpretation of the facts supports a finding that the defendant committed professional negligence. The affidavit must also attest that the plaintiff has concluded “the claim is meritorious and based on good cause.” If the plaintiff files suit without an affidavit, the court shall, upon motion of the defendant, dismiss the action without prejudice. The law also requires the plaintiff to produce an expert report within 10 business days of a demand by the defendant.

The Act also eliminates the legislative right to prejudgment interest during the first 24 months of a suit for all suits filed after January 1, 2010, and now pegs the interest rate with that of federal treasuries. Okla. Stat. tit. 12, § 727.1. Thus, it is now imperative for construction and design professional contracts to include interest provisions for non-payment.

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Oregon

Case Law

1. In ***Waxman v. Waxman & Associates, Inc.***, 224 Or. App. 499, 198 P.3d 445 (Or. Ct. App. 2008), the Oregon Court of Appeals held that breach of contract actions in Oregon arising from the construction, alteration or repair or improvement to real property must be brought within six years from the date of breach, regardless of when the breach is discovered or reasonably should have been discovered.

Waxman effectively clarifies the time in which a plaintiff has to file an action for breach of contract in construction defect cases. For several years, Oregon trial courts have wrestled over whether the statute of limitations in Oregon for an action based upon breach of contract is six years or ten years. Oregon trial courts regularly ruled on either side of this argument due to an ambiguity found to exist in two Oregon statutes. The Court of Appeal’s decision in *Waxman* appears to have settled that confusion.

In *Waxman*, the Plaintiffs were owners of one of four connected row houses which suffered from significant construction defects in the common elements. The homes were built in 1996 and 1997 and then sold to the Plaintiffs in 2001. Later, the original owners of the row home assigned to Plaintiffs all of their claims and causes of action arising from the construction of the row home.

In September 2005, the Plaintiffs filed an action in circuit court alleging claims of breach of contract and negligence against the original builder/developer. The builder/developer moved for summary judgment against Plaintiff's claims arguing, *inter alia*, that Plaintiff's negligence claim was barred by the economic loss doctrine and that the six year statute of limitations barred Plaintiff's contract claims. The builder/developer cited Oregon Revised Statutes section 12.080(1): "An action upon a contract or liability, express or implied, excepting those mentioned in ORS 12.070, 12.110 and 12.135 and except as otherwise provided in ORS 72.7250 . . . shall be commenced within six years." Or. Rev. Stat. § 12.080(1) (emphasis supplied). Plaintiffs countered that the statute of limitations is ten years because one of the statutes mentioned (Oregon Revised Statutes section 12.135) provides that "An action against a person, whether in contract, tort or otherwise, arising from such person having performed the construction, alteration or repair of any improvement to real property...shall be commenced within the applicable period of limitation otherwise established by law; but in any event such action shall be commenced within 10 years from the substantial completion or abandonment of such construction, alteration or repair of the improvement to real property."

The trial court granted the builder's motion, concluding that the negligence claims were barred by the economic loss doctrine and that the breach of contract claim was barred by a six year statute of limitations. Plaintiffs appealed. The Oregon Court of Appeals reversed in part and affirmed in part. The Court held that the trial court erred in determining that the economic loss doctrine barred Plaintiff's negligence claim and remanded to the trial court for further consideration. However, the Oregon Court of Appeals affirmed the trial court's ruling that the six year statute of limitations barred Plaintiff's breach of contract claim. The Court said that although at first glance, the text of Oregon Revised Statutes section 12.080(1) appears to support Plaintiffs' interpretation, an examination of the interplay between Oregon Revised Statutes section 12.080 and Oregon Revised Statutes section 12.135 and the legislative history behind the creation and evolution of these statutes demonstrates that the legislature intended a six year statute of limitations rather than the ten year period found in Oregon Revised Statutes section 12.135. Further, the Court found that nothing in the statutes suggests that the Oregon legislature intended to make a discovery rule applicable to actions for breach of contract. Therefore, the Court held that unless the statute is tolled (e.g. fraudulent concealment of the breach) a claim for breach of contract accrues on the date of breach regardless of when the homeowner actually discovered, or reasonably could have discovered, the defects, and that the statute of limitation runs six years from the breach.

2. In ***Abraham v. T. Henry Construction, Inc.***, 230 Or. App. 564, 217 P.3d 212 (2009), the Oregon Court of Appeals determined that a negligence claim based on a violation of the Oregon Building Code could be brought between contracting parties.

More than eight years after construction was substantially completed on their house, plaintiffs sued multiple contractors and subcontractors for breach of contract and negligence. The trial court dismissed these construction defect claims on summary judgment, ruling that the contract claims were outside the statute of limitations and the tort claims were barred by the economic loss doctrine, because plaintiffs could not show that there was some breach of a standard of care independent of the contract terms.

On appeal, the plaintiffs' main argument was that defendants had breached an independent standard of care by failing to meet the standard of care set by the Oregon Building Code and that this breach caused the property damage.

The court acknowledged that the economic loss doctrine bars a claim in tort between contracting parties when the basis for the claim is that a party was negligent in performing its contractual obligations. However, the court recognized an exception to the economic loss doctrine if there was a breach of the standard of care independent of the contract and "without

reference to its specific terms.” The court noted that, while the independent standard of care exception to the economic loss doctrine is usually based upon the existence of a special relationship, a standard of care set forth in a statute was also independent of the contract terms. The same can be true of administrative rules, such as the Oregon Building Code. The plaintiffs successfully argued that the Oregon Building Code set forth a standard of care in alleging that part of its purpose is to protect people from substandard construction and its effects. Plaintiffs had stated a claim of negligence per se, and, through retention of an expert who would testify that violations of the Oregon Building Code caused the property damage to the house, had shown an issue of material fact. Therefore, the court reversed the trial court’s grant of summary judgment to defendants and remanded for consideration of the negligence claim.

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Pennsylvania

Case Law

1. In ***Zimmerman v. Harrisburg Fudd I, L.P.***, 2009 PA Super. 2002, 984 A.2d 497, the Superior Court of Pennsylvania, in a case of first impression, ruled that under the Contractor and Subcontractor Payment Act (CASPA), 73 Pa. Cons. Stat. §§ 501–516, a contractor was entitled to recover both attorney fees and expenses incurred to collect money owed during the post-judgment collection period. The contractor obtained a judgment before a board of arbitrators against the owner consisting of the contractor’s entire contract claim plus CASPA interest, penalties and attorney fees. Post-award, the contractor incurred additional attorney fees and moved for post-award interest, penalties and the additional attorney fees. The Court of Common Pleas for Dauphin County denied the contractor’s motion for post-award interest, penalties and fees. On appeal, the Superior Court ruled that the trial court erred in denying post-award statutory interest, penalties and attorney fees and found that the contractor was the “substantially prevailing party” as a matter of law because it was awarded its entire claim. Further, the Superior Court ruled that the interest provision of CASPA is an exception to the statute that governs the post-award interest rate in that CASPA mandates the continuation of statutory interest post default until payment is made. As such, the Superior Court vacated the trial court’s order and remanded for proceedings to determine the reasonable attorney fees and expenses incurred during the collection-of-judgment and collection-of-fees periods.

2. In ***U.S. for the Use of Pioneer Construction Co. v. Pride Enterprises, Inc.***, No. 3:CV-07-0994 (M.D. Pa. Nov. 27, 2009), the federal district court for the Middle District of Pennsylvania denied a contractor’s summary judgment motion where the subcontractor executed and submitted partial releases with certain partial payment requests. In finding that there was a question of fact pertaining to the interpretation of the partial releases, the court ruled that the parties’ actions during the course of the project, by failing to require a release to accompany the first three payments and encouraging Pioneer to prepare a delay claim, supported a conclusion that the parties did not intend the release clause to bar future delay claims. In addition, the court adopted the reasoning of the Eastern District of Pennsylvania in ***Joseph P. Sulzbach, Inc. v. Cottman Mechanical Contractors, Inc.***, No. Civ. A. 92-4378 (E.D. Pa. Dec. 23, 1993), as well as the Courts of Appeals for the Fifth, Ninth, Eleventh, and District of Columbia Circuits, and held that subcontractors could seek and recover delay damages under a federal Miller Act payment bond.

3. In *Excavation Technologies, Inc. v. Columbia Gas Co. of Pennsylvania*, 985 A.2d 840 (Pa. 2009), the Supreme Court of Pennsylvania held that a utility company was not liable for the economic harm it caused an excavator by inaccurately marking and failing to mark locations of gas lines around a work site. Appellant excavator sued the utility company under a theory of negligent misrepresentation, claiming that the utility company failed to comply with its statutory duties under Pennsylvania's One Call Act. 73 Pa. Stat. § 177. Appellee utility company argued that the economic loss doctrine, which generally bars recovery in negligence actions for injuries that are solely economic, precluded liability in this instance. The trial and Superior Courts agreed. Appellant argued that the recognized exception for claims of negligent misrepresentation under Section 552 of the Restatement and as set forth in *Bilt-Rite Contractors, Inc. v. Architectural Studio*, 581 Pa. 454, 866 A.2d 270 (Pa. 2005), applied because Appellant utility company enjoyed an economic benefit from providing accurate information about the location of its underground lines. In declining to extend the *Bilt-Rite* exception and affirming the Superior Court's decision, the Pennsylvania Supreme Court held that the legislature never intended for utility companies to be held liable for economic harm caused by an inaccurate response under the One Call Act because it did not provide a private cause of action for economic losses. In addition, the Supreme Court found that the relationship between utilities and contractors bore no resemblance to the architect-contractor relationship discussed in *Bilt-Rite*. The Supreme Court further held that excavators, not utilities, retained the duty to identify the precise location of facilities.

4. In *Sloan Co.v. Liberty Mutual Insurance Co.*, No. 07-5325 (E.D. Pa. Aug. 25, 2009), the federal district court for the Eastern District of Pennsylvania ruled that a subcontractor could recover under a surety bond despite specific language that the surety referenced as a "pay-if-paid" defense. Subcontractor Sloan brought an action against surety Liberty Mutual Insurance Company, alleging breach of contract of a surety bond, when the general contractor failed to pay Sloan for drywall and carpentry work. The contract contained the following payment clause: "Final payment [to the Subcontractor] shall be made within thirty (30) days after the last of the following to occur, the occurrence of all of which shall be conditions precedent to such final payment: . . . (6) Contractor shall have received final payment from the owner for the Subcontractor's Work" The surety pointed to the "condition precedent" language in the clause and argued that the language constituted a "pay-if-paid" provision; thus, according to the surety, there was no obligation to pay Sloan because the owner had not yet paid the general contractor. Sloan argued that the clause did not shift the burden of non-payment by the owner to the contractor and was nothing more than a "pay-when-paid" timing mechanism. The court agreed, holding that the surety, although it may step into the shoes of the general contractor, was not entitled to assert that a pay-if-paid clause barred recovery under the bond.

5. In *United States ex rel. SimplexGrinnell, LP v. Aegis Ins. Co.*, No. 1:08-CV-01728 (M.D. Pa. Jan. 14, 2009), the federal district court for the Middle District of Pennsylvania declined to expand Pennsylvania's Bad Faith Statute, 42 Pa. Cons. Stat. Ann. § 8371, to encompass surety bonds. The court ruled that a claimant subcontractor failed to state a claim for bad faith because the Miller Act payment bond did not constitute an insurance policy. In so holding, the court recognized critical distinctions between insurance and suretyship.

Legislation

1. **73 P.S. §§ 517.1–517.19, The Pennsylvania Home Improvement Consumer Protection Act.** The Act took effect on July 1, 2009, and applies to most contractors who own or operate home improvement businesses and/or engage in the improvement of private residences. The Act requires contractors to register with the Bureau of Consumer Protection Department of the Pennsylvania Attorney General's Office. The Act also provides that no home improvement contract shall be valid or enforceable against an owner unless it complies with the

specific requirements of Section 517.7 of the Act. Section 517.7 requires, among other things, disclosure of the contractor's identity and registration numbers, disclosure of project start and end dates, a description of the scope of work, materials, and specifications, identification of subcontractors on the project, disclosure of total price, and the inclusion of specific contractual provisions. In addition, a home improvement contract is voidable by the owner if it contains a hold harmless clause, confession of judgment clause, waivers of building or safety code requirements, terms that award attorney's fees to the contractor, and other clauses. Contractors who fail to comply with the Act are subject to Pennsylvania's Unfair Trade Practices and Consumer Protection Law and may face an award of treble damages, costs and attorneys' fees. The Act excludes contracts relating to new home construction.

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Rhode Island

Case Law

1. The case of ***DePasquale Building & Realty Company v. Rhode Island Board of Governors For Higher Education***, M.P. No. PC07-6393 (R.I. Sup. Ct. June 29, 2009), available at <http://www.courts.ri.gov/superior/pdf/07-6393-12-11-09.pdf>, involved a claim by a general contractor against an owner for direct and consequential damages (including delay damages) under revised forms of American Institute of Architects Contract A101 (1997 edition), incorporating the Standard Form of General Conditions, AIA-A201(1997 edition). This award was made notwithstanding the "mutual waiver of consequential damages" found at paragraph § 4.3.10 of AIA A201 (1997 edition). In a highly unusual ruling, the Arbitrator found that the combination in the contract of a liquidated damages provision and the mutual waiver of consequential damages provision was fundamentally unfair to the contractor and amounted to an adhesion contract which was void as against public policy. On a motion to confirm the award, the Superior Court found that the arbitrator had exceeded his power by manifestly disregarding agreed-upon contractual provisions and that the contract was not unenforceable as a matter of law. The court noted that the general contractor was a sophisticated and experienced construction company, vacated the damages award and confirmed an alternative damages award of \$327,000, based on the contractual provisions. This matter is currently on appeal to the Rhode Island Supreme Court.

Legislation

1. **Rhode Island General Laws § 37-24-1 et seq., The Green Buildings Act.** The Green Buildings Act, a collaboration between builders, developers, architects, engineers, legislators, and environmentalists, was enacted in November 2009 to promote sustainability in new construction. This Act adopts the Leadership in Energy and Environmental Design (LEED) certified standard of the United States Green Building Council for all new major public facility projects. The Department of Administration has been authorized to promulgate regulations to enforce the Act and to create a green buildings advisory committee to provide advice on the Act's implementation.

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South Carolina

[Editor's Note: The 2008-2009 Construction Law Update mistakenly did not include the update from South Carolina. Accordingly, the decisions from 2008 are included in this edition.]

Case Law – Judicial Decisions

1. Arbitration Clause Enforceable in Declaratory Judgment Action

In ***Stecker v. TALX Corp.***, No. 4582, 2009 WL 1917205 (S.C. Ct. App. July 1, 2009), Plaintiff TALX Corp. (“TALX”) purchased Net Profit, Inc. (“Net Profit”) from defendant Stecker in October 2004. Net Profit provided tax consulting services to businesses and helped to obtain federal tax credits. The acquisition agreement included an arbitration clause which provided that all disputes arising from the acquisition would be resolved through arbitration, with the exception that any party could seek damages or injunctive or other equitable relief for disputes related to indemnification either through the courts or through arbitration. After the acquisition, many of Net Profit’s clients sought refunds for tax credits the IRS had disallowed.

In November 2006, Stecker brought a demand for arbitration in Missouri for amounts due from TALX for the acquisition. The following month, Stecker filed a declaratory judgment action in South Carolina seeking to determine whether TALX was entitled to indemnification for the tax credit refunds under the acquisition agreement. In January 2007, TALX filed counterclaims in the Missouri arbitration seeking indemnification for the refunds. In July 2007, upon Stecker’s motion, the South Carolina trial court stayed TALX’s counterclaims and issued a temporary injunction prohibiting the arbitrators from hearing the counterclaims.

The South Carolina Court of Appeals reversed. As an initial ruling, the Court found that Stecker’s declaratory judgment action was *not* beyond the bounds of the contract’s arbitration clause, as it was an action for the legal remedy of contract construction rather than one for damages or equitable relief. By seeking a determination that required interpretation of contractual language, Stecker raised a question of law which precluded the trial court from hearing the action under the parties’ arbitration clause.

The Court then addressed TALX’s contention that the trial court erred in staying TALX’s counterclaims. The Court found that the acquisition agreement contained clear and unambiguous language allowing the parties to elect to arbitrate disputes involving indemnification.

2. Modification of Arbitration Award Must Involve Merits of Action

Osborne Elec., Inc. v. KCC Contractor, Inc., 2008-UP-296 (S.C. Ct. App. June 5, 2008) involved a breach of contract action between general contractor and subcontractor in arbitration wherein the arbitrator awarded damages and attorney’s fees to the subcontractor. The arbitrator’s finding stated the subcontractor was “entitled to \$165,406.81 for its contract balances including change orders after reduction for the appropriate back charges in favor of [the general contractor].” The general contractor sought modification of the award in the circuit court, based on a “miscalculation of figures or an evident mistake” in the award, pursuant to S.C. Code Ann. § 15-48-140 (a)(1) (2005). The general contractor’s assertion was that its contract with the subcontractor provided that the general contractor could recover attorney’s fees and expenses incurred in the prosecution or defense of any action “by reason of any other breach or failure by the subcontractor.” Thus, because the arbitrator’s ruling reduced the award after back charges, the arbitrator in essence found the subcontractor was in breach and the general contractor should be entitled to attorney fees under the contract.

The South Carolina Court of Appeals referred to its previous opinion in *Lauro v. Visnapuu*, 570 S.E.2d 551 (S.C. Ct. App. 2002) *cert. denied*, S.C. 2003: “[e]ven if the arbitrator’s decision in this regard were erroneous, it does not constitute an evident miscalculation of figures as envisioned under § 15-48-140. That is, the arbitrator did not commit a mathematical error in computing the total amount of the award.” *Id.* at 556. Similarly, the arbitrator in the instant case did not overlook the back charge issue, but instead determined the general contractor was not entitled to attorney’s fees on the merits. Therefore, the Court held, that S.C. Code Ann. § 15-48-140 (a)(1) did not apply as the code section only allows for modification when the award is imperfect in a manner of form and not when the modification would affect the merits of the controversy.

3. Waiver of Right to Compel Arbitration

In *Forrester v. Penn Lyon Homes, Inc.*, 553 F.3d 340 (4th Cir. 2009), the Plaintiffs filed suit in state court for breach of warranty against Defendant for claims arising out of the construction and installation of a modular home. The Defendant provided the Plaintiffs a “10 Year Manufacturer’s Structural Warranty,” which contained an arbitration clause requiring the parties to submit all disputes arising under it to arbitration. The Defendant removed the litigation to federal court despite the arbitration clause. Over the course of 18 months, the Defendant fully participated in discovery, filed numerous pretrial motions, engaged in multiple settlement and mediation proceedings, and filed its proposed jury instructions, verdict forms, voir dire, and exhibit and witness lists in anticipation of the scheduled trial. The Defendant then filed a motion to compel arbitration and stay court proceedings after settlement negotiations failed and the Plaintiffs moved for a scheduling conference.

The district court denied the Defendant’s motion to compel arbitration and stay judicial proceedings. The court found that the Defendant had defaulted its right to arbitration, reasoning that the Complaint itself refers to the structural warranty and that the Defendant waited for two years and until the completion of almost all pretrial preparations and filings to request arbitration. The Defendant subsequently filed an interlocutory appeal.

The Court of Appeals noted that, pursuant to the Federal Arbitration Act, a party may lose its right to a stay of court proceedings in order to arbitrate if it is “in default in proceeding with such arbitration.” 9 U.S.C. § 3 (2006). The Court acknowledged the strong federal policy favoring arbitration, but noted that a party will default its right to arbitration if it “so substantially utiliz[es] the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay.” *Maxum Founds, Inc. v. Salus Corp.*, 779 F.2d 974, 981 (4th Cir. 1985).

The Court found that the record revealed the Defendant was on notice of the structural warranty claim long before it moved to compel arbitration. The Plaintiffs referred to the warranty several times during litigation, including in their complaint, among their discovery responses, in their opposition to summary judgment, and in their proposed verdict form. However, the Defendant waited until the eve of trial, and after two years of litigation, to file its motion to compel arbitration.

The Defendant’s use of the litigation process caused the Plaintiffs actual prejudice. Specifically, it required the Plaintiffs to expend significant time and money responding to the Defendant’s motions and preparing for trial, permitted the Defendant to defeat several of the Plaintiffs’ claims on summary judgment, and forced the Plaintiffs to reveal their trial strategy. Further, before it moved to compel arbitration, the Defendant had the opportunity to witness how a jury might respond to a claim under the structural warranty in another lawsuit in the same district court, where a jury found the Defendant liable to a homeowner under the warranty at issue in this case. The Court noted that allowing the Defendant to fully participate in litigation and delay assertion of a contractual right to compel arbitration until the eve of trial defeats the

reasons behind the federal policy favoring arbitration. Accordingly, the Court affirmed the district court's ruling that the Defendant defaulted its right to arbitration.

4. Arbitration Agreement Unenforceable Where Specified Forum is No Longer Available

In *Grant v. Magnolia Manor-Greenwood, Inc.*, No. 26668, 2009 WL 1678204 (S.C. June 15, 2009), the Plaintiff and Defendant entered into an arbitration agreement specifying the National Health Lawyers Association, now the American Health Lawyers Association (AHLA), as the arbitration administrator. The Plaintiff filed a claim against Defendant for survival, wrongful death, and loss of consortium. The Defendant moved to compel arbitration and stay the judicial proceedings, which the Plaintiff opposed, arguing that the new AHLA rules forbade the AHLA from administering any arbitral proceedings for personal injury claims pursuant to a pre-dispute agreement.

The trial court denied the Defendant's motion to compel arbitration even though the Defendant argued that Section 5 of the Federal Arbitration Act (Section 5) allows for the appointment of a replacement arbitrator when the designated arbitrator becomes unavailable. In reviewing the arbitration agreement, the court found that the AHLA had become unavailable as an arbitrator, found that the designation of the AHLA as arbitrator was a material term of the agreement, and declined to appoint a new arbitrator because there would no longer be a meeting of the minds between the parties.

The Supreme Court of South Carolina acknowledged a dispute in the case law as to whether Section 5 applies in cases where the parties have specified an exclusive arbitral forum that is no longer available. Some courts allow for the appointment of new arbitrators when the named arbitrator refuses to or cannot act. See *Ex Parte Warren*, 718 So.2d 45 (Ala. 1998). On the other hand, other jurisdictions do not apply Section 5 in cases where a specifically designated arbitrator becomes unavailable. See *In re Salomon Inc. Shareholders Derivative Litig.*, 68 F.3d 554 (2d Cir. 1995). The Court did not adopt either rule, though it found "great merit" in the rule expressed in the Second Circuit.

The Court, however, found that the choice of forum is an integral part of the agreement where the designation of a particular arbitral forum has implications that may substantially affect the substantive outcome of the resolution. Accordingly, the Court held that the parties's arbitration agreement was unenforceable.

5. Order Dismissing Action and Allowing Parties to Pursue Arbitration is Immediately Appealable

In *Widener v. Fort Mill Ford*, 674 S.E.2d 172 (S.C. Ct. App. 2009), the Plaintiff filed a claim against a car dealership alleging violations of the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act and the Unfair Trade Practices Act. The Defendant moved to dismiss or stay the proceedings and to compel arbitration. The trial court held that the arbitration agreement was enforceable pursuant to the Federal Arbitration Act and dismissed the action.

Prior to this case, South Carolina courts had not specifically addressed the issue of whether an order dismissing an action without prejudice and allowing the parties to pursue arbitration is immediately appealable. The Court of Appeals' analysis involved a review of the United States Supreme Court decision of *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), holding that an order dismissing an action with prejudice and directing that the dispute be resolved by arbitration is final and immediately appealable. The *Green Tree* Court added, "[h]ad the District Court entered a stay instead of a dismissal in this case, that order

would not be appealable.” *Id.*, at 87 n.2. Further, the Second and Ninth Circuits have held that orders dismissing actions without prejudice and compelling arbitration are immediately appealable. See *Salim Oleochemicals v. M/V Shropshire*, 278 F.3d 90 (2d Cir. 2002); *Interactive Flight Techs. v. Swissair Swiss Air Transp. Co., Ltd.*, 249 F.3d 1177 (9th Cir. 2001).

The Court of Appeals distinguished *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 606 S.E.2d 752 (S.C. 2004), where the South Carolina Supreme Court held that an order compelling arbitration and staying the remaining claims is not immediately appealable. The trial court’s dismissal in this case directly prejudices the Plaintiff because any future action will be barred by the statute of limitations. Accordingly, the Court held the trial court’s order is immediately appealable.

6. Complaint Is Irrelevant in Determining Whether Arbitrator Manifestly Disregarded Law

In *Gissel v. Hart*, 676 S.E.2d 320 (S.C. 2009), the Plaintiffs brought an action against the mobile home manufacturer and its employees alleging negligence, fraud, and breach of contract with fraudulent intent. The employees, who were individually named as Defendants, filed a motion to dismiss and moved to refer the matter to arbitration. The trial court compelled arbitration. The arbitrator awarded the Plaintiffs actual, consequential and incidental damages against the employees jointly and severally and awarded punitive damages against each employee individually.

The employees appealed to the trial court and moved to vacate the arbitrator’s award, arguing there was no evidence presented to the arbitrator that the employees acted outside the scope of their employment. The trial court denied the motion to vacate and confirmed the arbitrator’s award.

On appeal, the Court of Appeals vacated the arbitrator’s award when it found the Plaintiffs’ complaints did not clearly assert claims against the employees in their individual capacities, thus there was no basis for awarding punitive damages. The Court of Appeals, however, did not rule specifically on any of the four statutory grounds on which an arbitrator’s award may be vacated. See 9 U.S.C.A. § 10(a)(1)-(4) (West Supp. 2006). Instead, the court noted the employees’ argument that the arbitrator exceeded his powers in awarding damages against them individually and then looked to the allegations of the complaint to determine whether the award was proper.

South Carolina jurisprudence recognizes that an arbitration award is generally conclusive and will be vacated only under narrow, limited circumstances. *Pittman Mortgage Co. v. Edwards*, 488 S.E.2d 335, 337 (S.C. 1997). Factual and legal errors committed by arbitrators do not constitute an abuse of powers, and a court is not required to review the merits of a decision so long as the arbitrators do not exceed their powers. *Id.*

The Supreme Court of South Carolina found that the complaint is irrelevant to the determination of whether the arbitrator manifestly disregarded the law. Most importantly, the employees did not dispute that they were named as defendants, because they specifically filed their own motions to dismiss and moved to have the matter sent to arbitration, and did not contend they should be dismissed as parties at that time. Accordingly, the employees should not be permitted to complain on appeal. See *Erickson v. Jones St. Publishers, LLC*, 629 S.E.2d 653 (S.C. 2006) (party may not complain on appeal of error which his own conduct induced). In this case, the employees were clearly named as individual defendants and the Court of Appeals erred in looking to the complaint to determine otherwise.

7. Scope-of-Work Provisions Required Contractor to Complete Work on “Per Building” Basis

In *Laser Supply & Servs., Inc. v. Orchard Park Assocs.*, 676 S.E.2d 139 (S.C. Ct. App. 2009), Laser entered into a contract with Orchard Park Apartments for exterior wood siding repair and replacement. After various disagreements, Laser filed an action for breach of contract, along with several other causes of action against Orchard. Orchard responded with a breach of contract counterclaim and several other counterclaims. The trial court granted Orchard’s summary judgment motions and entered judgment against Laser on all of its claims. Laser appealed the ruling that the parties’ contract called for completion of work on a “per building” basis, rather than completion of work when the specified quantities of materials had been exhausted.

The siding contract’s language concerning the scope of work is incapable of more than one meaning, when viewed objectively by a reasonable person who has examined the context of the entire contract and is aware of the practices and terms as generally understood in the construction industry. See *Hawkins v. Greenwood Dev. Corp.*, 493 S.E.2d 875 (S.C. Ct. App. 1997).

Exhibit I of the parties’ contract includes a payment schedule allowing invoices to be submitted only after the completion of work on specified buildings in the Orchard’s apartment complex. Exhibit I also limits the quantities of materials that may be used for the work and requires Orchard’s approval of a change order prior to Laser’s use of quantities exceeding those limits. Further, Exhibit I states the contract is a “unit price/not to exceed” contract and all repairs shall be itemized by building and invoiced at the scheduled price.

Reading the contract as a whole, the only reasonable interpretation of the scope-of-work provisions is that the parties intended for the remediation work to be performed on all of the buildings listed in the payment schedule. Further, if the parties had intended for completion of work to be reached when the specified quantities of materials had been exhausted, there would have been no logical reason for them to have included language addressing change orders for use of quantities exceeding specified limits.

8. Duty to Defend if Complaint Alerts Insurer to Possibility of Coverage

In *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 677 S.E.2d 574, 579 (S.C. 2009), Landowner brought gross negligence and “taking or inverse condemnation” causes of action against municipality and county. After summary judgment was granted for the city on gross negligence and taking but denied on inverse condemnation, city’s insurer withdrew its defense, claiming that inverse condemnation actions were specifically excluded from the city’s liability insurance policy.

After the city retained its own counsel and filed a second summary judgment motion as to the inverse condemnation, the landowner raised a civil conspiracy issue, claiming city and county officials conspired to have the county “flag” his property to prevent landowner from selling the property. Summary judgment was granted as to inverse condemnation and the civil conspiracy cause of action was dismissed due to sovereign immunity. Thereafter, this declaratory judgment action was brought by the city against its insurer to recover defense costs from the previous lawsuit incurred after the insurer withdrew its defense.

The Court held that, although the landowner failed to plead the elements of civil conspiracy, the insurer had a continuing duty to defend from the cause of action even after the negligence and takings actions were disposed. Although a civil conspiracy claim was not specifically identified, the facts alleged in the complaint were sufficient to alert the insurer of the

possibility of such an action, thereby creating a possibility of coverage. “Although the determination of an insurer’s duty to defend is dependent upon the insured’s complaint, an analysis of this duty involves the allegations of the complaint and not the specifically identified causes of action. Moreover, an insurer’s duty to defend may arise from facts outside of the complaint that are known to the insurer.”

9. Damage to Pool Not Covered Under Water Damage Exclusion and Anti-Concurrent Causation Clause of Homeowners’ Policy

In *S.C. Farm Bureau Mut. Ins. Co. v. Durham*, 671 S.E.2d 610 (S.C. 2009), the homeowners’ insurer filed a declaratory judgment action seeking a declaration that its policy did not cover damage to the homeowners’ swimming pool after the homeowners emptied their pool and it “floated” out of its foundation and rose from the ground, causing damage to the pool and deck. The homeowners’ expert explained that pressure from underground water, the presence and depth of which varies from place to place, will result in a pool “floating” if the pool is drained. “Floating” can be avoided by unscrewing a plug in the drain system, which allows the ground water that is higher than the base of the pool to enter and relieve pressure upon the pool. The trial court found that the policy covered the damage to the pool and the insurer appealed. The primary issue on appeal is what “caused” the homeowners’ pool to “float.”

The trial court noted that the term “cause” is not defined in the homeowners’ policy and acknowledged that “[w]here a term is not defined in an insurance policy, it is to be defined according to the usual understanding of the term’s significance to the ordinary person.” *State Farm Fire & Cas. Co. v. Barrett*, 530 S.E.2d 132 (S.C. Ct. App. 2000). The trial court, however, incorrectly defined the term “cause” in construing the policy. “Cause” in the context of an insurance policy and in the usual understanding of the term’s significance to the ordinary person is not the same as legal causation.

The Supreme Court of South Carolina then defined “cause” as “[s]omething that produces an effect, result, or consequence” and noted that “but for” the underground water pressure, the damage would not have occurred. Accordingly, the underground water pressure was a “cause” of the damage.

The Court held that, under the water damage exclusion and anti-concurrent causation clause of the homeowners’ policy, the loss was excluded from coverage because the underground water pressure at least one cause of the damage to the homeowners’ pool. The water damage exclusion provided that loss was excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss, and though the underground water pressure was not the sole cause of the loss or even the efficient proximate cause, it was a cause of the loss and so, the exclusion applied, and nothing in the language of the exclusion excluded an existing condition as a cause.

10. Homeowners Owed Duty of Care to General Contractor and Not to Subcontractor

In *Lanier Constr. Co., Inc. v. Bailey & Yobs, Inc.*, No. 4580, 2009 WL 1918231 (S.C. Ct. App. July 1, 2009), a subcontractor brought an action against its general contractor and the homeowners after its cement truck fell into the homeowners’ septic tank while making a cement delivery ordered by the general contractor. Though the homeowner never marked the location of the septic tank as offered, the general contractor knew its location and worked around the area for three months. The trial court granted the homeowners’ motion for summary judgment, finding the homeowners were not liable. The subcontractor and general contractor appealed the decision, arguing that the court improperly determined the homeowners did not owe the subcontractor a duty of care and that evidence supported a finding that the homeowners

voluntarily assumed the duty to make the premises safe by agreeing to mark the septic tank's location.

The trial court, citing *Sides v. Greenville Hosp. Sys.*, 607 S.E.2d 362 (S.C. Ct. App. 2004), found that “[u]nder a premises liability theory, a contractor generally equates to an invitor and assumes the same duties that the landowner has, including the duty to warn of dangers or defects known him but unknown to others.” Further, the court held that the general contractor owed the duty to warn of the latent condition because the subcontractor was a business invitee of the same.

The Court of Appeals found that the homeowners had a duty to warn the general contractor of the latent danger and, likewise, the general contractor had the same duty to warn the subcontractor, its invitee. Further, the homeowners discharged their duty to warn the general contractor when the parties discussed the septic tank's location. The subcontractor was injured because its invitor, the general contractor, failed to perform its duty to warn of latent dangers. Accordingly, the homeowners did not owe the subcontractor a duty to warn because they performed their duty by informing their general contractor of the latent danger posed by the septic tank.

11. Unsigned Certificate of Insurance Does Not Constitute Documentation of Insurance

Barton v. Higgs, 674 S.E.2d 145 (S.C. 2009) involved a November 22, 2003 compensable injury to the plaintiff when he fell from a roof. At the hearing before the single commissioner, the general contractor presented a Certificate of Insurance (Certificate) from the subcontractor demonstrating a workers' compensation policy with coverage dates effective September 13, 2003 through September 13, 2004. The Certificate, however, was not signed in the blank listed for “Authorized Representative.” Though the subcontractor testified that he paid for the policy, coverage was never bound, resulting in the subcontractor not being insured on the date of the accident. However, the single commissioner ruled that liability should be transferred to the South Carolina Employers' Fund (Fund) because it found that the subcontractor had attempted in good faith to obtain workers' compensation insurance and presented the Certificate to the general contractor, who in turn relied in good faith.

The Court analyzed Section 42-1-415(A) of the Workers' Compensation Act, which creates a narrow exception to the rule which provides that the general contractor may transfer the responsibility to pay benefits to the Fund. In order to transfer liability, the higher tier contractor “must collect documentation . . . on a standard form acceptable to the commission.” S.C. Code Ann. § 42-1-415(B) (2006). The workers' compensation commission, however, has promulgated a regulation providing that a Certificate of Insurance “shall serve as documentation of insurance” and that the Certificate “must be dated, signed, and issued by an authorized representative of the insurance carrier for the insured.” S.C. Code Ann. Regs. 67-415 (2007).

The Court found that the general contractor could have easily discovered the absence of the signature and determined that the subcontractor did not have a valid policy. Accordingly, the general contractor is not entitled to transfer liability to the Fund because the general contractor failed to meet the requirements set forth in the regulation when it failed to collect a signed Certificate.

12. Incomplete Certificate of Insurance Does Not Constitute Proper Documentation

Hopper v. Terry Hunt Constr., No. 26665, 2009 WL 1679934 (S.C. Jun. 15, 2009) involved another incomplete certificate of insurance dispute. On February 19, 2004, the Plaintiff

suffered an injury while working for a subcontractor and sought workers' compensation benefits from the subcontractor and general contractor. Prior to construction, the subcontractor presented a Certificate of Insurance (Certificate) indicating that the subcontractor had a workers' compensation policy. The Certificate, however, was effective from January 1, 2003 through December 31, 2003. Further, the "Description of Operation/Locations" box was left blank and the Certificate contained no information regarding the coverage that the policy provided, the deductible amount, or the project to which the policy applied. The single commissioner found that the employee suffered a compensable injury, but ruled that the subcontractor and general contractor could not shift liability to the South Carolina Employers' Fund (Fund) because the Certificate did not indicate the subcontractor had coverage.

A higher tier contractor is generally considered the statutory-employer of an employee of a lower tier contractor and remains liable to pay benefits to an employee if he sustains a compensable injury. S.C. Code Ann. § 42-1-400. However, liability may be transferred from the higher tier contractor to the Fund after the higher tier contractor has properly documented the lower tier contractor's claim that it retains workers' compensation insurance. See *Barton v. Higgs*, 674 S.E.2d 145 (S.C. 2009).

The Supreme Court of South Carolina held that an incomplete Certificate of Insurance does not constitute proper documentation and that a general contractor may not rely upon a Certificate showing an expired workers' compensation policy to show "documentation" of the subcontractor's workers' compensation insurance.

12. "Engaged to Perform Work" Means Each Time a Subcontractor is Actually Hired

Hardee v. McDowell, 673 S.E.2d 813 (S.C. 2009) involved workers' compensation coverage issues. On March 11, 2002, the subcontractor presented the general contractor with a Certificate of Insurance (Certificate) demonstrating a workers' compensation policy with coverage dates effective January 30, 2002 through January 30, 2003. The subcontractor worked on various projects for the general contractor throughout the year, but was never required to demonstrate further proof of insurance. In the summer of 2002, the subcontractor began working on the Socastee library project. On September 6, 2002, the Plaintiff was totally and permanently disabled when he fell from scaffolding while working on the library project. The day before the accident, however, the subcontractor's insurance was cancelled; neither the subcontractor nor the general contractor was aware of the cancellation. The workers' compensation commissioner found the general contractor liable for paying the Plaintiff's benefits. Further, the general contractor was not allowed to transfer liability because it failed to request or obtain proof of insurance, pursuant to S.C. Code Ann. § 42-1-415(B).

The issue in this case is at what point in time a contractor must obtain proof of insurance from a subcontractor. Section 42-1-415 provides that such proof must be obtained when the subcontractor is "engaged to perform work." The Court reviewed *S.C. Uninsured Employers' Fund v. House*, 602 S.E.2d 81 (S.C. Ct. App. 2004), which stands for the proposition that a contractor does not have a continuing duty to check the validity of the subcontractor's insurance status after the subcontractor is "engaged to perform work." The Court of Appeals, however, did not clearly define the phrase "engaged to perform work." As a result, the Supreme Court of South Carolina held that, based on the express language of the statute, "engaged to perform work" means each time a subcontractor is actually hired to perform work. Thus, if a contractor enters into a contract to hire a subcontractor for one job in January and then enters into another contract to hire the subcontractor for a second job in February, the general contractor should verify that the subcontractor still has insurance coverage at the time of the February hiring. Although then general contractor checked for proof of insurance at one point in early 2002, it did

not check for proof of insurance at the time it actually hired the subcontractor and, thus, does not meet the requirements to transfer liability.

The general contractor argued that a check at the time the Socastee library project began would not have shown a lack of coverage since the subcontractor's policy was cancelled after the date of hire. However, if the contractor had obtained a Certificate of Insurance at the time of hiring for the library project and then coverage was subsequently terminated unbeknownst to the parties, the general contractor would have been enabled to transfer liability to the Fund, and the purpose of the statute would have been served.

13. Arbitration Clause Enforceable Even if Validity of Contract Is in Question

In *New Hope Missionary Baptist Church v. Paragon Builders, LLC*, 667 S.E.2d 1 (S.C. Ct. App. 2008), a church hired Paragon Builders, LLC ("Paragon") of Orangeburg, South Carolina to act as a "chief construction advisor" for the construction of a new church facility in North Carolina. The parties executed a two-page document entitled "Construction Management Agreement," and the church agreed to pay Paragon a non-refundable \$25,000 fee upon the contract's execution. Article 2 of the contract included an unambiguous and binding arbitration clause.

At some point thereafter, the church filed a declaratory judgment action seeking to determine the existence, validity, and enforceability of the contract. The church's complaint alleged several grounds advocating the invalidity of the contract, most notably including a contractual ambiguity as to the nature of Paragon's duties and a lack of authority of the church's signatories to the contract.

The trial court denied Paragon's motion to dismiss and compel arbitration based upon the proposition that arbitration could not be compelled until the existence of an agreement and validity of the contract was determined. The South Carolina Court of Appeals reversed. The Court determined the church's claims amounted to an assertion of fraud in the inducement or ineffective assent to the contract. The Court then identified a number of United States Supreme Court and South Carolina Supreme Court cases which held that an arbitration clause remains enforceable when fraud in the inducement is alleged as to the entire contract but not to the arbitration clause itself. Specifically, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), held that the language of the Federal Arbitration Act did not permit the court to determine the validity of an arbitration clause if the making of the clause itself was not called into question. *S.C. Pub. Serv. Auth. v. Great Western Coal, Inc.*, 312 S.C. 559, 437 S.E.2d 22 (1993) applied the *Prima Paint* decision to South Carolina law.

14. Modification of Arbitration Award Must Involve Merits of Action

In *Osborne Elec., Inc. v. KCC Contractor, Inc.*, 2008-UP-296 (S.C. Ct. App. June 5, 2008), a breach of contract action between general contractor and subcontractor resulted in the arbitrator awarding damages and attorney's fees to the subcontractor. The arbitrator's finding stated the subcontractor was "entitled to \$165,406.81 for its contract balances including change orders after reduction for the appropriate back charges in favor of [the general contractor]." The general contractor sought modification of the award in the circuit court, based on a "miscalculation of figures or an evident mistake" in the award, pursuant to S.C. Code Ann. § 15-48-140 (a)(1) (2005). The general contractor's assertion was that its contract with the subcontractor provided that the general contractor could recover attorney's fees and expenses incurred in the prosecution or defense of any action "by reason of any other breach or failure by the subcontractor." Thus, because the arbitrator's ruling reduced the award after back charges,

the arbitrator in essence found the subcontractor was in breach and the general contractor should be entitled to attorney fees under the contract.

The South Carolina Court of Appeals referred to its previous opinion in *Lauro v. Visnapuu*, 570 S.E.2d 551 (S.C. Ct. App. 2002) *cert. denied*, S.C. 2003: “[e]ven if the arbitrator’s decision in this regard were erroneous, it does not constitute an evident miscalculation of figures as envisioned under § 15-48-140. That is, the arbitrator did not commit a mathematical error in computing the total amount of the award.” *Id.* at 556. Similarly, the arbitrator in the instant case did not overlook the back charge issue, but instead determined the general contractor was not entitled to attorney’s fees on the merits. Therefore, the Court held, that S.C. Code Ann. § 15-48-140 (a)(1) did not apply as the code section only allows for modification when the award is imperfect in a manner of form and not when the modification would affect the merits of the controversy.

15. AAA Lacks Jurisdiction When One Party Denies Arbitration Agreement

In *Colony United Bus. Brokers, Inc. v. Price*, 2008-UP-713 (S.C. Ct. App. Dec. 16, 2008), the Defendant entered into a listing agreement with the Plaintiff for the sale of Defendant’s business. After a disagreement between the parties, the Plaintiff instituted an arbitration action with the AAA to arbitrate the issue of whether the Plaintiff was owed commission for producing a buyer. The Defendant argued the AAA lacked jurisdiction because no arbitration agreement existed between the parties. However, the AAA proceeded with arbitration and awarded the Plaintiff a commission along with attorney’s fees. The Defendant subsequently filed a motion to vacate the arbitration award. The trial court affirmed the arbitration award and granted judgment in favor of the Plaintiff. The Defendant then filed this appeal.

An arbitrator does not have jurisdiction to enter an arbitration award in favor of one party if the opposing party disputes the existence of an agreement to arbitrate. *See MBNA Am. Bank v. Christianson*, 659 S.E.2d 209 (S.C. Ct. App. 2008). When this happens, the party desiring arbitration must petition the trial court to compel arbitration because it is the duty of the courts, rather than the arbitrator, to determine whether such an agreement exists. *Id.*

The Court of Appeals found the AAA was without jurisdiction as soon as Defendant objected to the lack of an arbitration agreement and that the trial court committed reversible error when it did not grant the motion to vacate the arbitration award.

16. Warranty of Workmanlike Service Not Applicable to Builder/Owner

In *Smith v. Breedlove*, 661 S.E.2d 67 (S.C. 2008), a homebuilder without prior construction experience built a residence for the use of himself and his immediate family. Throughout the construction of the home, the homebuilder contracted with various contractors to perform varying construction services for the project. During the period of construction, the homebuilder’s name appeared as the owner and general contractor on the building permit application, the permit itself, applications for utility services, the certificate of occupancy, and various other documents where the identification of a contractor was necessary. After construction was completed, the homebuilder and his family moved into the residence and intended to stay there for the remainder of their lives.

Four years later, after a change in their personal circumstances, the homebuilder and his family sold the residence “as is” to a third party. Shortly after moving into the residence, the

new purchaser discovered several construction defects and brought actions for negligence and breach of implied warranty of workmanlike service against the homebuilder. The Circuit Court granted summary judgment for the homebuilder and the Supreme Court affirmed.

As to the implied warranty claim, the Court first rejected the purchaser's argument that a genuine issue of material fact as to the builder's status as a general contractor was sufficient to preclude summary judgment. Instead, the Court stated that the issue was whether the builder was a general contractor *in the business of constructing houses* and whether the home was built *for purposes of sale*. The Court cited prior case law which established the premise that the warranty exists when the purchaser is forced to rely upon the skill of an experienced builder. Because the builder made no such representations to the purchaser as to his skill as a builder or his intention to build the home for future sale, the implied warranty did not apply. The court also emphasized the fact that the purchaser had the opportunity to inspect the home prior to the purchase, and instead relied upon her husband's judgment as to the quality of the construction.

As to the negligence claim, the Court found that foreseeability was the key inquiry in determining liability. It is well-settled law that, in a traditional home construction, it is reasonably foreseeable that there will be future purchasers of the home, and therefore a duty is owed to those purchasers. However, it was uncontested in this case that the builder only intended to build the home for his own family at the time the house was built. Therefore, there were no foreseeable future plaintiffs, no duty was owed, and summary judgment was proper.

17. CGL Coverage Available for Resulting Damage from Subcontractor's Defective Work

In *Auto Owners Ins. Co. v. Newman*, slip op. No. 26450 (S.C. Mar. 10, 2008), Plaintiff filed a claim against general contractor shortly after completion of the construction of the plaintiff's home for breach of contract, negligence, and breach of warranty; alleging defective construction relating to the installation of the stucco siding. Plaintiff's inspector determined that the installation failed to conform to industry standards. As a result the home's framing and exterior sheathing was damaged due to water intrusion seeping through the stucco siding. Plaintiff was awarded \$55,898 in binding arbitration. Following arbitration, general contractor's insurer sought a declaratory judgment to determine its rights under a standard CGL policy.

Trial court determined that the damages were an occurrence and the policy applied. CGL insurer appealed to determine whether the trial court erred in holding that the damages awarded by the arbitrator for negligent construction were covered under the CGL policy.

General contractor's insurer argued that under *L-J v. Bituminous Fire & Marine Ins. Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005), the subcontractor's defective installation of stucco did not cause an "accident" constituting an "occurrence" giving rise to insurance coverage.

The South Carolina Supreme Court's analysis involved a review of *L-J*. The Court stated that in *L-J*, the developer's claim alleging negligent construction causing damage was only to the work product itself, and therefore the claim was for faulty workmanship alone. Accordingly, the Court held that claims for faulty workmanship did not constitute an "occurrence" giving rise to policy coverage because damages to the work product alone could not have been "caused by an accident or by exposure to the same general harmful conditions."

The Court continued its review of the *L-J* decision by noting its analysis of *High Country Assocs. v. New Hampshire Ins. Co.*, 648 A.2d 474 (N.H. 1994) in the *L-J* decision, and noting

the Court's distinction between *L-J* and *High Country*. In *High Country*, a condominium homeowners' association sued the general contractor for negligent construction alleging continuous moisture damage as a result of a subcontractor's defective installation of siding. The moisture seeping into the building resulted in widespread decay of the interior and exterior walls. The Court noted that this claim was not simply a claim for faulty workmanship seeking damages to repair the siding, but rather was a claim seeking damages to repair the widespread decay of the walls.

The *L-J* decision attempted to distinguish the claim in *L-J* with that claim in *High Country* by stating that claim in *L-J* was "a claim for faulty workmanship versus a claim for damage to work product caused by the negligence of a third-party," as in *High Country*. The Court in *L-J* determined that the claim in *High Country* could be covered under a CGL policy, while the claim in *L-J* could not be covered.

The Court then clarified its use of the language "third party" in *L-J* as referring to subcontractors who are not a party to the CGL policy between the insurer and the contractor. Therefore, the Court held that the subcontractor's negligent installation of the stucco on plaintiff's home led to an "occurrence" invoking coverage under the CGL policy for the resulting "property damage" to other property other than the stucco siding.

Additionally, the Court determined that even though the damage to the stucco siding itself constituted property damage to the work product alone, an allowance for replacement of the defective stucco siding was proper because the underlying moisture damage could neither be assessed nor repaired without first removing the entire stucco exterior. Therefore, the replacement of the defective siding was covered under the terms of the CGL policy.

18. Attorney's Fees Limited to Amount Declared in Notice and Certificate of Lien

In *Mozingo & Wallace Architects, LLP v. Grand*, 666 S.E.2d 267, 271 (S.C. Ct. App. 2008), an architect filed a mechanic's lien on a project and subsequently brought a foreclosure suit that included collection and quantum meruit causes of action. The owner brought a breach of contract counterclaim. The Master in Equity found in favor of the architect and both parties appealed—the owner challenged the Master's finding and the architect challenged the limitation of the attorney's fees award to the principal debt recited in the notice and certificate of the lien.

The owner's claim was based upon the assertion that changes to the design schematics requested by the owner were never completed, thus resulting in a breach of contract by the architect. The architect admitted that the changes were never made, but this was due to the architect's belief that the changes were minor and could be addressed in the second phase of the base contract. However, the architect was ordered to stop work by the owner before it could progress to the second phase. Therefore, the court held the architect's failure to complete the revisions was due to the owner's own conduct. Because performance was rendered impossible by the other party, the architect was not in breach. See *Moon v. Jordan*, 301 S.C. 161, 164, 390 S.E.2d 488, 490 (Ct. App. 1990).

As to the architect's assertion that attorney's fees should not have been limited to the principal debt recited in the notice and certificate of the mechanic's lien, the Court held that such a limitation was in accord with the intention of the legislature. "It would not be reasonable for a party enforcing the lien to be able to recover higher attorney's fees if it prevailed because it

could add prejudgment interest to the lien award but limit a defending party if it prevailed to the debt stated in the notice and certificate of lien.”

19. Delay and Frustration Do Not Constitute an “Emergency” for Purposes of Emergency Substitution Procedures

In *Sloan v. Dept. of Transp.*, 379 S.C. 160, 666 S.E.2d 236 (2008), Eagle Construction Company (“Eagle”) was awarded the general construction contract for a project involving the widening of Ladson Road in Charleston County, South Carolina. In September of 2004, after numerous delays and time extensions, the Department of Transportation (“DOT”) terminated Eagle from the project. Two weeks later, rather than solicit new bids to complete the project and citing “safety concerns,” DOT directly negotiated a new contract with Sanders Brothers Construction Company (“Sanders”) pursuant to the emergency procurement provisions of S.C. Code Ann. § 57-5-1620. The statute provides, in pertinent part:

...[I]n cases of emergencies, as may be determined by the Secretary of the Department of Transportation, the department, without formalities of advertising, may employ contractors and others to perform construction or repair work or furnish materials and supplies for such construction and repair work, but all such cases of this kind shall be reported in detail and made public at the next succeeding meeting of the commission.

Sanders had previously worked on the project as a subcontractor. Sanders completed the work before the March 31, 2005 deadline in the contract.

In January 2005, Plaintiff Sloan filed a declaratory judgment action alleging that no emergency existed to justify DOT’s procurement without a published invitation for bids. The parties filed cross motions for summary judgment in 2006, and the trial court found that the plaintiff’s action was moot. The trial court also addressed the merits of the action and found that DOT properly complied with the emergency procurement statute.

On direct appeal, the South Carolina Supreme Court reversed. The Court held that DOT’s use of the emergency procurement statute fit within the confines of the well-recognized exception to the mootness doctrine as a scenario which is capable of repetition but will evade review. In the instant case, the project was completed shortly after the suit was filed, but well before summary judgment motions could be heard.

The Supreme Court next analyzed whether Sloan had standing to bring the action. After recognizing that taxpayers have standing to challenge conduct of great public importance, the Court referred to *Sloan v. School Dist. of Greenville County*, 342 S.C. 524, 537 S.E.2d 303 (Ct. App. 2000), and noted that the public had a great interest in the expenditure of public funds through the competitive bidding process. Therefore Sloan, as a taxpayer, had standing to challenge the use of the emergency procurement statute.

Regarding the merits of the case, DOT argued that an emergency existed under the statute because of “safety hazards,” the numerous delays suffered by the project, and the growing frustration of the surrounding community. The Supreme Court adopted a plain meaning of an “emergency” and held that the statute should only be used due to “a sudden, unexpected onset of a serious condition,” and that any existing safety hazards had been present throughout the duration of the four year project and did not warrant the exercise of “emergency” measures.

Case Law – Procurement Decisions

1. Engineer’s Estimate Basis for Determining Sole Prime Contractor Qualification

In *In the Matter of: S.C. Dept. Metal Health Inpatient Buildings - Deferred Maintenance Stone & Fewell Pavilion Pavement Repairs*, State Project No. J12-9707-LC-P, (Jan. 26, 2009), the apparent low bidder protested the agency’s determination that the bidder was not responsible. The bidder had a general contractors license at the time of bid; however, the bidder’s license only covered a portion of the work to be performed. The bidder intended to use a properly licensed subcontractor to perform the work for which the bidder did not possess a license.

The dispositive issue was whether the bidder had the proper license to bid the project as a sole prime contractor. S.C. Code Ann. § 40-11-340 only allows a contractor to bid as a sole prime contractor when forty percent or more of the work falls within the contractor’s license classification. The bidder argued that, based on its cost breakdown, the bidder was qualified to perform over forty percent of the work and was therefore qualified to bid as the sole prime contractor. Some of the work for the project was not regulated by the South Carolina contractor licensing laws. The agency had deducted the value of the unregulated work from the overall project cost to determine whether the bidder was responsible. The bidder argued that this calculation was not correct.

The CPOC reviewed the contractor license law for two key issues and found that the statutes did not provide clear guidance as to: (1) whose project estimate should be used to determine whether a bidder has the proper license to bid the job as the sole prime contractor; and, (2) how does one deal with unregulated work when determining the percentages of work falling under a contractor’s license. The CPOC sought and advisory opinion from the South Carolina Contractor’s Licensing Board. The Licensing Board advised that the project engineer’s estimate should be used to determine the required license to perform the work. The Licensing Board also advised that for the purposes of determining the sole prime contractor percentages, unregulated work should not be included in the calculation. The Licensing Board also provided an opinion as to which work items fell within the bidder’s license classifications and which work items did not.

Based on the advice received from the Licensing Board, the CPOC determined that the bidder was only licensed to perform thirty percent of the total cost of the regulated work. Therefore, the bidder did not have the proper license to bid the project as the sole prime contractor and the agency’s determination that the bidder was not responsible was proper

2. Bid Withdrawal Appropriate

In the Matter of: Bid Withdrawal S.C. Dept. Of Juvenile Justice IRM Generator Project, State Project No. N12-9587-JM, (Feb. 23, 2009) involved an invitation for bids wherein the agency informed bidders that it would post the Notice of Intent to Award on a particular date. The apparent low bidder’s bid was significantly lower than the second lowest bid. The agency’s engineer asked the low bidder to review its bid, low bidder determined that it had based its bid on equipment that did not meet the project specifications. The apparent low bidder notified the agency’s engineer that it had made a mistake in its bid. The low bidder requested the opportunity to obtain a quote on the correct equipment to determine if it could honor its bid. The agency granted the bidder’s request, but went ahead and posted the Notice of Intent to Award.

Apparent low bidder subsequently requested to withdraw its bid. The CPOC determined that the bidder had mistakenly used a quote for equipment that did not meet the requirements of the specification and that the bidder's mistake would cause a substantial loss relative to the size of the project. The CPOC also found that the agency had not detrimentally changed its position in reliance on the bid. Accordingly, it was appropriate to allow the bidder to withdraw its bid without forfeiting its bid bond.

3. Licensing Board Website Contains Incomplete Information

In *In the Matter of: Bid Protest College of Charleston Craig Cafeteria Conversion and Renovation*, State Project No. H15-96357-PG, (Apr. 3, 2009), the unsuccessful bidder protested agency's Notice of Intent to Award claiming that the apparent low bidder's bid was unresponsive because the apparent low bidder had listed an unlicensed plumbing contractor. Apparent low bidders had listed BPCO as the plumbing subcontractor, along with the subcontractor's license number. Protestor had checked LLR's Licensee Lookup Website and had not found any listing for BPCO. The protestor had also searched the LLR Licensee Lookup Website and found that the license number listed on the bid belonged to a Blackwell Plumbing Company. A hearing was held and it was determined that the listed subcontractor was properly licensed and the CPOC denied the protest. The CPOC noted after the hearing, he learned that the LLR's Licensee Lookup Website contains incomplete information. The website does not list all names in which a contractor may be authorized to do business. In this particular case, the plumbing contractor was authorized to do business in two names, but only one name was listed on the LLR's Licensee Lookup Website. The CPOC stated that the only way to make a definitive determination that a contractor is licensed and is authorized to do business in one or more names is to contact the Contractor's Licensing Board directly.

4. Bidder Responsible Despite Fact that listed Subcontractor Had Not Bid Work

In *In the Matter of: Bid Protest U.S.C. Upstate New Residence Hall, State Project H34-9537-JM*, (Jul. 30, 2008), the Agency solicited bids and required bidders to list mechanical, electrical and plumbing subcontractors on the bid form. Agency posted a notice of intent to award to the apparent low bidder the same day as the bid. An unsuccessful bidder protested, arguing that the low bidder was neither responsive nor responsible because the HVAC subcontractor that the apparent low bidder had listed had not bid the project and did not intend to perform the HVAC work. Apparent low bidder admitted that the HVAC subcontractor had not bid the work and that the bidder had listed the subcontractor in error. However, since the bid, the HVAC subcontractor had agreed to perform the HVAC work.

Protestor first argued that the bid was non-responsive. The CPOC disagreed. Responsiveness is determined from the face of the bid. Since the low bidder had listed a properly licensed HVAC subcontractor on the bid form, the determination of responsiveness had been met.

Protestor next argued that the low bidder was not responsible because at the time of the bid, the HVAC subcontractor did not intend to perform the mechanical work for the low bidder and the low bidder could not perform the mechanical work itself. The CPOC noted that a procurement officer's determination of responsibility is final and conclusive unless it is clearly erroneous, arbitrary, capricious or contrary to law. At the time the agency's procurement office made its determination of responsibility, the apparent low bidder had listed a fully qualified HVAC subcontractor. The agency had no reason to believe that the HVAC subcontractor might

decline to perform the work for the apparent low bidder. Therefore, the agency's determination of responsibility was proper.

Additionally, the CPOC noted that the apparent low bidder had provided a bid bond guaranteeing that the low bidder would enter into a contract to perform in accordance with its bid. As the low bidder had listed the HVAC subcontract, the low bidder must either enter into the contract with the agency using the listed subcontractor or default on its bid. If the low bidder defaulted on its bid, the agency would have recourse against the low bidder's bid bond. Accordingly, the agency was entitled to rely on the bid bond as an adequate guarantee that the low bidder would use the listed subcontractor. Accordingly, the agency's determination of responsibility was proper and the protest was denied.

5. Listing of Improperly Licensed Subcontractor Make Bidder Non-Responsible

In *In the Matter of: Bid Protest Charleston Community Mental Health Center Children's Clinic Addition, State Project J12-9704-PG*, (Apr. 7, 2008), the Agency accepted bids for construction of a project and received four bids. The agency awarded the contract to the apparent low bidder. An unsuccessful bidder and HVAC subcontractor protested, asserting the low bidder was not responsive or responsible because the bidder had listed an HVAC subcontractor who did not hold the proper license to perform the work.

The CPOC held that the low bidder was responsive because the low bidder listed a licensed HVAC subcontractor and the bid appeared responsive on its face. The CPOC then examined the responsibility of the low bidder. At the time of the bid, the listed mechanical contractor held a mechanical license with a packaged unit classification. A review of the project's plans showed that the HVAC work for the project did not involve the installation of package units. The CPOC asked the Contractor's Licensing Board for an advisory opinion. The Contractor's Licensing Board advised the CPOC that a subcontractor with a PK subclassification did not possess the proper license to bid the HVAC work for the project, which required both an AC and HT subclassification.

The apparent low bidder argued that it had listed a responsible subcontractor because the HVAC subcontractor had sub-subcontracted the relevant portions of the work to another subcontractor who held the required license. The CPOC disagreed, finding that the S.C. contractor licensing laws only allowed the HVAC subcontractor to bid work within the scope of its subclassification. Because the HVAC subcontractor's license subclassification did not cover all the HVAC work, the HVAC subcontractor could not offer to perform all the required work. Accordingly, the low bidder was found to be non-responsive for failure to list a properly licensed subcontractor for the HVAC portion of the work. Additionally, substitution of another subcontractor was not appropriate. The CPOC found the award improper and vacated the award.

6. Improper Bid Bond Submitted - Deficiencies Could Not Be Cured

In *In the Matter of: Bid Protest Coastal Carolina University Watson Stadium Picket Fence, Project CCU-FEN08-PTM*, (Apr. 16, 2008), the Agency rejected a bidder's bid because the bidder did not provide a bid security bond on State Engineer's Form SE-310 as required by the bidding documents. Bidder protested the rejection of its bid alleging that its submission of bid security in an amount of 1.35 times the bid amount indicated the bidder's intention to be bound and that the bidder corrected its mistake and submitted the bid bond on the correct form within 24 hours.

The bidding documents allowed bidders three different options for submission of bid security, including submission of a bond on the proper state form, an electronic bid bond authorization number, or a certified cashier's check. The bidder submitted a bid bond on its surety's bond form. The CPOC found that the bidder's bid bond did not meet the requirements of any of the three required options.

The Procurement Code does allow a bidder to correct certain deficiencies in bid bonds within 24 hours after the bid. The deficiencies that can be corrected include correcting the amount of the bid security and correcting the surety rating. The deficiencies in the bidder's bond did not fall within the categories where a 24-hour cure period was authorized. Since the bidder's bid bond did not meet the terms required for bid bonds on state projects, the bid bond was not eligible for cure. The CPOC therefore denied the protest.

7. License Not Required for Installation of Pool Equipment

In *In the Matter of: Bid Protest U.S.C. Ten Lane Air Lift Bulkhead Blatt P.E. Center Natatorium, Project USC-BVB-1308-JN*, (Sept. 30, 2008), the Agency solicited best value bids for to provide and install a floating bulkhead for a natatorium. The agency's bidding documents clarified that the agency would remove and replace the masonry construction necessary for installation of the bulkhead. Agency posted a Notice of Award to the low bidder, which was also determined to have provided the best value in accordance with the criteria set forth in the solicitation.

An unsuccessful bidder protested, claiming that the apparent low bidder was not responsible because the low bidder did not possess a South Carolina contractor's license and as required by DEHEC regulations pertaining to pool construction. The CPOC disagreed, finding that the bid was not for the construction of improvements to real property. The CPOC found that the low bidder only proposed to provide a piece of manufactured equipment and place it in the existing pool and that the equipment would not become a part of the pool or any other real property. Accordingly, the CPOC found that the apparent low bidder was not required to hold a South Carolina contractor's license and was therefore a responsible bidder.

8. Bid Responsiveness Regarding Subcontractor Listing Determined on Face of Bid

In *In the Matter of: Bid Protest S.C. Dept. of Parks, Recreation and Tourism Support Facility Rebid Charles Towne Landing Redevelopment, State Project No. P28-9632-PG-S1*, (Oct. 13, 2008), the unsuccessful bidder protested notice of award to the apparent low bidder, claiming that the low bid was not responsive because the low bidder listed a manufacturer, rather than a subcontractor, on the bid form. The CPOC reviewed the history of procurement decisions regarding bidder responsiveness based on subcontractor listings. Prior to 1993, the Procurement Review Panel had held that listing an improperly licensed subcontractor rendered a bid unresponsive. These Procurement Panel decisions required the procurement officer to look beyond the face of the bid to determine whether a bid was responsive. In 1993, the General Assembly amended the Procurement Code to provide that responsiveness would be determined on the face of the bid. Under the new legislation, as long as a bidder lists a subcontractor in each space of the bid form as required, the bid is considered responsive. Since the low bidder had listed one name for a metal building supplier as required on the bid form, the bid was considered to be responsive.

As the protestor had argued that the low bidder had improperly listed a manufacturer rather than a subcontractor on the bid form, the CPOC reviewed the low bidder's responsibility. The CPOC examined the bid from the listed subcontractor and determined that the firm quoted both materials and installation. Accordingly, the firm listed by the low bidder fell within the definition of subcontractor as provided in the bidding documents and Procurement Code. On these facts, the CPOC found that the protestor had failed to meet its burden of proof in providing the apparent low bidder was not responsible.

9. Separate License Required for Fire Sprinkler Work

In *In the Matter of: S.C. Dept. Corrections Indefinite Delivery Contracts Fire Protection Services, State Project No. N04-D046-LC*, (Nov. 11, 2008), the Agency requested permission from the CPOC to cancel the award for an indefinite delivery contract for fire sprinkler systems work. The bidder maintained several branch offices in South Carolina. The bidder's West Columbia branch had submitted the bid using the license number for the bidder's North Charleston branch office. The South Carolina Fire Protection Sprinkler Act requires a fire sprinkler contractor's main office and branch offices be licensed separately. The fire sprinkler contractor is prohibited from assigning or using a license for one branch office to another branch office for the purpose of bidding or performing the work. The CPOC determined that cancellation of the award was warranted because the award violated the explicit language of the Fire Protection Systems Act such that it was an administrative error for the agency to award the contract to the bidder's West Columbia branch office, which did not possess a fire sprinkler company license at the time of bidding.

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Legislation

1. **S. 324, Landfill Bill Passes Senate.** The full Senate recently amended and gave final approval to [S. 324](#), a bill that would place a moratorium on permits for expanding current landfills and also for the construction of any new landfills. Currently, there is a stakeholders group working through the landfill regulations to address the capacity of waste that can be accepted in Class 3 (Solid Municipal Waste) landfills. The full Senate amended the bill so that the proposed moratorium would only apply to Class 3 landfills and would remain in effect until the stakeholders group completes their work on the regulations or until December 31, 2010, whichever is earlier. As amended and passed by the Senate, the bill exempts Construction and Demolition landfills and onsite landfills. The House referred the bill to the House Agriculture and Natural Resources Committee.

2. **S. 268, Special Inspection Legislation.** The full House Labor, Commerce and Industry committee recently approved [S. 268](#), the Special Inspections legislation. Chapter 17 of the State Building Code requires the use of special inspectors on large projects for the inspection of high strength bolts, steel fabrication and elements, sprayed fireproofing, and structural concrete, to name a few. The bill creates a statewide registry for special inspectors so that owners and contractors are able to locate special inspectors for any area of the state by simply logging onto the Department of Labor, Licensing and Regulation's (DLLR) website. The bill mandates that the Building Codes Council, under DLLR, will use current staff to set up the registration process and publish a list of registrants on their website.

3. **Building Energy Efficiency Standard Act.** The Coastal Conservation League and the State Energy Office recently filed the Energy Standard Act which would require South Carolina to adopt the International Energy Conservation Code (IECC) as the energy standard and to provide that all new and renovated buildings must comply with this standard. The bill would also require that local building officials would be responsible for enforcing the energy standard. The bill was filed in an effort to allow South Carolina to receive federal energy stimulus funding, which Governor Mark Sanford has already requested. Initially it was thought that the 2009 version of the IECC was needed in order to apply for the stimulus funding, but it was clarified that it was not necessary to require builders to comply with the 2009 IECC, which was adopted less than a month ago. Instead the bill was amended to require compliance with the 2006 IECC, which is the current standard for commercial contractors. This bill received approval in a House Labor, Commerce and Industry subcommittee

4. **H. 3553, Business Community Opposing Negative Legal Bill.** While this bill has received no traction to date, Carolinas AGC, in conjunction with The South Carolina Civil Justice Coalition, is strongly opposing [H. 3553](#). The bill, which was introduced by Representative Bakari Sellers, eliminates the statute of repose and statute of limitations for actions brought by and on behalf of the State. This legislation creates never-ending opportunities for lawsuits, including false claim actions brought on behalf of the State by private persons, and would create liability for any business that ever entered into a contract with the State. Potential liability would extend back for decades, making lawsuits nearly impossible to defend. The bottom-line is this bill would significantly increase litigation and legal costs and would be very harmful to the business climate of our state.

5. **H. 3305, Secret Ballot Legislation.** [H. 3305](#), a constitutional amendment to guarantee a worker's right to a secret ballot in a union election, has passed the House and has been referred to the Senate Judiciary Committee. This amendment would maintain the status quo with regard to labor unions and does not change any right-to-work laws or make it more difficult for labor unions to organize. The bill was introduced to protect workers' right to a secret ballot in response to federal legislation that would effectively eliminate secret ballot elections. The federal legislation, called the Employee Free Choice Act (EFCA), removes the ability of an employer to ask for a secret ballot election and tilts the playing field to labor unions, who favor card-check agreements. For over six decades, workers have had the right to organize through secret ballot elections and card-check agreements, while employers have had the right to call for an election. Card-check agreements allow labor unions to organize without informing every employee and exposes workers to possible public scrutiny because authorization cards are not secret. Arizona has already passed a similar amendment and South Carolina is one of 15 states with pending amendments. Congressional Republicans are working on an amendment to the EFCA stating that any state that has adopted a constitutional amendment to preserve the secret ballot in their state would not be subjected the passage of the federal EFCA.

6. **H. 3489 and S. 350, Tort Reform.** Two tort bills were filed early in the session. H. 3489 by Speaker Bobby Harrell and 45 co-sponsors in the House and S. 350 in the Senate with Senator Larry Martin and 15 co-sponsors. It looks like these bills will not be addressed until the legislature returns in January 2010 as the budget/stimulus funding and legislative furloughs are taking priority this session. Specifically, the bill:

- (1) Has a clarifying clause stating that a possible building code violation is not deemed gross negligence or recklessness per se. This clarification should stop plaintiffs' attorneys from citing building code violations to circumvent the limitations of the Statute of Repose.
- (2) Allows the non-use of seat belts to be admissible in civil cases to reduce damages if injury was caused by failure to wear a seat belt.
- (3) Limits appellant surety bond to \$25 million and \$1 million for small businesses.
- (4) Models Federal Court Rule 23 allowing for immediate appellate review of certification of classes (class actions).
- (5) Provides for a reasonable limit of \$350,000 award per entity, allowing for a total of \$1.05 million to be awarded for full and fair non-economic damages.
- (6) For punitive damages, limits awards to 3 times compensatory damages or \$250,000, whichever is greater, and for small businesses limits awards to 3 times compensatory damages or \$250,000, whichever is less.
- (7) The bill provides that no claim or discovery may seek to pierce (lift) the corporate veil until the plaintiff has obtained a judgment against a company.

7. **School Construction Bond Measure**

Legislators approved a bill that will allow school districts in South Carolina to apply for federal stimulus funds for construction and renovation projects. The bill allows districts to apply for the funds through the South Carolina Department of Education, the agency responsible for issuing the interest-free bonds. A new bond category was created in the federal stimulus legislation, but state legislation was needed to give the South Carolina Department of Education authority to distribute the money. The measure allows bond holders to receive a federal tax credit equal to the interest they would otherwise receive. A federal provision specifies how the funds are dispersed and automatically allows Charleston County to obtain \$13.5 million and Greenville County to obtain \$15 million. The remaining \$131 million will be split among the other districts, with 60 percent of that money specifically allocated for rural schools. 2009 S.C. Acts 68.

8. **Modifications to Mechanic's Lien Statute**

Legislation provided for several modifications to the mechanic's lien statute:

- Under the new changes, persons who provide landscaping services in excess of \$5,000.00 are entitled to file mechanic's liens for such work. Section 29-5-26 defines the landscaping services that are eligible for lien.
- Section 29-5-15 has been amended to require lien claimants to provide proof of licensure, if licensure is required, in order to file a mechanic's lien.

As a practice note, this amendment went into effect on June 2, 2009 and could have serious ramifications related to the enforcement of this provision by the Clerk of Court or Register of Deeds where the lien is filed. Some Clerks of Court have recently returned liens that do not list a contractor's license or registration number. Not all subcontractors or materials suppliers are required to be licensed pursuant to the residential builders and commercial contractors licensing statutes. Due to the interpretation required to determine whether a claimant must be licensed or registered, there is a potential for some Clerks of Court or Registers of Deeds to refuse to file a lien when the claimant is not required to be licensed or registered.

- Section 29-5-15 provides penalties for filing a frivolous lien. A claimant who files a frivolous lien may be fined up to \$5,000, may be subject to the loss of registration or contractor's license or both.
- Section 29-5-120 was amended to provide that a mechanic's lien and associated bonds may be released by court order upon written affidavit of counsel stating that (1) six months has passed since lien attached and no suit or notice of pendency has been filed, or (2) failure of the filing party to take some other timely action required by Title 29, Chapter 5.

The Act also revised section 40-59-30 of the residential builders licensing statute to provide that a residential builder or residential specialty contractor cannot bring suit to enforce a contract or file a mechanic's lien unless they are licensed or registered with the Residential Builders Commission. 2009 S.C. Acts 40.

9. **Consolidate Procurement Code**

Legislators approved changes to the S.C. Consolidated Procurement Codes in both the 2008 and 2009 legislative sessions. The 2008 changes were extensive and authorized the use of the following alternative project delivery methods to be used: (a) design-bid build; (b) construction management at-risk; (c) operations and maintenance; (d) design-build; (e) design-build-operate-maintain; and (f) design-build-finance-operate-maintain. The State Engineer must approve an agency's use of alternative project delivery methods. Other changes in the 2008 legislation included:

- Adding new section 11-35-3021 pertaining to circumstances under which a contractor may substitute a subcontractor in place of a subcontractor listed in the contractor's bid or proposal and procedures for such substitution.
- Adding new section 11-35-3023 allowing an agency to limit participation in a solicitation through the pre-qualification process. The new section provides the minimal information for a request for pre-qualification and provides that if fewer than two businesses are pre-qualified, the pre-qualification process must be cancelled. In design-bid-build procurement, pre-qualification may only be used if the construction is unique in nature, is over \$10 million in value, or involves special circumstances as determined by the State Engineer. In concert with this

change, previous section 11-35-1825, which pertained to pre-qualification, was repealed.

- Adding new section 11-35-3024, which provides for additional requirements for construction requests for proposals when the request for proposals are for design-build, design-build-operate-maintain, and design-build-finance-operate-maintain delivery methods.
- Adding new section 11-35-3035 to allow agencies to require errors and omissions insurance for services delivered under alternative project delivery methods.
- Adding new section 11-35-3037 to allow agencies to require security to assure uninterrupted provision of operations and maintenance services when those services are included under alternative project delivery methods.
- Adding new section 11-35-3070, allowing agencies to approve minor changes to architectural and construction contracts when the changes is within the agency's certification, do not alter the original scope or intent of the project, and do not exceed the approved project budget.
- The definitions in section 11-35-2910 were amended to include definitions for the new project delivery systems implementation.
- Minor amendments were also made to the following sections: 11-35-1510, 11-35-1530, 11-35-2410, 11-35-3010, 11-35-3020, 11-35-3030, 11-35-3210, 11-35-3220, 11-35-3230, 11-35-3245 and 11-35-3310.

The Legislature passed additional modifications were made to the S.C. Consolidated Procurement Code in the 2009 session including:

- Changes to section 11-35-1524 pertaining to preferences for South Carolina vendors and products in state procurement. Additional preferences have been added for end products made in the United States and for contractors and subcontractors who employ South Carolina residents. The amended statute also provides definitions, eligibility for preferences, procedures for applying preferences and penalties for false applications for preferences.
- Amendments to section 11-35-40 to allow deviations from procurement code requirements when such deviations are required for eligibility for federal grants or funding.
- Minor changes were made to section 11-35-3215. Under the former language, a written determination was needed to support any award for design services. Under the new language, a written determination is only needed when a nonresident is being considered for award.
- Section 11-35-3025, pertaining to changes in architectural/engineering contracts, was repealed. This statute was no longer needed as these issues were covered by new section 11-35-3070, added in the 2008 legislative session.

2008 S.C. Acts 174 and 2009 S.C. Acts 72.

10. Illegal Immigration Reform Act

The Act encompasses many provisions pertaining to the unauthorized aliens. Of particular interest to the construction industry are provisions that prohibits a public employer from entering into a services contract with a contractor, where the contract exceeds \$25,000, unless the contractor agrees to (1) register and participate in the federal work authorization program to verify the employment authorization of all new employees; (2) require its subcontractors to register and participate in the federal work authorization program; and, (3) employ only employees who has or qualifies for a South Carolina driver's license or identification card or possesses the same from another state with similar license requirements. A contractor who complies with the requirements of the Act in good faith may not be sanctioned for employing an individual not authorized for employment in the United States.

The Act provides that wages paid to an unauthorized alien will not be allowed as a deductible business expense for state income tax purposes. Safe harbor provisions are included to prevent liability for failing to comply with the section if the taxpayer has conducted a reasonable investigation to determine that the employee met certain verification requirements and the information provided by the employee to the taxpayer was facially correct. The Act also establishes new state employment and record keeping requirements for employers pertaining to verification of employees' status. 2008 S.C. Acts 280.

11. Architectural Registration

Changes were made to Title 40 Chapter 3 to align South Carolina architectural registration requirements with the National Council of Architectural Registration Boards (NCARB) internship requirements by defining "Intern Architect" and provide that registration applicants must be actively participating in the Intern Development Program in order to qualify for the examination. Changes were made in the continuing education requirements to require 12 hours of continuing education per year in the topics related to health safety and welfare. Section 40-3-280 was amended to allow the use of electronic seals and signatures on drawings and specifications in lieu of original seals and signatures. 2008 S.C. Acts 307.

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South Dakota

Case Law

1. In ***W.J. Bachman Mechanical Sheetmetal Co. v. Wal-Mart Real Estate Business Trust***, 2009 SD 25, 764 N.W.2d 722, the South Dakota Supreme Court again clarified that the 120 day time limit established by South Dakota Codified Laws section 44-9-16 for filing a mechanic's lien may not be extended by time spent making repairs. In *Bachman*, the subcontractor/lien claimant spent a significant period of time making substantial repairs at the request of the general contractor, repairs required as a result of vandalism and not originally contemplated by the parties in their original contract.

Legislation

1. S.D. Codified Laws §11-10-6. An Act amending South Dakota Codified Laws chapter 11-10 (Building Codes and Standards), adding a new section establishing the 2006 edition of the International Building Code as a design standard for any new construction commenced after July 1, 2009 within the boundaries any local unit of government that has not adopted an ordinance prescribing standards for construction. The Act does not apply to one or two-family dwellings, mobile or manufactured homes, townhomes, or farmsteads or any accessory structure thereto.

2. S.D. Codified Laws §11-10-8. An act to establish certain energy efficiency disclosure requirements for new residential buildings, adopting the International energy Conservation Code of 2006 as the voluntary standard applying to construction of new residential buildings in the state, and requiring disclosure of information related to the energy efficiency of any previously unoccupied new residential building that is a single family or multifamily unit of four units or less to a buyer or prospective buyer before purchase contract is signed.

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Tennessee

Case law

1. In ***Acuity v. McGhee Engineering, Inc.***, 297 S.W.3d 718 (Tenn. Ct. App. 2008), *appeal denied* (Tenn. Aug. 17, 2009), a case of first impression in Tennessee, the Court of Appeals held that a performance bond surety that completes a project steps into the shoes of the owner and may sue the project engineer under a theory of equitable subrogation for the engineer's role in causing the default of the contractor.

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2. In ***Shelby County, Tennessee v. Crews***, 2009 WL 4017260, No. W200801368COAR3CV (Tenn. Ct. App. Nov. 23, 2009), the Tennessee Court of Appeals determined that once a government entity is granted a right of possession with the only remaining issue of compensation left to be resolved, the condemner can not voluntarily dismiss its petition in an attempt to disgorge itself of the condemned property.

3. In ***Gordon v. Greenview Hospital, Inc.***, ___ S.W.3d ___, 2009 WL 4878021 (Tenn. Dec. 7, 2009), the court held that Tennessee courts could not exercise personal jurisdiction over a Kentucky corporation despite the fact that (a) the corporation's Kentucky filings listed a Tennessee address as its principal address, (b) the corporation maintained offices in Tennessee; and (c) the fact that the corporation was a subsidiary of two Tennessee corporations.

4. In ***Simmons v. City of Murfreesboro***, 2009 WL 4723369, No. M200800868COAR3CV (Tenn. Ct. App. Dec. 9, 2009), the court held that the proper measure of damages in a case involving an improperly restored property following the installation of a

sewer line was the lesser of the cost to repair the property or the diminished value of the property.

5. In **Forrest Constr. Co., LLC v. Laughlin**, 2009 WL 4723365, No. M200801566COAR3CV (Tenn. Ct. App. Dec. 9, 2009), the court overruled the trial court's decision that a homeowner was the first party to materially breach a contract by failing to pay according to the terms of the contract. The Court held that instead the contractor was the first party to materially breach contract by submitting requests for payment that were not properly supported by records as required by the contract, submitting draws for work done on other projects, and for failing to complete construction. The homeowners were also excused from the normal requirement of providing notice and opportunity to cure alleged defects because of the contractor's aforementioned material breaches of contract.

6. In **Caldwell v. PBM Properties**, 2009 WL 3103815, No. E200801991COAR3CV (Tenn. Ct. App. Sept. 29, 2009), the court affirmed the decision in *Chrisman v. Hill Home Development, Inc.*, that the four year statute of repose for improvements to real property found at Tenn. Code Ann. § 28-3-202 bars actions for reoccurring nuisances that fall outside of period of repose. A reoccurrence may constitute a new action as it pertains to the statute of limitations, however, to be actionable it must also be within the four year repose period.

7. In **Bowen v. Rasnake**, 2009 WL 5083467, No. E200900353COAR3CV (Tenn. Ct. App. Dec. 28, 2009), the Tennessee Court of Appeals confirmed the lower court's award of \$42,300 to the plaintiff for the defective construction of the defendant despite an "as is" clause in the contract for purchase of the residential dwelling. The court held that the award was appropriate based upon the one-year builder's warranty provided in the contract as well as the provision requiring the dwelling to be constructed in accordance with the Southern Building Code.

8. In **Phelps v. Bank of America**, 2009 WL 690695, No. M200702135COAR3CV (Tenn. Ct. App. Mar. 13, 2009), the Court of Appeals upheld the Trial Court's ruling. Plaintiff appeals from the grant of summary judgment in a negligence and breach of contract action against bank which had closed a loan and delivered the loan proceeds to the contractor. An agreement between the contractor and a third party providing financing for the construction project stated that the contractor and the third party would be paid out of the loan proceeds. The Contractor failed to pay the third party in accordance with their agreement. The trial court granted summary judgment to the bank, holding that there was a joint venture between the contractor and the third party and that the Bank's delivery of the loan proceeds to the contractor was payment to the joint venture. The Court also held that a finding of a joint venture pretermitted negligence and breach of contract claims against the bank.

9. In **Henry v. Cherokee Construction and Supply Co., Inc.**, ___ S.W.3d ___, 2009 WL 792829 (Tenn. Ct. App. Mar. 26, 2009), the Court of Appeals upheld a trial court's decision to dismiss a claim for defective construction under the four year statute of repose. Plaintiffs sued Cherokee Construction and Supply Company, Inc. ("Defendant") alleging damages sustained when a wall in the home that Defendant constructed for Plaintiffs collapsed. Defendant filed a motion for summary judgment. The Trial Court entered an order finding and holding that Plaintiffs' claim was barred by the four year statute of repose contained in Tenn. Code Ann. section 28-3-201, et seq., and granting Defendant summary judgment.

10. In **Power Equipment Co. v. England**, 2009 WL 482703, No. E200800919COAR3CV (Tenn. Ct. App. Feb. 26, 2009), the Tennessee Court of Appeals

overturned the trial court's ruling that Plaintiff could proceed against Defendant on contract implied in law theory. It was undisputed that England and Power Equipment had an express, written contract for the lease of the machinery and England owed Power Equipment a balance of \$48,402.77 for the use of equipment pursuant to the contract and his personal guarantee. Thus, Power Equipment was required to pursue its remedy against England with whom it had privity of contract before it could pursue an alleged remedy against the Owner under a contract implied in law theory.

11. In ***Cost Enterprises, LLC v. City of Lebanon, Tenn.***, 2009 WL 856643 (Tenn. Ct. App. 2009), the city council cannot deny a PUD by mere citizen opposition. The council must apply standards for the approval of a PUD within its preexisting ordinances. The council cannot make new laws concerning the approval of the PUD. Since the decision is administrative, they must look to the ordinances currently in place.

12. In ***Pugh's Lawn Landscape Co., Inc. v. Jaycon Dev. Corp.***, 2009 WL 1099270 (Tenn. Ct. App. 2009), the trial court erred in expanding an arbitration award between the two parties since neither the Landscaper nor the corporation asked the trial court to expand the arbitration award. The contract between the two parties set out the expenses to be paid in enforcing the agreement and those expenses should be the only fees incurred by the breaching party.

13. In ***Lockwood v. Hughes***, 2009 WL 1162577 (Tenn. Ct. App. 2009), the buyer of a home failed to have a home inspection prior to closing and discovered a water leak shortly after moving in. The buyer alleged fraudulent concealment of the leak by the seller. The court found that the buyer could have used reasonable means to discover the leak prior to purchase and failed to do so. The court found no injustice needed to be corrected.

14. In ***Nason v. C & S Heating, Air, & Elec., Inc.***, 2009 WL 1162619 (Tenn. Ct. App. 2009), an owner had electrical and air conditioning work done on his property and the work was not completed. In a prior proceeding the court found the owner did not have statutory standing to challenge the proceeding due to his own making. The owner needed to claim the company's lien and claimed interest during the civil action and since this was not done, the owner is now precluded by collateral estoppel because he failed to be a party in the prior litigation.

15. In ***Metro Const. Co., LLC v. Sim Attractions, LLC***, 2009 WL 1605558 (Tenn. Ct. App. 2009), an improvement was installed by the plaintiff on defendant's commercial rental property. The plaintiff filed a notice of mechanic's and materialman's lien for labor and material furnished for the improvement. The Court of Appeals found that the defendant-secured party had a superior interest in the improvement because the purported lease of the improvement was a secured transaction and the defendant-secured party had perfected its security interest.

16. In ***Cheatham County ex rel. Armstrong v. Kong***, 2009 WL 1910952 (Tenn. Ct. App. 2009), Cheatham County issued and subsequently revoked a building permit. The owner was directed to demolish the structure but failed to do so. The Court of Appeals, citing Tenn. Code Ann. § 13-7-111 and Cheatham County Zoning resolution § 8.100, concluded that when structures are erected in violation of regulations, "certain persons" institute an injunction or action in order to remedy the violation.

17. In ***Dan Stern Homes, Inc. v. Designer Floors & Homes, Inc.***, 2009 WL 1910955 (Tenn. Ct. App. 2009), a builder filed suit against flooring company for breach of the

implied warranty for fitness for a particular purpose and breach of the implied warranty of merchantability. After finding that the company had knowledge of the purpose for which the wood was sold to builder and that builder acted in reliance upon the company's knowledge to install the floors, the Court of Appeals concluded that the warranty for fitness for a particular purpose was not breached because the floor was not acclimated to the home before installation. As for the implied warranty of merchantability, the Court found that evidence was not sufficient to prove the flooring was not merchantable at delivery.

18. In *Baptist Mem'l Hospital v. Argo Const. Corp.*, 2009 WL 2245667 (Tenn. Ct. App. 2009), the parties executed a contract to improve the storm and sewer drainage system at Baptist Hospital's East Campus. The contract contained a broadly-worded exclusive remedy provision. In concluding that the remedy did not fail of its essential purpose, the court upheld the provision as valid and applied to bar indemnity even if the defect in the pipe was latent and unable to be detected within the one-year contractual period.

19. In *Collins v. Fugate*, 2009 WL 2341549 (Tenn. Ct. App. 2009), the Plaintiff claimed that Defendant promised him the lifetime use of her property in order to dock a houseboat in exchange for the labor and materials plaintiff expended in constructing a boat dock ten years earlier. Defendant responded by claiming that the parties agreement had terminated under its own terms. The court disagreed with Plaintiff by finding that he had earned a revocable personal license, but such license terminated at the time Plaintiff sold his boat. Additionally, assuming, arguendo, that Plaintiff had earned an irrevocable license, his argument fails because he failed to prove his expenditures and because numerous other builders worked on the construction of the dock.

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Legislation

1. Tenn. Code Ann. § 62-6-103, Contractors Licensing Act -- Recovery of expenses by unlicensed contractor.

The Tennessee Legislature recently amended the section of the Contractor Licensing Act that limited the recovery of damages by unlicensed contractors to actual, documented expenses. The prior version of this statutory limitation applied only to an "unlicensed contractor covered by the provisions of this chapter." For example, an unlicensed contractor was not entitled to recover its profit or any undocumented expenses on a project. The amended statute now limits the recovery to actual, documented expenses for "any contractor required to be licensed" who violates "any of the provisions of" the contractor licensing laws, rules or regulations. Tenn. Code Ann. § 62-6-103(b) (emphasis added). This provision went into effect on June 23, 2009. Presumably, this amended statute now in effect limits the recovery for even a contractor who is licensed, but still violates the statute, such as by exceeding the monetary limit of a license.

2. Tenn. Code Ann. § 66-11-124, Mechanics' and Materialmen's Liens – Waiver of lien.

The Tennessee Legislature recently amended the Mechanics' and Materialmen's Lien Law to provide redress for subcontractors asked to waive lien rights in their subcontracts.

Contract provisions that require a party to waive its lien rights have been unenforceable since 2005. The amended law (which went into effect July 1, 2009) now provides an administrative process by which subcontractors can pursue removal of the lien waiver provision from the subcontract. Contractors who subsequently refuse to remove lien waiver provisions face revocation of their licenses. Additionally, contractors who include lien waiver provisions in their subcontracts may be required to pay the subcontractors' attorney's fees and costs.

Section 66-11-124(b)(2) of the Tennessee Code Annotated now allows a subcontractor who is solicited to sign a subcontract containing a lien waiver to notify the Tennessee Board for Licensing Contractors. After receiving this notification, the executive director of the Board must notify the contractor attempting to procure a lien waiver that such action is against the law and public policy of the State of Tennessee. After being so notified, the contractor can prevent further action on the matter by:

1. removing the lien waiver provision from the contract, and
2. affirmatively stating that lien waiver provisions will not be included in future contracts to perform construction work in Tennessee.

If the contractor does not delete the lien waiver provision, there must be a hearing before the Board. If the Board finds that the contractor's contract contains a waiver of any right of lien, the contractor's license will be immediately revoked and notice of such revocation will be sent by the Board to all states in which the contractor is licensed.

Finally, when a potential right of lien arises, the amended statute allows a subcontractor to recover attorney's fees and costs from a contractor who solicits a lien waiver, by stating: "In any action for damages based on the waiver of a right of lien filed by a person solicited by the contractor, such person shall have the right to recover from the contractor reasonable attorney's fees and cost in connection with the enforcement of such lien." Tenn. Code Ann. § 66-11-124(b)(2)(D).

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3. Unlicensed Contracting

On June 23, 2009, Tennessee's governor signed into law HB1249 which amended the statute limiting recovery of unlicensed contractors to only documented expenses (T.C.A. 62-6-103(b)). The new language now makes it clear that the statute not only applies to unlicensed contractors, but to contractors who are licensed but exceed their monetary limit.

4. Worker's Compensation

T.C.A. § 626111(a)(1) provides: "Any application for initial licensure or for renewal of licensure also shall be accompanied by an affidavit affirming that the applicant maintains general liability insurance and workers' compensation insurance and specifying the amount of such insurance as well as any other information the board may require." In 2009, the General Assembly enacted Public Chapter 1041, which clarifies that unless you are a sole proprietor or partner (with no employees) getting paid directly by the property owner, an employer in the contracting group designated by the National Council of Compensation Insurance (NCCI) must

have workers' compensation insurance on all of their workers and themselves. The Act was set to become effective effective December 31, 2009

Following the release of a Tennessee Attorney General opinion (AG Opinion No. 09-173) and an official bulletin from the Department of Commerce and Insurance Commissioner, agreed to defer the implementation date of the new law. The issue will be addressed by the General Assembly in 2010.

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Texas

Case Law

1. In ***Ashkar Engineering Corp. v. Gulf Chemical & Metallurgical Corp.***, No. 01-09-00855-CV (Tex. App. Feb. 4, 2010) the Houston Court of Appeals concluded that because the acts or omissions complained of amount to a claimed departure from accepted standards of the practice of engineering, the substance of the claims against the engineer constituted negligence claims requiring Plaintiff to comply with the certificate of merit provision in Texas Civil Practice & Remedies Code chapter 150.

2. In ***Dealers Electrical Supply Co. v. Scoggins Construction Co.***, 292 S.W.3d 650 (Tex. 2009), an electrical subcontractor on a bonded public-work project walked off the job without paying the supplier of electrical parts. The supplier missed the McGregor Act deadline to pursue a claim on the bond, and filed suit against the prime contractor for violation of the Texas Construction Trust Fund Act, Texas Property Code sections 162.001(a) and 162.031(a), and breach of a separate Joint Check Agreement. The Court held that the McGregor Act did not provide the supplier's exclusive remedy and reversed and remanded.

Legislation

1. **Sunset of the Texas Residential Construction Commission.** The 2009 legislature failed to renew the Texas Residential Construction Commission (TRCC) allowing it to sunset as of September 1, 2009. (CH 401 Texas Property Code) By the terms of that agency's sunset provision that legislative action (or inaction) also abolished the statutory provisions in Title 16 of the Texas Property Code that established the agency, provided a dispute resolution process for residential construction claims, and set statutory performance standards and warranties. Residential construction claims are now governed by the law that existed prior to 2003 when the TRCC was established. The Residential Construction Liability Act (RCLA) has been largely dormant for the last six years but may now be the primary statute governing residential construction claims. The RCLA was modified extensively to provide cross references to Title 16, and it is unclear how these cross-references should be interpreted given that Title 16 no longer exists.

2. **HB 2730 Relating to the continuation and functions of the Department of Public Safety of the State of Texas and the Texas Private Security Board; providing a penalty.** Texas law prohibits individuals from working on construction projects at a school if the individual has been convicted of a crime that would otherwise prevent him/her from obtaining a

teaching certificate. The prior law left uncertain the extent of the contractor's duty to investigate. This bill clarified that a contractor is only responsible for checking its own employees. Subcontractors must check their own employees and certify compliance to the contractor.

3. **HB 669 Relating to liability arising out of the filing of a mechanic's, contractor's, or materialman's lien.** This amendment provides that a person claiming a lien under Chapter 53, Property Code (mechanic's lien statute) is not liable under the Fraudulent Lien Act unless the claimant files the lien with intent to defraud.

4. **HB 1513 Securing subcontractor trustee account payments from bankruptcy claims.** The Legislature revised the Construction Trust Fund Statute (Chapter 162, Property Code) to make clear that payments under a contract are never subject to confiscation by a court (such as in bankruptcy) because they are never the "property" of the payor/debtor, but belong to the contractor/subcontractor who is owed the funds.

5. **HB 987 Relating to competitive procurement requirements for local governments.** The minimum threshold at which entities such as school districts, counties, local governmental entities and port authorities must solicit competitive bidding was raised from \$25,000 to \$50,000. The bill also amended Section 271.153(a), Local Government Code, to allow contractors to recover "reasonable and necessary attorney's fees that are equitable and just" in suits for breach of contract against cities, school districts, and other local governmental entities.

6. **HB 2802 Relating to consideration of contract amount and bidder's principal place of business in awarding certain municipal contracts.** The legislature imposed maximum contract price of \$100,000 for instances in which smaller municipalities may use their discretion in awarding contracts to resident, non-lowest bidders.

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Utah

Case Law

1. ***Nickerson Co. v. Energy West Mining Co.***, 2009 UT App. 366. The court upheld the trial court's decision granting a motion for summary judgment determining that a party who has a contract for construction work cannot recover against a third party for unjust enrichment because unjust enrichment is a remedy reserved solely for transactions where no contract covers the work at issue. In this case, the subcontractor sued the owner on an unjust enrichment theory after it was not paid for work. The owner had paid the contractor for the subcontractor's work, but the contractor just did not pay the subcontractor. The Court also suggested that the rule would be the same even if the owner had not paid the contractor for work attributable to work performed by the subcontractor.

2. ***Deer Crest Associates, I, LC v. Silver Creek Development Group, LLC***, 2009 UT App. 356, 222 P.3d 1184. The court upheld a contract clause that (1) required arbitration and (2) required the arbitration demand be made within 30 days after the events that are the basis of the claim arise. The court dismissed a civil action because the parties agreed to

arbitrate and held that the 30-day limitation window for claims contained in the subcontract agreement was reasonable and enforceable.

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Vermont

Case Law

1. In ***Harrington v. Vermont Agency of Transportation***, 2009 VT 25, 971 A.2d 658, the Vermont Supreme Court considered whether the value paid to past landowners in condemnation sales was admissible in an action challenging the value being offered to a current landowner. In order to complete reconstruction of a section of Route 9 in Bennington, the Vermont Agency of Transportation (VTrans) took a portion of the Harrington's front yard through eminent domain. The Harringtons were awarded \$4,095 for their land, which they appealed to the superior court. In determining whether this value was adequate, the superior court excluded all evidence of the value paid by VTrans for other land acquisitions. The reason for this decision was that these prices were not the result of an arms length transaction because at least one of the parties in each transaction was not acting voluntarily. The Harringtons sought to introduce evidence concerning payment for a specific piece of property, the Niles property, arguing that this was an arms length transaction because VTrans purchased the entire property when it only required a strip of land for the project. Moreover, the property was right down the road from the Harrington's property. The superior court excluded the evidence and the Harringtons appealed. On appeal, the Supreme Court of Vermont affirmed, holding that the Harringtons had the burden to prove that the Niles transaction was, in fact, an arms length transaction and they had failed to meet this burden. Therefore, the value evidence was properly excluded.

2. In ***A2, Inc., v. Chittenden Trust Co.***, 2009 VT 50, 986 A.2d 252, the Vermont Supreme Court considered whether sewage development capacity is a common element of a development that cannot be unilaterally transferred.

In the late 1980s two individuals, Eastman and Kfoury, obtained a variety of permits to start the Water Tower Hill development. One of the agreements entered into with the town by Eastman and Kfoury was an arrangement to provide sewage capacity sufficient to handle the project's estimated maximum sewage flow of 200,000 gallons per day. Eastman and Kfoury later ran into financial difficulty after selling only a few lots in the development. As a result, Eastman and Kfoury transferred title to the unsold lots to the Eastern Real Estate Corporation, which was eventually acquired by the defendant, Chittenden Trust Company.

In 1994, plaintiffs purchased lots A-1.1, A-14, and A-2. The purchase agreements for lots A-1.1 and A-14 included an allocation of sewage capacity, but the agreement for lot A-2 did not. The total sewage capacity allocated in these purchase agreements was much less than the original 200,000 gallon per day total granted to Eastman and Kfoury by the town. When plaintiffs approached the town to request the conditional use permits to begin their development, the town informed them that it no longer had sufficient sewage capacity to accommodate the plaintiffs' plans. Plaintiffs learned that prior to their acquisition of the property, the developer had divided the then uncommitted sewage capacity between the purchasers of a lot in Water Tower Hill and the town. As a result, the plaintiffs sued both the town and the developer.

The superior court granted summary judgment to the defendant, rejecting plaintiffs' argument that sewage allocation is a common element of a development that cannot be unilaterally transferred. The Vermont Supreme Court affirmed, holding that the amount of sewage capacity to be transferred to the plaintiffs was a specifically negotiated term of the purchase agreements. Nothing required the developer to give notice to plaintiffs prior to transferring any of its sewage allocation. Had plaintiffs wanted such protection, they should have bargained for it.

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Virginia

Case law

1. In ***Balzer & Associates, Inc. v. Union Bank & Trust Co.***, No. 3:09CV0273-HEH (E.D. Va. June 15, 2009), an engineering services firm sued a foreclosing bank in state court to enjoin their use of site plans developed by the engineering firm and for conversion. After removal to federal court on grounds of federal question jurisdiction, the defendant bank moved to dismiss. The court dismissed the request for an injunction under the Copyright Act because the site plans had never been registered as required by the Copyright Act. With the dismissal of the federal question claim, the court exercised its discretion to remand the state law conversion count.

2. In ***Commonwealth v. AMEC Civil, LLC***, 54 Va. App. 240, 677 S.E.2d 633 (Va. Ct. App. 2009), AMEC Civil filed suit against the Virginia Department of Transportation, seeking more than \$21 million in additional compensation relating to the construction of the Route 58 Clarksville Bypass in Mecklenburg County. The circuit court for Mecklenburg County returned a general verdict awarding AMEC all of its claimed damages, finding, among other things, that AMEC had complied with the written notice requirements of the contract. The Virginia Court of Appeals reversed the trial court's holdings on the sufficiency and timeliness of AMEC's written notice of its intention to submit a claim in accordance with Virginia Code section 33.1-386(A). Of the more than five hundred letters addressing "various concerns" on the project, the court held that "[o]nly a handful announced AMEC's intention to escalate an ongoing issue into an administrative claim."

3. In ***Comstock Potomac Yard, L.C. v. Balfour Beatty Construction, LLC***, No. 1:08-cv-894 (E.D. Va. Apr. 20, 2009), after disputes arose on a commercial condominium complex and the contractor became increasingly concerned about the owner's ability to finance completion, the parties entered into a settlement agreement providing for immediate payment of outstanding invoices and some of the disputed claims and retainage, payment and release of subcontractor mechanic's liens, certification by the owner of the financial ability to fund completion, and an agreement that the contractor would not file any mechanic's liens in the future. Thereafter, the owner refinanced its construction loan, the parties failed to successfully mediate the remaining disputed claims, and the contractor filed two mechanic's liens on the project. Following an evidentiary hearing to determine the validity of the two mechanic's liens, the court ruled that the liens violated the terms of the settlement agreement barring the contractor from filing liens. In reaching this conclusion, the court rejected the contractor's contention that the settlement agreement lacked consideration, the argument that the lien

waiver provision was subject to a condition precedent that had not occurred, and the contention that the owner had breached the terms of the settlement agreement first, thereby depriving it of the ability to enforce the lien waiver.

The court noted that Virginia law permits enforcement of lien waivers if supported by consideration and that the promises by the owner to make substantial payments for work performed, to negotiate the remaining disputes in good faith, and to maintain certain reserves as of the date of the agreement all constituted valuable, bargained-for consideration. The court rejected the contractor's argument that the lien waiver was conditional, based on the plain language of the agreement and its review of the parties' negotiations culminating in the final settlement agreement in which the contractor sought to impose conditions but eventually acquiesced in final unconditional language. The court further found that the owner complied with the plain language of the settlement agreement in maintaining certain reserves at the point in time when the agreement was signed, and that if the contractor had intended to prohibit a refinance of the loan or to ensure the continual maintenance of these reserves, language providing for those conditions should have been negotiated for and included in the agreement.

4. In **DiMarco Constructors, LLC v. Staunton Plaza, LLC**, No. 5:09cv00001 (W.D. Va. July 14, 2009), the owner of a shopping center entered into separate contracts with different contractors to construct a building pad and to build a building on the pad. The building pad contractor hired an engineering firm to inspect and certify that the pad conformed to the plans and specifications. After the building was completed, it was damaged by settlement and the owner refused to pay the building contractor the balance of its contract. The building contractor filed suit, and the owner joined the pad contractor, who impleaded the engineering company for claims of contractual and implied indemnity. Upon the engineer's motion for summary judgment and/or to dismiss, the court found that there was no evidence that the engineer and pad contractor had executed a written contract proffered by the engineer, thus, there was no claim for contractual indemnity and the claim was not time-barred under the terms of that proffered, unexecuted contract. In so holding, the court rejected the engineer's contention that the pad contractor's silence after receiving the proposed contract was sufficient to manifest its intent to be bound. The court refused to imply a right to indemnity because no unique factors or special relationship was alleged or evident. Where, as here, an oral contract existed, the court determined that if the parties had intended a right to indemnification to exist, the parties would have included that term in their oral contract. In passing, the court noted that a right of equitable indemnification might exist, but was premature until such time as the pad contractor's liability was adjudicated. The court also rejected the pad contractor's claim for contribution but held that the facts, as pled, supported a cause of action for breach against the engineer.

5. In **Fleming v. Dickenson County Building Dept.**, No. 2 :09cv00009 (W.D. Va. May 18, 2009), homeowners obtained a building permit to demolish an existing home on their property and construct a new home in the same location. After the roof was completed but before the entire project was complete, the power company presented them with an easement for maintenance of overhead power lines near their home and instructed them to remove a portion of their new roof for safety reasons. The homeowners refused to modify their design and completed the home. Thereafter, the county refused to issue a building permit, contending that the home violated safety regulations due to its proximity to existing overhead electrical power lines. The homeowners sued the county building department under 42 United States Code section 1983 alleging that the denial of an occupancy permit for their newly constructed home, which resulted in the refusal by the bank to fund the project and the inability of the homeowners to occupy the home, constituted a deprivation of constitutionally protected rights.

The homeowners included a count that the county conspired with the power company to deprive them of their rights. The court dismissed the case, finding no allegation of deprivation of a constitutionally protected right.

6. In **Forester v. Penn Lyon Homes, Inc.**, 553 F.3d 340 (4th. Cir. 2009), homeowners sued modular home manufacturer for breach of warranty, and the parties conducted extensive discovery and motions practice until, on the eve of trial, the manufacturer moved to compel arbitration under the arbitration clause in the 10 Year Manufacturer's Structural Warranty. The court found that under the Federal Arbitration Act, simply failing to assert arbitration as an affirmative defense or delaying to assert the defense or participating in litigation will not, alone, waive the right to enforce the clause. However, where the delay in asserting the right to arbitration or the parties' actions in participating in the litigation causes prejudice to the other party, waiver of the right to arbitrate will be found.

7. In **Helton v. Phillip A. Glick Plumbing, Inc.**, 277 Va. 352, 672 S.E.2d 842 (Va. 2009), a homeowner 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 does 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.

8. In **Luria v. Board of Directors of Westbriar Condominium Unit Owners Ass'n**, 277 Va. 359, 672 S.E.2d 837 (Va. 2009), the managing member of a developer limited liability company made improper distributions prior to learning that the condominium suffered from significant structural defects resulting from his actions. The court rejected the claim that the managing member owed a fiduciary duty to the condominium association and 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.

9. In **Martin Bros. Contractors, Inc. v. Virginia Military Institute**, 277 Va. 586, 675 S.E.2d 183 (Va. 2009), Martin Brothers sought additional compensation for owner-caused delays of 270 days. VMI paid part of the claimed delay damages, but asserted that the remainder of the claim was barred by a provision in the contract that restricted the contractor's recovery of home office overhead expenses. The trial court accepted VMI's argument that the contract clause was a permissible liquidated damages provision, but the Virginia Supreme Court reversed. The court held that the clause restricting recovery of home office overhead expenses was void and unenforceable under Virginia Code section 2.2-4335.

10. In **Mears Group, Inc. v. L.A. Pipeline Construction Co.**, No. 3:08-CV-329 (E.D. Va. Jan. 7, 2009), the case arose out of disputes between 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 of the project, 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 of 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. Because 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.

11. In **Smith Mountain Building Supply, LLC v. Windstar Properties, LLC**, 277 Va. 387, 672 S.E.2d 845 (Va. 2009), the trial court invalidated a contractor's mechanic's lien because it included amounts incurred outside the 150-day limitation period. Of the two mechanic's liens filed, only a small portion of the liens' amounts were actually incurred 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 Virginia Code section 43-15. In reconciling two earlier decisions, the Virginia Supreme Court discussed the rule that only including amounts incurred within the 150-day window was a prerequisite to perfection. Although inclusion of an amount clearly not permitted could constitute an inaccuracy, thereby saving a lien under Virginia Code section 43-15, 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.

12. In **Stanley Martin Companies, Inc. v. Ohio Casualty Group**, No. 07-2102 (4th Cir. Feb. 12, 2009), 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.

13. In **U.S. ex rel. Acoustical Concepts, Inc. v. Travelers Casualty & Surety Co. of America**, 635 F. Supp. 2d 434 (E.D. Va. 2009), a carpentry subcontractor who successfully completed separate subcontracts on two federal projects for the general contractor sued the general contractor's sureties to collect the contract balance on those two subcontracts. The sureties filed for summary judgment, asserting no payment was due on either federal subcontract because of a large set-off asserted by the general contractor on a separate, unrelated, non-federal project subcontract. The court granted the plaintiff subcontractor summary judgment, finding that the sureties were not entitled to rely upon the broad set-off provisions in the federal subcontracts, which operate to frustrate the intent and purpose of the Miller Act of ensuring prompt payment to subcontractors for their work on federal projects. Acknowledging that the subcontract language determines the "sums justly due," the court found that the set-off provisions are distinct from provisions determining the amount owed to the claimant for its work on the federal project and are not referenced in or supported by the stated intent of the Miller Act. While recognizing the common law principle that a surety's liability is typically co-extensive with that of its principal, the court reasoned that allowing a surety to rely on the contractor's right to set-off debts on a non-federal project would unduly delay and complicate the swift payment promised by the Miller Act and, therefore, the common law principle must give way to the rights granted by the Act. Endorsing prior rulings in which sureties were not permitted to rely upon timing provisions (pay-if-paid clauses) contained in subcontracts, and distinguishing cases in which only recoupment was asserted in defense of a payment bond claim, the court found that sureties are not entitled to rely upon a set-off provision which contravenes the Miller Act's purpose of providing prompt payment to subcontractors for their labor and materials supplied to federal projects.

14. In ***Viking Enterprise, Inc. v. County of Chesterfield***, 277 Va. 104, 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.

Legislation

1. **Va. Code § 2.2-2405, Design-Build Construction Management Review Board.** Authorizes the Design-Build Construction Management Review Board to make a one-time determination that a locality with a population in excess of 100,000 has the personnel, procedures, and expertise necessary to enter into contracts for construction on a fixed price or not-to-exceed price design-build or construction management basis. Any localities receiving the determination shall still be required to comply with applicable provisions of the Virginia Public Procurement Act and all other applicable law governing design-build or construction management contracts for public bodies other than the Commonwealth.

2. **Va. Code § 2.2-4301, Virginia Public Procurement Act; competitive negotiations; ranking criteria.** Provides for a public body to inform the offeror at the early stage of informal interviews of any ranking criteria that will be used in addition to the review of the professional competence.

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Washington

Case Law

1. In ***Washington State Major League Baseball Stadium Public Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Construction Company***, 165 Wash. 2d 679, 202 P.3d 924 (Wash. 2009), the municipal corporation that owned the stadium sued the contractor to recover costs incurred because it had to repair the intumescent fire protection coating system. The trial court granted summary judgment in favor of the contractor because the suit, which was filed seven years after the completion of the project, was barred by Washington's six year statute of limitations for contract claims. On appeal, plaintiffs argued that the six year statute of limitations did not apply because the action was brought "for the benefit of the State." The Washington Supreme Court agreed, holding that the actions of the municipal corporation were sovereign acts and, therefore, qualified for a statute of limitations exemption.

2. In ***Water's Edge Homeowner's Ass'n v. Water's Edge Associates***, 152 Wash. App. 572, 216 P.3d 1110 (Wash. Ct. App. 2009), the Division II Court of Appeals affirmed the trial court's decision holding that a stipulated settlement for \$8.75 million between the insurance policyholders and the homeowner's association was unreasonable. The Court found that the

defendants' exposure was only approximately \$500,000 because partial summary judgment motions had effectively gutted the remaining claims and because the homeowner's association could not prove diminution in value where every owner that sold made a profit.

Legislation

1. **E2SSB 5854 (Ch. 423), Reducing climate pollution in the built environment.**

This statute directs the State Building Code Council to adopt state energy codes that require homes and buildings constructed between 2013 and 2031 to incrementally move toward a 70% reduction in energy use by 2031.

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West Virginia

Case law

1. In **Ziegenfuss Drilling, Inc. v. Frontier-Kemper Constructors, Inc.**, Case No. 2:007;cv-00342, 2009 U.S. Dist. Lexis 74039 (S.D. W.Va. 2009), the United States District Court ruled that a general contractor was not entitled to summary judgment regarding its obligation to pay a subcontractor under a pay-if-paid clause. Frontier-Kemper Constructors subcontracted with Ziegenfuss to drill a pilot hole for a raise bore construction project. Various delays occurred in the drilling of this hole. The owner refused to pay the general contractor for multiple invoices as a result of the delays. Frontier-Kemper subsequently refused to pay Ziegenfuss and Ziegenfuss sued. West Virginia recognizes the enforceability of unambiguous pay-if-paid provisions. *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W.Va. 33, 614 S.E.2d 680 (W.Va. 2005). While the district court acknowledged this precedent, it went on to hold, that if an alleged "pay-if-paid" clause is ambiguous then it does not, in fact, set a condition precedent but merely fixes the "usual" time for payment to the subcontractor. The court, in essence, followed the majority rule indicating that the intent to create a condition precedent must be clearly spelled out in the contract language. If it is not then the language at issue will likely be construed as a "pay-when-paid" clause. The payment clause at issue did not contain language that specifically outlined receipt of payment by the owner was a condition precedent. Thus, the general contractor was not entitled to summary judgment on its claim that it was not obligated to pay Ziegenfuss.

2. In **Mid-State Surety Corp. v. Thrasher Engineering, Inc.**, 575 F.Supp.2d 731 (S.D. W.Va. 2008) the district court addressed issues of the liability of one surety to another under a completion contract. Mid-State was the surety for the original contractor of a water treatment plant project. The original contractor was terminated for default and Mid-State entered into a completion contract with Diversified Enterprise, Inc. As part of the completion contract, Diversified was obligated to provide its own performance bond and agree to indemnify Mid-State any "liability, damages, loss, costs and expenses" arising from any "act, omission or default" of Diversified. International Fidelity supplied the bond to Mid-State on an AIA A312 bond form.

Disputes arose regarding Diversified's completion of the contract. The owner filed suit against the contractor and, four days after filing this suit, issued a certificate of substantial completion. Despite this, a resolution to this dispute could not be finalized as Diversified refused to contribute to any settlement. Mid-State then forwarded correspondence to Fidelity indicating Mid-State considered Diversified in default of the completion contract.

Sixteen days after sending its correspondence to Fidelity, Mid-State filed suit against Diversified and Fidelity in federal court. This case was eventually stayed as Mid-State and Diversified agreed to arbitrate the dispute. Fidelity did not participate in the arbitration but did join the motion to stay. The arbitrator awarded Mid-State \$191,241.47. Mid-State then moved to reopen the federal matter and sought judgment against both Diversified and Fidelity. Fidelity argued it was not obligated to pay Mid-State because (a) there had been no default by Diversified since the owner had been operating the plant for a substantial amount of time before issuing the certificate of substantial completion and (b) Mid-State failed to meet the conditions precedent contained in the bond.

The district court ruled against Fidelity on both arguments. First, it found that the arbitration decision found a default on the part of Diversified. Under West Virginia law, an the decision in an arbitration is binding on a surety and will be given preclusive effect when the arbitration provision in the underlying contract is incorporated by reference into the bond. Thus, the decision against Diversified was binding on Fidelity law, particularly since it was aware of the arbitration proceeding.

The court also found that Mid-State had satisfied the three conditions of the bond. First, the letter sent to Fidelity indicated that Mid-State considered Diversified in default and requested the conference required by the bond. The fact that the conference was never held was immaterial to the court. This was sufficient to comply with the notice requirements. Second, the failure of Mid-State to state in its letter that Diversified was "terminated" was not determinative since its intention was clear *and* the lawsuit filed by Mid-State against Diversified was sufficient to terminate Diversified's rights under the contract. Third, the court held that it was impossible for Mid-State to satisfy the third condition (i.e. – agreement to pay contract balance to Fidelity) because Mid-State was seeking damages in excess of the contract balance from Diversified. Thus, this condition could not be satisfied and Mid-State was excused.

Finally, the court held that even if Mid-State could not have satisfied these conditions, Fidelity would still be obligated to pay Mid-State. The completion contract obligated Diversified to indemnify Mid-State for any losses arising out of Diversified's acts, omissions or defaults. This provision was incorporated into Fidelity's bond. Thus, Fidelity would be required to pay Mid-State under this indemnity obligation.

3. In ***Blessing v. National Engineering & Contracting Co.***, 222 W.Va. 267, 664 S.E.2d 152 (W.Va. 2008) the Supreme Court of Appeals of West Virginia addressed the issue of insurance coverage for bodily injuries suffered on a state funded bridge project. The plaintiff's husband was fatally injured while working on the construction of a bridge. The plaintiff filed suit against the West Virginia Department of Transportation and the individual from the state assigned as project manager asserting various negligence theories. Under West Virginia law, the State is not liable for damages unless there is insurance coverage for the state's actions. The State's insurance policy provided no coverage unless a state employee was on site at the time of the accident performing construction activities. The State filed a motion for summary judgment arguing that while the state employee was on site he was merely supervising the

construction of the contractors, not performing it. The trial court agreed and granted summary judgment.

On appeal the plaintiff claimed there was an issue of fact as to whether the state employee was engaged in “construction” for purposes of insurance coverage. The Court agreed. The facts relied upon by the court to overturn summary judgment included the state employee’s “right to intervene and alter the work in progress upon observing any unsafe construction practices or methods” and the obligation to review and approve pay applications. The Court held that in light of these facts and the fact that the term “construction” is not defined in the state’s policy that a trier of fact must determine if “construction” included these activities.

The Court, however, did reject two other arguments asserted by plaintiff. First, she claimed that sovereign immunity was waived since the general contract obligated the general contractor to indemnify the state for the contractor’s acts or omissions. The Court stated, however, that this obligation is simply to hold the state harmless for another’s acts, not its own. The waiver of sovereign immunity, in contrast, was to see that the state was liable for its actions.

Finally, the Court turned aside the argument that sovereign immunity was waived by the inclusion of the state as an additional insured on the general contractor’s policy. The Court refused to address these issues on procedural grounds since the insurer was not brought as a party to the action.

4. In ***Neal v. J.D. Marion***, 222 W.Va. 380, 664 S.E.2d 721 (W.Va. 2008) the Court addressed West Virginia’s statute of repose (W.Va. Code 55-2-6a). In this case, Defendant Marion constructed a house in February 1994 and sold it. In 1996, Plaintiff Neal entered negotiations with the original purchaser to buy the home. Marion allegedly was very involved in these negotiations representing that there were no problems with the foundation and agreeing to provide a warranty for future repairs. Neal agreed to purchase the home and Marion, without disclosing them to Neal, made various repairs to the foundation before the purchase was finalized.

Neal filed suit on October 1, 2004 to recover money spent in repairing various problems with the foundation system. Marion moved for summary judgment based upon West Virginia’s ten year statute of repose. This statute bars any actions based upon contract or tort ten years after construction is complete. The trial court granted the motion and Neal appealed.

The Supreme Court of Appeals overturned the summary judgment. The Court first noted the statute’s ten year limitation applies to damages arising from three general circumstances: (a) “for any deficiency in the planning, design, surveying, observation or supervision of construction”, (b) from the “actual construction of any improvement to real property” and (c) “for injury to person for bodily injury or wrongful death arising out of the defective or unsafe condition of any improvement to real property.” The Court held the trial court’s decision failed to take into account the full breadth of the statutory language as it did not take into account the term “improvement”.

The Court then went on to hold that the time frame for the statute of repose does not automatically begin when the construction ends if the problem at issue was not part of the original construction. Instead, if there is an “improvement” to the real estate, this can serve as an independent basis to “reset” the statute of repose. An “improvement” was defined by the

Court as including “a subsequent act which modifies or repairs the original design or construction of real property.”

In this case, the complaint arises out of Marion’s undisclosed remedial work to the foundation. This was an “improvement” to the property. The record did not contain sufficient information as to when this work was completed. If it was after October 1, 1994, then Neal’s action would not be barred by the statute of repose. If before that date, however, the statute would bar the claim.

The Court stated that the time for the statute of repose “begins to run when the builder or architect relinquishes access and control over the construction or improvement **and** the construction or improvement is (1) occupied or (2) accepted by the owner of the real property, whichever occurs first.” Given this definition and the Court’s interpretation of the word “improvement”, contractors face the possibility of never receiving the benefit of the statute of repose given that warranty work could arguably be considered a “repair”. Contractors will need to carefully define the scope of any repairs so as to limit the possible exposure this resetting would cause.

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5. In **Ashbaugh v. Corp. of Bolivar**, 223 W.Va. 741, 679 S.E.2d 573 (W. Va. 2009), the West Virginia Supreme Court of Appeals considered the validity of a town ordinance restricting connection to existing streets. Ashbaugh sought determination that a town ordinance preventing the connection of privately constructed roads or streets to existing town roads was an improper attempt by the Town of Bolivar to frustrate Ashbaugh’s development. After continued litigation with the town, Ashbaugh received approval for his Marmion Hills subdivision development. However, at about the same time, the town council passed the ordinance at issue in this case. The town offered traffic control and safety as the reasons for passing the ordinance. Ashbaugh argued that he was entitled to use the existing roads shown on his approved plat map for ingress and egress from his subdivision. The circuit court agreed with the town and upheld the ordinance. The West Virginia Supreme Court of Appeals affirmed the lower court decision, holding that the ordinance had a valid purpose, which was to control traffic and increase safety. Moreover, Ashbaugh was given the alternative to use other existing streets on his approved plat map for ingress and egress to his subdivision, which he refused.

6. In **France v. Southern Equipment Co.**, No. 34494, ___ S.E.2d ___ (W. Va. Jan. 28, 2010), the West Virginia Supreme Court of Appeals considered whether a building owner was liable for injuries sustained by an employee of a roofing contractor hired to replace the owner’s roof.

In the spring of 2006, Royalty Builders hired 16 year old Robert France to do some roofing work over his spring break from high school. France had never done any prior roofing or construction work. At about this same time, Southern Equipment Company got an estimate from Quality Metal Roof Manufacturing and Sales, Inc. for a new sheet metal roof, which it later accepted. When accepting the estimate from Quality Metal Roof, Southern Equipment was unaware that Quality Metal Roof only sold roofing materials and had subcontracted the roof installation to Royalty Builders. While working on the replacement of Southern Equipment’s roof, France fell through the roof and landed on a concrete floor approximately 25 feet below, suffering a serious head injury. The parties do not dispute that proper safety equipment was not used.

France brought suit against Quality Metal Roof and Southern Equipment for failure to provide a reasonably safe work environment and negligence in hiring Royalty Builders. France settled with Quality Metal Roof and Southern Equipment sought summary judgment on the basis that it owed no duty of care to France. Southern Equipment argued that Royalty Builders was an independent contractor over which Southern Equipment had no control. The circuit court granted Southern Equipment's summary judgment motion.

On appeal, the question was whether the illegal work exception to the independent contractor doctrine applied and whether roofing was an inherently dangerous activity. In affirming the lower court decision, the court of appeals explained that the illegal activity exception consists of three factors. These factors require that the company: (1) causes unlawful conduct or activity by the independent contractor, (2) knows of and sanctions the illegal conduct or activity by the independent contractor, and (3) that such unlawful conduct or activity is a proximate cause of an injury or harm. Southern Equipment did not know that Royalty Builders had illegally hired an underage individual. Therefore, the illegal activity exception did not apply. Additionally, the court of appeals held that roofing was not an inherently dangerous activity because the danger could be controlled through the use of reasonable precautions and safety measures. Finally, France also made an argument that Southern Equipment's facility was a "multi-employer worksite" under OSHA law, requiring Southern Equipment to provide safety equipment. This argument was rejected by the court of appeals.

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Wisconsin

Case law

1. In ***Becker v. Crispell-Snyder, Inc.***, 2009 WI App 24, 316 Wis. 2d 359, 763 N.W.2d 192, the Wisconsin Court of Appeals considered whether developers were third-party beneficiaries of a contract and, thus, could maintain a breach of contract action against an engineering firm with whom they had no direct contractual relationship. In *Becker*, the town recruited developers to build a subdivision in the town. The town entered into a contract with an engineering firm for the express purpose of furthering the subdivision development, and forced the developers to use the engineering firm and pay for its services. The developers were not a party to the contract between the town and the engineering firm. The appellate court held that the developers had standing to sue the engineering firm for breach of contract because the developers were third-party beneficiaries of the contract between the town and the engineering firm: (1) the contract specifically conferred a direct benefit on the developers, (2) the benefit was limited to the developers and only one other party, and (3) the contract required the developers to assume liability to the engineering firm because they had to pay the engineering firm's invoices.

2. In ***Ash Park, LLC, v. Alexander & Bishop, Ltd.***, 2009 WI App 71, 317 Wis. 2d 772, 767 N.W.2d 614, the Wisconsin Court of Appeals considered whether a court could order specific performance of a real estate purchase contract. The court affirmed the circuit court's grant of summary judgment ordering specific performance of a real estate contract, holding that a party may seek specific performance even if it has an adequate remedy at law available. The

appellate court further held that because an action for specific performance is, essentially, an action for the purchase price, post-judgment interest under Wisconsin Statutes section 815.05(8) was appropriate. The appellate court also upheld an award of prejudgment interest under Wisconsin Statutes section 138.04 because the purchase price was a reasonably determinable amount.

3. In ***Industrial Risk Insurers and Quad Graphics, Inc. v. American Engineering Testing, Inc.***, 2009 WI App 62, 318 Wis. 2d 148, 769 N.W.2d 82, the Wisconsin Court of Appeals considered, among other issues, whether the economic loss doctrine barred a strict product liability claim. Quad contracted with a company to design and supervise the construction of an automated storage and retrieval system (AS/RS). The AS/RS collapsed and fire resulted at a warehouse structure owned by Quad. Quad and its insurer brought a strict product liability claim, alleging that the AS/RS was defective. The appellate court applied the integrated system test and the disappointed expectations test to determine whether the economic loss doctrine barred the strict product liability claim. The appellate court held that the damage to the adjacent buildings amounted to damage to “other property,” and the buildings were not part of an integrated system, which precluded application of the economic loss doctrine. The parties bargained for an AS/RS, not for the entirety of Quad’s commercial printing facility. The appellate court also held that the damage to the adjacent buildings resulting from the collapse of the AS/RS was not a reasonably foreseeable risk, which barred application of the economic loss doctrine. Quad, as the purchaser, could not have anticipated the need to seek protection against loss through contract. Thus, the economic loss doctrine did not bar Quad’s strict product liability claim.

4. In ***KBS Construction, Inc. v. McCullough Plumbing, Inc.***, No. 2008AP1867 (Wis. Ct. App. Dec. 23, 2009), the Wisconsin Court of Appeals upheld reformation of a plumbing contract to include the cost of missing fixtures. The court also considered whether a general contractor committed theft by contractor when it failed to pay a subcontractor on the belief that nothing further was contractually owed to the subcontractor. KBS entered into a contract with McCullough for the design and installation of the plumbing fixtures and systems for Phase I of the Metropolitan Place Condominiums. Unsatisfied with McCullough’s work, KBS brought suit against McCullough for negligent and deficient work in breach of the contract. McCullough responded by filing a counterclaim against KBS, seeking reformation of the contract to include an alleged sum of money related to the cost of plumbing fixtures for the project that was mistakenly deducted from the contract price. Additionally, McCullough claimed that KBS’s refusal to pay McCullough the funds it was owed constituted theft by contractor. KBS’s claims were resolved by stipulation prior to trial and only McCullough’s claims were tried before the court. The court found in favor of McCullough on the mutual mistake claim and against McCullough on its theft by contractor claim. As a result, the court reformed the contract price to include the cost of the missing plumbing fixtures. In deciding the theft by contractor claim, the court explained that KBS withheld the funds because it contended that nothing further was owed to McCullough. Therefore, McCullough had not proven the requisite intent for theft by contractor. McCullough was also denied its request for attorneys’ fees and litigation costs on the basis that the contract did not provide for them. The contract between KBS and McCullough included a provision for the recovery of legal expenses arising from collections, but the provision listed the “Owner” as the party responsible for these costs. KBS was not the “Owner” and, therefore, was not responsible for these costs.

5. In ***Milwaukee Board of School Directors v. BITEC, Inc.***, 2009 WI App 155, ___ Wis.2d ___, 775 N.W.2d 127, the Wisconsin Court of Appeals considered whether a performance bond is applicable during the warranty period following completion of a roofing

project. In 2002, the Milwaukee Board of School Directors (MBSD) solicited bids for the replacement of the Cooper Elementary School roof. Specialty Associates, Inc. (SAI) was awarded the contract for the roof replacement and, as required by the contract, provided a performance bond from Atlantic Mutual. Upon completion of the project, SAI issued a five year limited warranty on the roof. A couple years after the roof was completed, MBSD noticed problems with the roof and filed claims against BITEC (the supplier of the roofing material), BITEC's insurer, SAI, and SAI's insurer. Shortly after filing suit, MBSD learned that SAI had filed for bankruptcy, preventing any recovery by MBSD. As a result, MBSD amended the complaint to include Atlantic Mutual, the bond issuer for the project. Atlantic Mutual sought summary judgment on the basis that its bond obligations had expired upon completion of the project and that it had no obligations concerning the five year warranty granted by SAI. The trial court granted summary judgment in favor of Atlantic Mutual and MBSD appealed. The court of appeals reversed the trial court, holding that Atlantic Mutual was responsible for all of SAI's obligations under the contract, including the five year warranty.

6. In ***PRN Associates, LLC, v. State Dep't of Administration***, 2009 WI 53, 317 Wis.2d 656, 766 N.W.2d 559, the Wisconsin Supreme Court considered a developer's remedy for bid protest. In October 2002, the University of Wisconsin Milwaukee (UWM) and University of Wisconsin System (System) sought bids from developers to renovate the Kenilworth Building. Following submission of their bid, plaintiffs received a letter from the UWM Vice Chancellor informing them that they had been selected for the project. Another developer, who had submitted a losing bid, protested the selection on the grounds that the selection process was faulty. As a result, plaintiffs received a letter from the System explaining that the request for bids had been withdrawn due to the lack of support from the State Building Commission and invited plaintiffs to bid again in the second round of bidding. In March 2004, a second round of bids was received for the project. Plaintiffs submitted a bid for this second request and at the same time submitted a notice of intent to protest the decision to withdraw the first round of bids. Plaintiffs' protest was denied as untimely, and they did not seek judicial review of this decision. After receiving notice that another developer was selected from the second round of bids, plaintiffs again protested. The protest was again denied, but this time plaintiffs sought judicial review of the denial; although, plaintiffs did not file their petition for review until July 2005, which was after the contract had been signed by the developer selected in the second round of bids. The circuit court granted the State's motion to dismiss for failure to state a claim on which relief could be granted because the contract had already been given to another bidder. The court of appeals affirmed. The Wisconsin Supreme Court also affirmed, holding that there was no relief that could be granted to plaintiffs. A damage remedy is not available in the procurement statutes because it would require the taxpayers to pay twice for the same project. Furthermore, the court explained that the correct relief for plaintiffs would have been to seek an injunction to prevent the contract from being awarded to another developer.

7. In ***Town of Clayton v. Cardinal Construction Co.***, 2009 WI App 54, 317 Wis.2d 424, 767 N.W.2d 605, the Wisconsin Court of Appeals considered the authority of the town board in approving construction of a new fire station. In 2006, the Town of Clayton board of supervisors (town board) sought approval from the town electors to purchase land and construct a new fire station. The town electors denied the town board's proposal. The town board was later informed by its chairperson that the board did not need approval from the electors to purchase up to ten acres and construct a fire station. Therefore, in December 2006, the town board voted and approved the land purchase and construction. In the following spring, the chairperson of the town board retired and two of the board's four members were not reelected. Prior to the end of their terms, the outgoing members of the town board entered into an agreement with Cardinal Construction to build the new fire station. Immediately after the new

town board members began their terms, Cardinal Construction was ordered to stop work on the fire station and the contract was canceled. The town board informed Cardinal that the contract had been canceled because the required elector authorization had not been obtained. The issue in the lawsuit that followed was whether the town board exceeded its statutory authority when contracting with Cardinal without elector approval. The trial court granted summary judgment to the town, finding the contract void. The court of appeals affirmed, holding that the town board exceeded its statutory authority in executing the contract without elector approval.

8. In ***Town of Waukesha v. 164 of Waukesha Limited Partnership***, 2009 WI App 147, ___ Wis.2d ___, 774 N.W.2d 814, the Wisconsin Court of Appeals considered the enforceability of an annexation waiver between a developer and town. In 2005, 164 of Waukesha (developer) proposed commercial development of some town property to the Waukesha town chairman. The chairman expressed discomfort with the development because of a past experience where a developer built a grocery store on town property and then petitioned to annex the property to the city, causing the town to lose a substantial tax base. As a result, the chairman told the developer that the town would request an agreement waiving the right to annex the property to the city. The developer agreed and the town approved the project. Under the terms of the annexation waiver agreement, the developer agreed to pay liquidated damages in the amount of \$250,000 if a petition for annexation was filed with the city. The property was eventually annexed into the city and the developer challenged the enforceability of the agreement. The trial court granted summary judgment to the town and the developer appealed. On appeal, the developer argued that the town lacked the authority to enter into this type of contract and, in the alternative, the agreement lacked consideration. The court of appeals affirmed the trial court, holding that the town did have the authority to enter into the annexation contract and that there was consideration for the agreement. A town has the authority to enter into agreements that are “necessary to the exercise of its corporate powers.” Moreover, the many modifications and variances granted to the developer during the approval process provided adequate consideration for the agreement.

9. In ***Wagner v. Foremost Buildings, Inc., 2010 WI App 1***, the Wisconsin Court of Appeals considered the factors relevant to the defense of accord and satisfaction. Wagner entered into a contract with Foremost Buildings for the construction of a cattle cover consisting of four buildings. In conjunction with the agreement, Wagner paid Foremost a \$25,000 deposit. The contract terms allowed Wagner to cancel the contract, upon written notice to Foremost, and Wagner would only be responsible for the cost of the services already performed. Wagner did cancel the contract before the project was completed and, as a result, received a letter from Foremost itemizing the expenses already incurred. The balance of the deposit was then returned to Wagner. On the back of the check received by Wagner was the following “In full and final settlement of deposit less cancellation charges for jobs 1692, 1693, 1694, & 1695.” With the check being for much less than Wagner expected, he disputed the amount. However, there was a question about when Wagner informed Foremost of his objection to the amount. Regardless, Wagner never cashed the check and returned it to Foremost approximately 10½ months after receiving it. The trial court granted summary judgment to Foremost based on its accord and satisfaction defense. The trial court held that retaining the check for 10½ months before returning it was unreasonable as a matter of law. On appeal, the court of appeals reversed the trial court, holding that the length of time a check is held without being cashed is not the only consideration when dealing with accord and satisfaction. Instead, the trial court must also consider when Wagner first informed Foremost that he objected to the amount. Therefore, the case was remanded for further proceedings.

10. In ***Osborn v. Dennison***, 2009 WI 72, 318 Wis.2d 716, 768 N.W.2d 20, the Wisconsin Supreme Court considered whether the return of earnest money was a prerequisite to bringing a suit for actual damages. In March 2005, the Osborns accepted Dennison's offer to purchase their home. The offer to purchase was written on the standard WB-11 Residential Offer to Purchase. Along with the offer, Dennison deposited \$2,000 in earnest money with the Osborn's broker. During a final pre-closing inspection, Dennison discovered water in the basement and the deal never closed. Shortly after the offer fell through, the Osborn's had their attorney write a letter to Dennison informing him of their intent to file suit for their actual damages. At about the same time, the Osborns placed their house back on the market and instructed their broker to hold onto the earnest money submitted by Dennison until they could add up their actual damages and sue. In response to the Osborn's threat to sue, Dennison demanded return of the earnest money. In October 2005, the Osborn's sold their home to a third party for \$42,500 less than their contract with Dennison. Then in April 2006, the Osborns filed suit against Dennison seeking actual damages. Dennison sought dismissal of the claim, arguing that the Osborns had already elected the remedy of liquidated damages by keeping the earnest money. The trial court denied the motion to dismiss and the Osborns supplemented their original complaint by including a sentence stating that they had released the earnest money to Dennison. The case was then transferred to another judge who ordered that the earnest money be returned to the Osborns and the case be dismissed on the basis that a condition precedent to bringing a suit for actual damages is the return of the earnest money. The court of appeals affirmed. The Wisconsin Supreme Court also upheld the dismissal, holding that when a buyer defaults, a seller has the option of keeping the earnest money as liquidated damages or suing for actual damages, but not both. The seller may not tie up the buyer's earnest money while seeking actual damages. Instead, the seller must direct the release of the earnest money to the buyer before or at the same time as filing suit for actual damages.

Legislation

1. **Wis. Admin. Code ch. Comm. 18, Elevators, Escalators, and Lift Devices.** Effective January 1, 2009, revisions to chapter Comm 18 were made to adopt the most current editions of the ASME A17.1, Safety Code for Elevators and Escalators, and the ASME A18.1, Safety Standard for Platform Lifts and Stairway Chairlifts relating to the regulation of conveyances. The rules were also updated to require elevators and dumbwaiters serving dwelling units to comply with the technical requirements established in Comm 18.

2. **Wis. Admin. Code ch. Comm. 16, Electrical.** Effective March 1, 2009, revisions to chapter Comm 16 were made to adopt the most current edition of the National Electrical Code. The changes were made to bring the state electrical code up to date with current technology and clarify or supplement the electrical standards contained in the 2008 edition of the National Electrical Code.

3. **Wis. Admin. Code ch. Comm. 62, Wisconsin Commercial Building Code, 81-84, Plumbing.** Effective March 1, 2009, revisions to chapters Comm 62 and 81-84 were made related to clarify existing rules and bring the state Uniform Plumbing Code up to date with current technology and nationally recognized standards.

4. **Wis. Admin. Code ch. Comm. 90, Public Swimming Pools.** Effective March 1, 2009, revisions to chapter Comm 90 were made to reflect the most current edition of the American National Standards Institute/International Aquatics Foundation (ANSI/IAF) requirements for public swimming pools and aquatic recreation facilities. The changes include

updates that reflect current technology and options for the design and installation of public swimming pools and water attractions.

5. **Wis. Admin. Code ch. Comm. 20-25, Uniform Dwellings (One- and Two-Family Dwellings).** Effective April 1, 2009, a number of changes to the Uniform Dwelling Code were made. The Uniform Dwelling Code is generally applicable to one- and two-family dwellings originally built after June 1, 1980. The code changes are applicable to permits applied for on or after April 1, 2009. A summary of the changes is available at the Wisconsin Department of Commerce website at <http://commerce.wi.gov/SBdocs/SB-Udc0409Changes.pdf>. Comm 22.31(2)(b) was also amended. The prior version of Comm 22.31(2)(b) allowed the use of REScheck software, Version 4.1.0 or later. An emergency rule was put into effect on September 5, 2009, because the specified versions of REScheck did not meet or support the requirements of Wisconsin's energy code. Changes to Comm 22.31(2)(b) were adopted, to become effective on April 1, 2010.

6. **Wis. Admin. Code ch. DHS 159, Certification and Training Course Requirements for Asbestos Activities.** Chapter DHS 159, Certification and Training Course Requirements for Asbestos Activities, as it existed on April 30, 2009, was repealed and a new chapter DHS 159 was created effective May 1, 2009.

7. **Wis. Admin. Code ch. Comm. 21, Uniform Dwellings (One- and Two- Family Dwellings), 66 Wisconsin Commercial Building Code.** Revisions to chapters Comm 21 and 66 related to installation of carbon monoxide alarms in tourist sleeping rooms under the Uniform Dwelling Code and to alarms in commercial buildings will be made permanent effective June 1, 2009. Emergency rules issued in September 2008 remain in effect.

8. **Wis. Admin. Code ch. Comm. 5, Licenses, Certifications, and Registrations, 40, Gas Systems.** Revisions to chapters Comm 5 and 40 related to rules for licensing liquefied gas suppliers will be effective June 1, 2009.

9. **Wis. Admin. Code ch. Comm. 5.30, Building Contractor.** Effective July 1, 2009, businesses whose work is regulated under any of the Commerce codes affecting commercial buildings, places of employment, one- and two-family dwellings, and public swimming pools must hold a Building Contractor Registration issued by the Safety and Buildings Division of the Wisconsin Department of Commerce. A contracting business will need the four-year registration to do most types of building construction work, to obtain building permits, to provide bids or contracts, or to work as a subcontractor. Certain exceptions apply. An emergency rule went into effect on March 2, 2009, which requires all building contractors to obtain a Building Contractor Registration credential by July 1, 2009, unless they are otherwise registered with the department through any of the specified certifications or licenses. Permanent rules were adopted and went into effect on October 1, 2009.

10. **BIM Guidelines and Standards on Division of State Facilities Projects.** The DSF prepared BIM Guidelines and Standards, which apply to all DSF architect/engineer selections advertised on or after July 1, 2009, for the following projects:

- Required on all construction (new and addition/alteration) with total project funding of \$5M or greater
- Required on all new construction with total project funding of \$2.5M or greater
- Required on all addition/alteration construction with total project funding of \$2.5M or greater that includes new addition costs of 50% or more of total

- Encouraged but not required on all other projects.

These guidelines cover the architect/engineer services in a design-bid-construct project delivery format from initial planning concepts up to bidding documents, then project closeout. The DSF's BIM Guidelines and Standards are available at:

ftp://doafpt04.doa.state.wi.us/master_spec/DSF%20BIM%20Guidelines%20&%20Standards/BI M%20Guidelines%20and%20Standards.pdf.

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Wyoming

Case law

1. In ***Winter v. Pleasant***, 2010 WY 4, 222 P.3d 828 (Wyo. 2010), the Wyoming Supreme Court invalidated a Contractor's lien statement because it failed to comply with Wyoming Statutes Annotated section 29-1-301(a)'s requirement that the lien statement be "sworn to" before a notary. The Contractor's lien included a statement that the person signing the statement swore to his identity and that he was making the statement as the attorney for the construction company. Despite this allegation, the statement failed to include the statutorily required language that the person making the statement swore to the authenticity of the information contained therein. As a result, the Court held that the lien statement did not comport with the statutory requirements and therefore was invalid.

Although the Court invalidated the Contractor's lien, the Court also addressed cross-appeals filed by both the Owner and Contractor regarding separate breach of contract issues. The Owner had hired the Contractor to build an office building under a fixed-price construction contract. The parties' contract required the Owner to pay the Contractor on a monthly basis based on the percentage of completion of construction. The parties followed this schedule for a short time, but eventually the Owner stopped making payments. As a result, the Contractor stopped work and demanded payment before resuming work. When the Owner refused to make further payments, the Contractor terminated the parties' contract and filed suit for breach of contract.

At trial, the lower court determined that the Contractor had breached the contract by failing to obtain written change orders, failing to comply with plans and specifications, and failing to build the building in a workmanlike manner. The Wyoming Supreme Court held that these breaches occurred before the Owner's failure to pay and, therefore, the Owner's own breach of contract was excused. Despite this conclusion, the Court determined that the Contractor was entitled to the value of the labor and materials expended on the project, less any offsets attributable to the Contractor's breaches of contract.

2. In ***Lucky Gate Ranch, L.L.C. v. Baker & Associates, Inc.***, 2009 WY 69, 208 P.3d 57 (Wyo. 2009), the Wyoming Supreme Court applied the two-year statute of limitation from Wyoming Statutes section § 1-3-107 to bar a claim against an engineer who admittedly failed to fulfill the requirements of his contract with the Owner. The Owner hired

Baker & Associates, an engineering company, to perform engineering and surveying services and prepare materials to be submitted to the State Engineer's office as part of an application by the Owner to change the method of irrigation and point of use on the Owner's property. The parties executed a written contract that explicitly required Baker to perform these services and provide certain documents to the Owner.

The Owner received, and paid, a bill from Baker but did not receive the documents, including a map and petition suitable for submission to the State Engineer. The Owner inquired about the status of the documents and Baker represented that it had submitted the application directly to the State. In the fall of 2004, the Owner contacted the State and learned that Baker had not submitted any documents. The Owner confronted Baker and Baker confessed that it had not submitted the documents but represented that the application could be completed in time for the 2005 growing season.

Baker then retained another engineering company to complete the services contemplated by the contract and submitted a bill from the second firm to the Owner for payment. On March 3, 2005, the Owner's attorney sent two letters to Baker, one of which informed Baker that the Owner might pursue a claim for damages. The Owner's attorney sent another letter on May 5, 2005, characterizing the services initially provided as worthless and demanding that Baker pay part of the bill received from the second engineering company. With the assistance of the yet another engineering company the Owner ultimately received approval from the State in February 2006.

The Owner filed suit on May 11, 2007. The district court granted summary judgment in favor of Baker and the Wyoming Supreme Court affirmed the decision. The Court held that Wyoming Statutes section 1-3-107 imposes a two-year statute of limitations on claims arising from the "act, error, or omission" of a professional. The Court held that the Owner "learned definitively" in the fall of 2004 that Baker had not submitted the contractually-required documents to the State, and the Owner's claim was barred because it was not commenced "within two years of the contractual breach." The Court rejected the Owner's argument that the claim did not accrue until the Owner knew the full extent of damages, and recognized that, at the very latest, the claim accrued when the Owner's attorney sent a demand letter on May 5, 2005.

The Court also rejected the Owner's argument that equitable estoppel prevented Baker from relying on the statute of limitations defense. Although Baker misled the Owner regarding performance of the contract, there was no evidence that Baker took any action after May 2005 to induce the Owner to delay filing litigation.

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FEDERAL UPDATE

Environmental Law

1. Lead Renovation Repair and Painting Program Rule

On April 22, 2008, the EPA issued the Lead Renovation, Repair and Painting Program Rule under the authority of section 402(c)(3) of the Toxic Substances Control Act (TSCA). See 40 CFR 745. Beginning in April 2010, all contractors performing renovation, repair, and painting projects that disturb lead-based paint in homes, child-care facilities and schools built before 1978 will be required to be certified and follow certain work practices to minimize and prevent lead contamination. As of October 22, 2009, renovation firms may begin applying for certification with the EPA, pursuant to 40 CFR 745.89, and all firms must be certified as of April 22, 2010. This certification must be renewed every 5 years. Moreover, renovations must be performed and/or directed by an individual who has completed a renovator training program from an accredited training provider. The rule sets forth certain work practices that must be observed, which can be summed up by these three simple procedures: (1) Contain the work area; (2) Minimize dust; and (3) Clean up thoroughly. More information on the program is available from the EPA at: www.epa.gov/lead/pubs/renovation.htm.

2. U.S. Supreme Court Narrows CERCLA Liability

On May 4, 2009, the United States Supreme Court clarified the boundaries of two key variables of Superfund liability: “who” is liable and “for how much.” In the 8-1 decision in *Burlington Northern & Santa Fe Railway v. United States*, the Court reversed the Ninth Circuit Court of Appeals in concluding that there are limits to the nebulous “arranger” category of liability, and that joint and several liability need not apply where a party’s involvement at a site is divisible and capable of apportionment. 129 S.Ct. 1870. See also *Bonnieview Homeowners Association v. Woodmont Builders*, 2009 WL 2999355 (DNJ 2009) (developer did not have requisite intent to dispose of contaminated soil because developer was unaware of contamination during lot development). The Court’s opinion on these issues creates new lenses through which to view potential Superfund liability.

In *Burlington*, the Environmental Protection Agency (“EPA”) and the California Department of Toxic Substances and Control (“DTSC”) incurred cleanup costs at a former agricultural chemical storage and distribution facility that was owned and operated by a now-defunct company, Brown & Bryant (“B&B”). The government sought costs under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) from Shell Oil (“Shell”) on the theory that Shell “arranged for the disposal” of hazardous substances by virtue of leaks and spills that routinely occurred when Shell’s common carrier delivered chemical products in bulk to B&B for sale and distribution. The EPA and the DTSC also sought costs from Burlington Northern (“Burlington”), a railroad that leased a portion of its property to B&B for its facility operations.

The Court of Appeals held that Shell was liable as an arranger on the basis that Shell had knowledge that the process of bulk chemical transfer to B&B would result in leaks and spills. The Supreme Court held that “mere knowledge” of leaks and spills is an insufficient basis upon which to base arranger liability because one must take “intentional steps to dispose” (e.g., intentional steps for leaks and spills to occur). The Court viewed Shell’s involvement in the

handling and transfer of chemicals (e.g., providing safety manuals and discounts for customers that took safety precautions) as evidence that Shell did not intend to dispose of hazardous substances.

Although the district court initially apportioned only 6% and 9% liability to Shell and Burlington, respectively (leaving the government responsible for the remaining cleanup costs), the Court of Appeals imposed joint and several liability (100%) for the entire cleanup on the Shell and Burlington defendants. The Supreme Court held that it was inappropriate for the Court of Appeals to assign joint and several liability to the railroad¹ because the district court's apportionment of 9% liability was "supported by the evidence" and was consistent with apportionment principles.

The Court's decision touches on a number of critical elements of CERCLA liability and has the potential to help (or hinder) a party's litigation or negotiation strategy. The Court's decision regarding allocation is likely to redirect CERCLA litigants' discovery efforts toward gathering evidence to demonstrate reasonable bases for apportionment, and may embolden potentially responsible parties ("PRPs") to test the boundaries of this defense. Similarly, although PRPs certainly welcome the limitations placed on arranger liability by the Supreme Court, developing facts to support (or refute) a party's "intent to dispose" will likely be a challenge for all CERCLA litigants. Additionally, given the refined standards for apportionment and the higher potential for the government to be responsible for insolvent party shares of cleanup costs, government entities are likely to engage in more aggressive PRP searches to ensure that a greater number of solvent parties are identified.

3. Facilities Are Now Required to Report Greenhouse Gas Emissions

On September 22, 2009, the EPA issued a final regulation called the Final Mandatory Reporting of Greenhouse Gases Rule. 40 CFR Parts 86, 87, 89 et al. For the first time, this rule will require approximately 10,000 U.S. facilities to calculate and report greenhouse gas ("GHG") emissions annually, beginning on January 1, 2010. The first annual reports are due by March 31, 2011.

The new reporting requirement applies to a wide array of industries, which EPA estimates account for approximately 85% of the total U.S. GHG emissions. Applicability of the new reporting requirements must be assessed on a facility-by-facility basis. For example, facilities in certain listed source categories must report annually, regardless of GHG emissions. These facilities include power plants, cement kilns, and lime manufacturers. By contrast, facilities in other listed source categories are only required to report when CO₂ equivalent GHG emissions are 25,000 metric tons or more per year. This group of facilities includes iron and steel, glass, and paper manufacturers. Finally, certain suppliers of fossil fuels and industrial GHGs above applicable thresholds are also subject to the new reporting requirements.

In addition to imposing a new annual reporting obligation, the regulation also requires subject facilities to comply with various recordkeeping, monitoring, and data quality requirements. Failure to comply with all applicable requirements of the new regulation potentially subjects the facility to EPA enforcement. Therefore, industry should consider carefully evaluating the applicability of the new regulation to their operations ahead of the first reporting period in 2010.

¹ The issue of apportionment to Shell was not relevant once the Court held that Shell was not a responsible party.

4. EPA's 2008 Construction General Permit

In July 2008, the EPA issued its final 2008 Construction General Permit ("CGP") covering "new" discharges of stormwater from certain construction sites. Updating the similar 2003 CGP, the EPA's 2008 CGP includes provisions construction operators must follow to comply with National Pollutant Discharge Elimination System ("NPDES") stormwater regulations. Construction operators are required to develop and implement stormwater pollution prevention plans and obtain a permit for any construction site that disturbs one or more acres of land, including sites smaller than one acre but part of a large common plan of development or sale that will ultimately disturb one acre or more. The 2008 CGP is eligible only where EPA is the permitting authority, which includes the following areas in EPA Regions 1, 2, 3, 5, 6, 7, 8, 9, and 10:

- Idaho, Massachusetts, New Hampshire, New Mexico, District of Columbia
- American Samoa, Guam, Johnston Atoll, Midway and Wake Islands, North Mariana Islands, Puerto Rico
- Indian Country lands within Alaska,² Arizona, California, Colorado, Connecticut, Idaho, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, Wisconsin, Wyoming
- Federal Facilities within Colorado, Delaware, Vermont, Washington
- Limited areas of Oklahoma and Texas

Appendix B of the 2008 CGP, which is available electronically on EPA's website, is updated frequently to list which geographic areas require a 2008 CGP permit. If a state or other geographic area is not on this list, it is likely that it has been granted authority by EPA to issue NPDES permits; therefore, it is important to consult with the appropriate authorities regarding new stormwater discharge requirements that may apply.

On October 19, 2009, the EPA issued notice in the Federal Register to propose that the two year term of the 2008 CGP be modified to add an extra year of applicability to allow the EPA "sufficient time to properly incorporate into a CGP, the national clean water standards, known as effluent limitation guidelines, for the construction and development industry that will be published by December 1, 2009." If this action is finalized, the 2008 CGP will expire on June 30, 2011 and not June 30, 2010. More information regarding the 2008 CGP, including copies of the final permit, is available from the EPA at: <http://cfpub.epa.gov/npdes/stormwater/cgp.cfm>.

5. Effluent Limitation Guidelines for the Construction/Development Industry

As mentioned in the update regarding the 2008 CGP, the EPA has indicated that it will publish national clean water standards for the construction and development industry on or before December 1, 2009. These clean water standards will include proposals for effluent limitations guidelines ("ELGs") and new source performance standards ("NSPS") to control the

² The Alaska Department of Environmental Conservation was recently authorized on October 31, 2009 as the stormwater permitting authority in Alaska. See Alaska Department of Environmental Conservation's Storm Water Program Website at <http://dec.alaska.gov/water/wnpssc/stormwater/index.htm>

discharge of pollutants from construction sites. According to the EPA, these proposed ELGs and NSPS will require construction sites to comply with standards that will include, but not be limited to, the following:

- A range of erosion and sediment control measures to control pollutants in stormwater discharges; and
- Numeric limit(s) on the allowable level of turbidity on stormwater discharges for certain large construction sites located in areas of the country with high rainfall intensity and soils with high clay content.

The forthcoming publication in the Federal Register will include information as to how and when comments may be submitted to the EPA regarding the proposed ELGs and NSPS. EPA had previously requested comments from the public regarding the then-proposed ELGs last November 28, 2008. If you wish to monitor this topic, additional information and updates are available at <http://www.epa.gov/waterscience/guide/construction/>.

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Administrative and Executive

1. OSHA Clarifies Requirement Regarding High-Visibility Garments for Highway Construction Workers

On October 20, 2009, the Occupational Safety and Health Administration (“OSHA”) released a letter of interpretation (#20080829-8611) clarifying that high-visibility garments are required safety attire for highway and road construction workers, noting that the use of “reflective vests is essential to help prevent workers from being injured or killed.”

In an earlier May 2004 letter of interpretation, OSHA held that workers in highway zones were required to wear high-visibility apparel, pursuant to section 5(a)(1) of the Occupational Safety and Health Act. Citing this May 2004 letter of interpretation, two November 2006 decisions by the Occupational Safety and Health Review Commission held that high-visibility apparel were only required when explicitly mandated by the Federal Highway Administration’s Manual on Uniform Traffic Control Devices. See, e.g., *Secretary of Labor v. United States Postal Service*, OSHRC, No. 04-0316, 11/20/06; *Secretary of Labor v. Ruhlin Co.*, OSHRC, No. 04-2049, 11/20/06.

In its October 20, 2009 letter of interpretation, OSHA withdrew its May 2004 response, stating that “high-visibility apparel is required under the General Duty Clause to protect employees exposed to the danger of being struck by public and construction traffic while working in highway/road construction work zones.” OSHA went on to discuss data developed by the Bureau of Labor Statistics that found that there were 425 road construction fatalities from 2003 to 2007, clear evidence that road and construction traffic is a well-recognized hazard to construction workers.

2. New E-Verify Requirements in Federal Contracts

On June 6, 2008, President Obama issued Executive Order 13465 "Economy and Efficiency in Government Procurement through Compliance with Certain Immigration and Nationality Act Provisions and the Use of an Electronic Employment Eligibility Verification System," which recently became effective on September 8, 2009. This Executive Order requires contractors entering into new federal contracts of \$100,000 or more with a performance period of greater than 120 days for services to be rendered within the United States to:

- Enroll in the Electronic Employment Eligibility Verification System ("E-Verify") within thirty (30) calendar days of the contract award;
- Verify the employment eligibility all newly hired employees from the date of the contract forward, pursuant to the E-Verify Clause (73 FR 67704) included in these federal contracts, within three business days after the new worker's date of hire;
- Verify the employment eligibility of all employees assigned to complete work provided under the federal contract, i.e. all current employees working for the contractor who will work on the federal contract;³
- Verify, if the prime federal contract includes the E-Verify Clause, the employment eligibility of any subcontractors' employees who performs services or construction pursuant to the prime contract with a value above \$3,000.

Moreover, this rule applies to federal contracts awarded on or after September 8, 2009 which means that, in addition to new contracts, existing indefinite-delivery/indefinite-quantity contracts with government agencies must be revised to require the use of the E-Verify by the contractor if the contract requires substantial work to be performed or goods to be provided within six months of September 8, 2009.

There are a number of potential issues and liabilities that may arise in regards to this mandatory verification of employment eligibility. For example, E-Verify will supplement and not replace Form I-9, the Employment Eligibility Verification form, in the employment eligibility verification process. The employer and employee must continue to complete Form I-9 whether or not the employer has enrolled in E-Verify, so I-9 compliance remains as an initial and important step for federal government enforcement efforts regarding employment eligibility.⁴ Federal contractors should also ensure that employees previously completed Form I-9s are still current and will comply with the E-Verify documentation requirements. For more information on this new rule, please review the information published by the U.S. Department of Homeland Security at:

www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextchannel=534bbd181e09d110VgnVCM1000004718190aRCRD&vgnextoid=cb2a535e0869d110VgnVCM1000004718190aRCRD.

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³ If it is too difficult to determine what current employees will work on the federal contract, contractors will also be given the option to check the employment eligibility of all the contractor's current employees.

⁴ All employees hired prior to November 6, 1986 by the contractor are "grandfathered in" and contractors are not required to submit an I-9 for those employees.

3. Federal Project Labor Agreements

Early last year, President Obama signed Executive Order 13502, an order strongly suggesting that agencies awarding contracts on federal construction projects valued at \$25 million or more should require the use of project labor agreements ("PLAs") by contractors. The Order, which directly overrules a prior executive order entered by former President Bush, urges that PLAs are necessary for several important reasons including providing steady supplies of labor, preventing labor dispute-related delays, and promoting timely construction of projects.

Despite the clear goals of Executive Order 13502, a study conducted by the conservative-think tank Beacon Hill Institute argues that none of the problems purportedly solved by Executive Order 13502 existed before the Order was signed. The Order has also prompted some construction groups, including the Associated Builders and Contractors, to speak out against the Order, arguing that it will lead to increased construction costs and discrimination and decreased competition. According to a February 2010 article in *Construction Executive* magazine, "[t]here is no reason to think that the administration's push for PLAs has ended." Maurice Baskin, *The Impact of the Obama Administration: It's Only Just Begun*, *Construction Executive*, Feb. 2010, at 36.

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Rules and Regulations

1. 73 Fed. Reg. 67064 (November 12, 2008): Ethics Compliance for Government Contractors

On November 12, 2008 the FAR Councils issued a new regulation governing ethics compliance. Effective December 12, 2008, the rule requires that government contractors disclose any "credible evidence" of: (a) criminal violations related to fraud, conflict of interest, bribery and gratuities; (b) violations of the civil False Claims Act; or (c) receipt of significant overpayments from the government. The rule does not define "credible evidence," but the councils have indicated that the standard triggering the reporting requirement is something more than the "reasonable grounds" standard in the proposed rule. The reporting requirement applies to all contracts worth more than \$5 million, with a performance period of more than 120 days, including existing contracts issued prior to the effective date of the rule. The rule also sets minimum standards for internal controls and compliance training.

2. 74 Fed. Reg. 48971 (September 25, 2009): Centralized Reporting Tool: The American Recovery and Reinvestment Act of 2009

This regulation requires that prime contract (and first tier subcontract) recipients of Recovery Act funds file quarterly reports detailing use of those funds. Information that must be reported includes: (a) amount of Recovery Act funds invoiced; (b) services performed; (c) purpose of the contract and expected outcomes; (d) assessment of progress; and (e) number and type of jobs created or retained because of work funded by the Recovery Act. Contractors who receive at least 80% of gross revenues from Federal sources must also report names and total compensation of each of the five most highly compensated officers. The officer compensation reporting requirement only applies, however, to contractors who receive

\$25,000,000 or more in gross revenue from Federal sources. All contractors in receipt of Recovery Act funds must register and file their reports at www.federalreporting.gov. Final notice of this requirement was published at 74 Fed. Reg. 48971 (September 25, 2009).

3. 74 Fed. Reg. 52851 (October 14, 2009): GAO Auditors May Interview Contractor Employees

This final rule implements the interim rule at 74 Fed. Reg. 14649 (March 31, 2009) without change. Under the rule, GAO audits of federal contractors' records, a common occurrence, may now include direct interviews with current contractor employees.

4. 74 Fed. Reg. 52849 (October 14, 2009): Limitation on Length of No-Bid Emergency Contracts

On October 14, 2009 the FAR Councils issued a final rule limiting the length of contracts awarded noncompetitively because of "unusual and compelling urgency." Under the rule, contracts meeting this description may not exceed: (a) the time necessary to meet the unusual and compelling requirements; (b) the time necessary for the agency to enter into a competitively bid contract; or (c) one year. These contracts may, however, exceed one year where the head of the contracting agency determines that exceptional circumstances apply.

5. 74 Fed. Reg. 31557 (July 1, 2009): Performance Information Repository

On March 4, 2009, President Obama issued a "Memorandum for the Heads of Executive Departments and Agencies" citing the Federal Government's "overriding obligation to perform its obligations efficiently and effectively while ensuring that its actions result in the best value for the taxpayers." 74 Fed. Reg. 9755 (March 6, 2009). The Memorandum directs that various departments, offices, and agencies take actions in accordance with this obligation and that various rules be drafted and implemented. Based on the President's directive, a number of regulatory changes are anticipated in the near term. On July 1, 2009, the FAR Councils released a final rule intended to ensure use of the Past Performance Information Retrieval System (www.ppirs.gov). Under the rule, agencies are directed to use past performance information in the PPIRS when awarding contracts. While the look back period for most procurements is three years, contracts for construction or architectural/engineering services require a six year look back.

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Federal Legislation

1. The Merkley Amendment to the Patient Protection and Affordable Care Act (H.R. 3590)

The Merkley Amendment that would have required construction companies to provide healthcare insurance to their workers was removed from the final Healthcare Reform bill. The provision, which applied to construction companies with annual payrolls valued at more than

\$250,000 and more than five employees, had been added to the 2009 Senate version of the healthcare reform bill, but was ultimately removed because it could not be passed in the Senate after the reconciliation process.

Business associations such as the Associated General Contractors of America and the National Association of Home Builders have lobbied against the Merkley Amendment, arguing that it unfairly targets construction companies, and that it would remove the small business exemption from the employer mandate just for the construction industry.

Labor groups representing construction workers, including the International Brotherhood of Electrical Workers and the AFL-CIO's Building and Construction Trades Department, have lobbied for the Merkley Amendment, arguing that most construction firms do not have to provide healthcare coverage because of the small business exemption. These unions claim to have secured a commitment from the White House that the administration will try to move the Merkley Amendment through again after the healthcare bill is passed, thus temporarily sidelining the lobbying battle between unions and business associations on the provision.

2. Update on the Employee Free Choice Act

Although it was not passed in 2009, it appears that lawmakers are still working toward a compromise to pass a controversial piece of legislation entitled the *Employee Free Choice Act* (H.R. 1409, S. 560) ("EFCA"). In speaking to the AFL-CIO recently, Vice President Joe Biden, indicated that the EFCA likely could still become law in 2010.

According to the House Report, the Act is intended to "amend the National Labor Relations Act to establish an efficient system to enable employees to form, join, or assist labor organizations, to provide for mandatory injunctions for unfair labor practices during organizing efforts, and for other purposes" Staunch opponents of the EFCA, including the Associated General Contractors of America and the Associated Builders and Contractors, argue that the law would violate employees' privacy and stifle relations between employers and employees.

One of the more hotly-contested issues in the EFCA is the "card check" provision which requires employees to choose whether to join a union by publicly signing a card. A compromise bill likely would include dropping the card-check provision in order to obtain the required number of votes for the law to pass the Senate. In exchange for dropping the card-check provision, the Act may include provisions advocated by labor relations groups which would require expedited election procedures and enhanced penalties for campaign violations by employers. Those groups opposing the EFCA, including AGC according to a March 4, 2010 article on its website, worry that the apparent compromise is merely a tactic to pass the EFCA in its original form.

3. Impact of Federal Stimulus Bill

February 2010 marked the one-year anniversary of the authorization of the American Recovery and Reinvestment Act of 2009 ("ARRA"), a federal economic stimulus package worth \$787 billion which was designed to revive a struggling economy through the creation of new jobs resulting from government investments in energy, transportation, education and healthcare projects. With approximately \$134 billion dedicated to construction spending, the ARRA promised to be the kick-start that the construction industry needed during tough economic times. In October 2009, data submitted by recipients of ARRA funding showed that stimulus funds had contributed to the creation of more than 30,000 new construction-related jobs.

Recent hearings held before the House Transportation and Infrastructure Committee suggest that the ARRA has continued to be successful. According to Committee reports, 10,348 highway, transit and wastewater projects have broken ground as a result of the ARRA, with approximately 5,700 more projects underway. These new projects are responsible for an estimated 300,000 direct jobs and 938,000 indirect jobs. Furthermore, according to an article on the website for the Associated General Contractors of America ("AGC"), the Committee also called for additional investment in infrastructure-related projects. The success of the ARRA to date, combined with the commitment to additional infrastructure spending, should continue to spur the construction industry. More information about the American Recovery and Reinvestment Act of 2009 can be found at www.recovery.org.

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