Construction Law Update:

Case Law & Legislation Affecting the Construction Industry (2011-2012)

Presented by

Division 10 – Legislation and Environment

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INTRODUCTION

Division 10 is proud to present the Sixth Edition of the annual publication, ***Construction Law Update: Case Law & Legislation Affecting the Construction Industry (2011-2012).***

This the third year that the **Construction Law Update** will be distributed exclusively in an electronic format along with the materials for the 2012 Annual Meeting in Las Vegas, Nevada. The **Construction Law Update** has become a hot item, requested by many construction practitioners throughout the country. Along with this year's pudate, you can get access to the archive of previous updates (2006-2010) on the Forum's *eLibrary* site at:

http://www.legalist.com/lasvegas2012/elibrary.html

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

Personally, I would like to thank Angela Stephens for her work as an executive editor, providing invaluable time and advice for bringing this year's update to publication. Angela works tirelessly throughout the year to make sure the updates "keep coming in" from the contributors. The Editorial Team would also like to thank all the volunteers and contributors for their efforts this year. Finally, we would be remiss if we did not thank Cherie Wickham of Stites & Harbison, PLLC, for her countless hours of administrative help this year.

The submissions in this publication are made throughout the 2011-2012 year, which means that some legislation may have passed, been rejected, or even tabled since the publication of this update. The case law and legislation included in this update are not intended to be an exhaustive compilation of every construction-related decision or legislative enactment from within a particular jurisdiction. We rely heavily on our authors to submit timely and accurate information. It is written by you and for you! If you would like to join this great team of contributors and authors, please contact one of our editors. Have a great year!

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CONSTRUCTION LAW UPDATE

Alabama

Case law:

1. *The Lemoine Company of Alabama, L.L.C. v. HLH Constructors, Inc.*, ___ So. 3d ___, 2010 WL 4679478 (Ala.), the Alabama Supreme Court held that "pay if paid" language in a subcontract creates an enforceable condition precedent. If that pay if paid condition precedent was not satisfied, the general contractor had no obligation to make a final payment of retainage to the subcontractor. As a secondary issue, the Court held that in light of the unsatisfied condition precedent the subcontractor could not recover on a theory of *quantum meruit.* During the course of construction, the general contractor Lemoine Company of Alabama withheld a 5% retainage with respect to the subcontractor HLH's work on the project. HLH had contracted to do the plumbing work for a condominium construction project in Baldwin County. At the conclusion of the project, the owner failed to pay the general contractor retainage owed under the general contract. The general contractor was forced to sue the owner to recover the unpaid balance and in that lawsuit obtained a default judgment. At the time of the *Lemoine v. HLH* trial, the general contractor had not collected from the owner any portion of the default judgment. Pursuant to the express pay if paid clause in the subcontract, the general contractor had not paid the final monies owed to the subcontractor. The subcontractor subsequently brought suit. The case was tried without a jury and the trial court entered a judgment against Lemoine. Lemoine appealed and raised this issue: whether the owner's payment to Lemoine of the balance owed under the general contract was a condition precedent to Lemoine's obligation to pay HLH the balance owed under the subcontract. The Alabama Supreme Court agreed with the general contractor's argument that the language in the subcontract clearly indicated that the subcontractor had assumed the risk of nonpayment by the owner and that the condition precedent was enforceable. The clause in the subcontract provided that payment to HLH was "subject to the express and absolute condition precedent of payment" by the project owner. Lemoine and HLH had "knowingly, clearly and unequivocally" entered into a subcontract whereby they agreed payment to the subcontractor was dependent upon payment by the owner to the general contractor. HLH argued to the Alabama Supreme Court without authority that it could recover based on a theory of *quantum meruit* because the general contractor had received the benefit of the subcontractor's work and labor done and materials provided. However, the Court found that accepting this argument would render the pay if paid clause meaningless. The Court noted that when an express contract exists, an argument based on a *quantum meruit* recovery in regard to an implied contract fails. The Alabama Supreme Court reversed the trial court's judgment and remanded the case for entry of judgment in favor of Lemoine.

Legislation:

1. **Senate Bill Number 59 Alabama 2011 Regular Session.** The bill amends §§ 6-5-221, 6-5-222, 6-5-225 and 6-5-227, Code of Alabama, 1975, reducing the statute of repose for actions against an architect, engineer or builder from 13 years to 7 years from the substantial completion of the construction of an improvement on or to real property. This Bill will become effective upon signature and approval by Governor Robert Bentley.

2. **Senate Bill 437, an amendment to the Prompt Pay Act, Ala. Code § 8-29-1, *et seq.* Alabama 2011 Regular Session**. This new bill adds language to the current Prompt Pay Act which limits the amount of retainage that can be withheld in connection with any construction job in the State of Alabama, excepting construction projects for an electric utility regulated by the Public Service Commission. The act also sets a specific time limit on the payment of retainage. Features of the bill are as follows:

(a) Retainage is limited to a maximum of ten percent, and after 50 percent completion of the work has been accomplished, no further retainage shall be withheld. Ala. Code § 8-29-3(i)-(k).

(b) The owner shall release retainage to the contractor no later than sixty (60) days after completion of the contractor's work as defined in the contract, or no later than sixty (60) days after substantial completion of the project, whichever occurs first. Ala. Code § 8-29-3(l)(1). "Substantial completion" is defined in the statute as "the stage in the progress of the project when the project or designated portion thereof is sufficiently complete in accordance with the contract documents with all necessary certificates of occupancy having been issued so that the owner may occupy or utilize the project for its intended purpose." Ala. Code § 8-29-3(l)(2).

(c) The contractor shall release to his subcontractor the portion of the owner's payment attributable to the subcontractor's work no later than seven (7) days after the contractor receives the owner's payment. Ala. Code §§ 8-29-3(l)(1) and 8-29-3(e).

(d) The penalty for withholding greater than ten percent retainage is that the payee shall be entitled to interest at the rate of one percent per month (twelve percent per annum) on the excess amount. Ala. Code § 8-29-3(i)-(k). Similarly, the penalty for not making timely payments under the terms of this statute shall be that the payee shall be entitled to interest at the rate of one percent per month (twelve percent per annum) on all amounts due from the time of the due date until paid. Ala. Code § 8-29-3(d).

(e) The Prompt Pay Act includes a provision for the recovery of attorney fees by the prevailing party in any actions to recover amounts due, including interest. Ala. Code § 8-29-6.

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Alaska

Case law:

1. In *ASRC Energy Services Power and Communications, LLC v. Golden Valley Electric Company, Inc.*, ___ P.3d ___ 2011 WL 5288786 (Alaska 2011), the Alaska Supreme Court handled a dispute arising out of two competitively bid construction contracts. Global Power & Communications, LLC ("Global") filed a complaint after the award was made, seeking additional compensation of $5.7 million under the two contractors due to claims of owners delay and extra work. Global amended its complaint to include a claim under the Alaska Unfair Trade Practices and Consumer Protection Act ("UTPA") for concealing and misrepresenting the existence of technical data relating to subsurface conditions at the project.

Before the trial, the Golden Valley Electric Association ("GVEA") moved for judgment on the pleadings, alleging that UTPA did not apply to construction contracts, as the contracts were complex transactions between business entities that did not implicate consumer protection. The trial court denied the motion and held that UTPA was applicable to the dispute. Global, after consulting with a damages expert, amended its complaint and reduced its claims to approximately $3.2 million. GVEA also amended its answer and alleged counterclaims that it had suffered damages as the result of the Global violating the UTPA by presenting requests for additional compensation ("RFI") that were false.

At trial, the court held that the Global had engaged in unfair trade practice and awarded GVEA treble damages and attorneys' fees under the UTPA. On appeal, Global argued that the trial court had abused its discretion, its conduct was insufficient to support liability under the UTPA, and that the attorneys' fees were not properly segregated.

The Alaska Supreme Court upheld the trial court's ruling regarding the UTPA violation; however, the court reversed the award of damages and attorneys' fees. The court held that GVEA could not pursue damages for UTPA claims for actions by Golden in the present litigation or for fees incurred in defending the suit. The UTPA only allowed damages that were incurred pre-litigation.

2. In *3-D & Co. v. Tew's Excavating, Inc.*, 258 P.3d 819 (Alaska 2011), a Developer hired a Contractor to construct roads in a new subdivision. After the project was completed, the Developer inspected the work and determined that it was ready for the Subdivision's inspection. The Developer never informed the Contractor that the work was insufficient or incomplete or even expressed any dissatisfaction with the work until nearly a year after project completion. Further, the Contractor was never informed that the Subdivision's inspection resulted in a punch list, nor was given the opportunity to fix the minor items listed.

The Developer later filed suit against the Contractor for breach of contract, claiming the road work was deficient and improperly widened. The Developer, however, did not present any specific evidence to its costs to fix the areas. The lower court held that although the Contractor had breached its contractor, the Developer failed to prove damages.

The Alaska Supreme Court upheld the lower court's decision, noting that party seeking damages must present sufficient evidence of its damages to provide a reasonable basis for the award. The amount of damages does not need to be exact, but there must be some evidence upon which to base an award. As the Developer failed to provide estimates of its costs to repair the road, the court concluded that there was a failure of proof of damages barring the Developer's recovery.

3. In *Handle Construction Co., Inc. v. Norcon Inc.*, ___ P.3d ___, 2011 WL 5107129 (Alaska 2011), a dispute arose over a solicited bid from a Subcontractor to perform concrete work on a project for a Contractor. The Contractor emailed the Subcontractor the bid solicitation, the drawings, and a bid schedule. The general manager of the Subcontractor printed the bid schedule, but not the email, and had another employee estimate the costs of the project. The Subcontractor subsequently was awarded the project and began work in September 2008.

In October 2008, after a trip to the project site, the Subcontractor notified the Contractor that there was a discrepancy between the bid schedule and the project drawings. The Subcontractor alleged that it did not realize that the word "foundation" in the Contractor's bid

schedule was intended to mean a two-pier foundation, rather than a one-pier foundation. The Subcontractor requested a change-order under the contract to correct the alleged discrepancy.

The Contractor refused to pay and the Subcontractor filed a complaint, alleging defective specifications and damages resulting from the discrepancies between the bid schedule and the project drawings. The lower court granted the Contractor's motion for summary judgment on the basis that the Subcontractor had committed a unilateral mistake and bore the risk for its error. The lower court entered a final judgment for the Contractor, holding that there were no further claims remaining for trial.

On appeal, the Alaska Supreme Court concluded that the legal theory of implied warranty of specifications (also known as the *Spearin* doctrine) was not applicable to the case. There was no dispute that the drawings required a two-pier foundation and the Subcontractor produced the product it meant to produce. The court concluded that the Subcontractor bore the risk for the unilateral mistake of not diligently reviewing the materials provided to it by the Contractor, not seeking clarifying instructions. The estimator never read the contents of the clarifying email because the general manager never even provided him with the email.

Thus, as the risk of mistake should be borne by the party who has the greater interest in the consequences of a contract term, the court concluded that the Subcontractor should bear the risk of unilateral mistake in this case.

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Arizona

Case law:

1. In *William Smith v. Krishna Pinnamaneni et al*., 2011 Ariz.App. LEXIS 59, 607 Ariz.Adv.Rep. 35, (2011), the Arizona Court of Appeals held that the defense of lack of licensure could be waived if not timely and appropriately raised in an arbitration proceeding. Accordingly, the Court rejected defendants' claims that the plaintiff contractor was not appropriately licensed and therefore was precluded by statute from pursuing its affirmative claim when defendants first raised the defense after plaintiff moved to confirm the arbitration award. The Court noted that contracts executed by unlicensed contractors are voidable, not void, and that unlicensed contracting constituted an affirmative defense that could be waived like any other affirmative defense.

2. In *Charles Leflet v. Redwood Fire and Casualty Insurance Company*, 600 Ariz.Adv.Rep. 6, 247 P.3d 180 (App.2011), the Court addressed the outer boundaries of *Morris* agreements and notice requirements, particularly in a multi-insurance scenario. Under a *Morris* agreement, an insured stipulates to allow judgment to be entered against it by the plaintiff by default or stipulation. The insured further agrees to assign all rights it may have under its liability insurance policy to the plaintiff. For its part, the plaintiff provides a covenant not to execute upon any of the insured's assets and agrees to collect the judgment only from the liability insurance. The plaintiff then asserts a breach of contract/declaratory judgment action against the insurer as an assignee to the insured.

In this case, a developer/general contractor and its primary insurer settled with class-action plaintiffs for less than the policy limits of the applicable policy ($375,000 when the developer possessed a $1,000,000 per occurrence policy), stipulated to an $8.475 million judgment with a covenant not to execute, and assigned their contractual rights against the subcontractors and the subcontractors' carriers, who were contractually obligated to insure the developer/general contractor from harm caused by the subcontractors. The rights that the developer/general contractor and its primary insurer were to assign included their contribution rights from non-participating insurers for the developer/general contractor's unpaid attorneys' fees, the developer/general contractor's right to pursue bad faith claims against the non-participating insurers, rights against the non-participating insurers to which the developer/general contractor had tendered its defense, and any contractual or other right to indemnity against the subcontractors, non-participating insurers, or any other insurer of the subcontractors. The non-participating insurers intervened in the settlement, claiming that the developer/general contractor had not provided requisite notice under *Morris* and thus breached the cooperation clause of its insurance policies. The non-participating insurers further argued that the settlement agreement did not qualify as a *Morris* agreement.

The Court of Appeals upheld the trial court's entering of summary judgment in favor of the non-participating insurers, holding that "an insurer that reserves its rights may not employ *Morris* to reduce its liability below policy limits, and an insured that facilitates such an effort breaches its duty to cooperate with its other insurers." The court held that "[b]ecause *Morris* agreements are fraught with risk of abuse, a settlement that mimics *Morris* in form but does not find support in the legal and economic realities that gave rise to that decision is both unenforceable and offensive to the policy's cooperation clause." As to notice, the court held: "Because an insurer who defends under a reservation of rights is always aware of the possibility of a *Morris* agreement, the mere threat of *Morris* in the course of settlement negotiations does not constitute sufficient notice. Instead, the insurer must be made aware that it may waive its reservation of rights and provide an unqualified defense, or defend solely on coverage and reasonableness grounds against the judgment resulting from the *Morris* agreement."

3. In *North Peak Construction v. Architecture Plus Ltd*., 2011 Ariz.App.LEXIS 57, 607 Ariz.Adv.Rep. 20 (2011), the Court of Appeals held that contractors that rely on plans and specifications prepared by architectural companies can assert breach of implied warranty claims against architectural companies. The Court of Appeals held that implied warranty claims made by contractors against design professionals were initially recognized in *Donnelly Constr. Co. v. Oberg/Hunt/Gilleland*, 139 Ariz. 184, 677 P.2d 1292 (1984), *overruled on other grounds by Gipson v. Kasey*, 214 Ariz. 141, 150 P.3d 228 (2007), and that such claims sound in contract, not tort, due to the similarity of defective design claims to claims arising from the implied warranty of habitability and workmanship found in other Arizona cases. The Court of Appeals further held that contractors may assert claims for breach of implied warranty against individual architects who sign and seal defective plans, even though the architects were not personally parties to the contract between the property owners and the architectural firms. The Court, however, did not address the issue of whether a different statute of limitations exists for negligence and implied warranty claims. Finally, the Court of Appeals stated that while claims for breach of the implied warranty recognized in *Donnelly* "arise out of a contract, express or implied," the contract is implied in law and therefore does not likely "arise out of contract" under 12-341.01(A) for purposes of awarding attorneys' fees.

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Arkansas

Case law:

1. In *Lexicon, Inc. v. ACE Am. Ins. Co.*, 634 F.3d 423 (8th Cir. 2010), a contractor sued an insurance company alleging it was obligated under commercial general liability policies (CGL) to cover property damage. The millions of dollars of property damage occurred when a silo, negligently built by the contractor's subcontractor, collapsed. The Eighth Circuit Court of Appeals found that the district court overstated the Arkansas Supreme Court's ruling in *Holder*. Rather, *Holder* allows the insurer to deny the contractor's claims of coverage for damage to the silo since that would be foreseeable. However, absent some other defense the insurance company would be obligated to reimburse the contractor for all property damage other than the silo.

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2. In *Chenal Restoration Contractors, LLC v. Linda Diane Carrol and Trade Wynds Imports, Inc.* (Arkansas Court of Appeals, Divisoin IV, CA 10-893), the Arkansas Court of Appeals addressed the amount of interstate commerce necessary to trigger the application of the Federal Arbitration Act (the "FAA") as opposed to the Arkansas Uniform Arbitration Act (the "AUAA").

Chenal Restoration Contractors, LLC ("Chenal") entered into a written agreement with Trade Wynds Imports, Inc. ("TWI") wherein Chenal agreed to repair TWI's tornado-damaged roof. TWI failed to make full payment, so Chenal initiated arbitration proceedings pursuant to the parties' agreement. Chenal also filed suit in the Circuit Court of Arkansas County to prevent the running of the statute of limitations. Chenal withheld service on TWI in order to prevent TWI from unnecessarily expending time and effort on the lawsuit, since Chenal intended to proceed with arbitration. However, TWI was notified of Chenal's suit by a third party and TWI filed an answer without being served. TWI also filed a counterclaim against Chenal, alleging that Chenal and its principal committed numerous torts against TWI and its owner.

The parties' agreement did not state whether it was governed by the Federal Arbitration Act (the "FAA") or the Arkansas Uniform Arbitration Act (the "AUAA"). The determination of which act applied would determine the appropriate forum for the suit, as the FAA allows for the arbitration of tort claims, whereas the AUAA does not. Pursuant to the AUAA, contract claims may be submitted to arbitration, but any tort claims arising from the transaction must be tried in court. The trial court denied Chenal's motion to compel arbitration and Chenal appealed.

On appeal, Chenal argued that interstate commerce was implicated, thereby triggering application of the FAA, because Chenal purchased supplies from out of state vendors, subcontracted with a Florida company to perform part of the labor, and dealt with TWI's out-of-state insurance company. TWI argued that it did not consent to Chenal's dealings with out-of-state parties, that it did not contemplate a connection with interstate commerce, and that Chenal's actions were not sufficiently linked with interstate commerce; thus, according to TWI, the AUAA applied.

The Arkansas Court of Appeals noted that the reach of the FAA extends to the full extent of the Commerce Clause's power. Therefore, even though the connection to interstate

commerce was "very slight," the FAA applied to the parties' dispute and both Chenal's claim and TWI's counterclaim were subject to arbitration.

Chenal also argued that TWI's claims were misstated breach of contract claims, incorrectly framed as torts in order to avoid arbitration. Because the court reversed on other grounds, it did not reach Chenal's second argument.

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Legislation:

1. Act 1208 of 2011; Ark. Code Ann. §§ 17-25-501, *et. seq*. Act 1208 amended the law concerning the Arkansas Residential Building Contractors Committee (the "Committee") and expanded the scope of the licensing requirement for construction and repairs to single-family residences. In brief, any person or organization conducting repairs, remodeling, or renovation to a single family residence must be licensed by the Committee. The amended statute identifies individuals and organizations conducting repairs, remodeling and renovations as "home improvement contractors" ("HWCs"). Exceptions to the licensing requirement include:

- An individual may act as his or her own building contractor, so long as he or she does not build more than one residence per year.
- An individual may act as his or her own HWC on his or her own property.
- A person or entity need not be licensed if the work to be done does not exceed $2,000.00 in value.
- Subcontractors of properly licensed contractors are exempt from the licensing requirement.
- Contractors licensed by Arkansas agencies other than the Arkansas Residential Building Contractors Committee are exempt, so long as the work they perform is within the scope of their license.

The penalty for an HWC doing construction work without a license is up to $400.00 per day. The new licensing requirements go into effect on January 1, 2012. At that time, an HWC applying for a license will be required to pass a licensing test. However, if an HWC applies for a license during the grandfathering period of July 27, 2011 until December 21, 2011, no test will be required.

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California

Case Law:

1. *Cortez v. Abich*, 51 Cal. 4th 285, 246 P.3d 603, 120 Cal. Rptr. 3d 520 (2011). In *Cortez v. Abich,* the California Supreme Court held that the California Occupational Safety and Health Act of 1973 ("Cal-OSHA") applies to homeowners, making them the "employer" of an unlicensed contractor and the unlicensed contractor's employees. 51 Cal.4th at 295.

In *Cortez*, homeowners hired an unlicensed general contractor to remodel their home. That general contractor hired the plaintiff to help demolish the roof. The plaintiff suffered injuries

when a portion of the partially demolished roof collapsed, causing him to fall. The plaintiff sued the homeowners in tort for alleged violations of the safety standards required by Cal-OSHA for employers. At trial, the homeowners argued that the work safety requirements of Cal-OSHA did not apply to their residential project. *Id.* at 290. The trial court agreed, finding that the homeowners were not plaintiff's employers and, as homeowners, they were not required to comply with Cal-OSHA. *Id.* The Court of Appeal concluded that the homeowners were employers, but that the project fell within Cal-OSHA's household domestic service exclusion. *Id.*

The California Supreme Court considered whether work done on a residential remodeling project qualifies as a "household domestic service" exclusion from the definition of employment under Cal-OSHA. *Id.* at 288-289. California Labor Code section 6303 defines employment under Cal-OSHA as "the carrying on of any trade, enterprise, project, industry, business, occupation, or work, including all excavation, demolition, and construction work, or any process or operation in any way related thereto, in which any person is engaged or permitted to work for hire, except household domestic service." The Court concluded that the labor for the home remodeling project entailed "the carrying on of a project or work that involved demolition and construction work," such that it qualified as employment under Labor Code section 6303. *Id.* The Court narrowly viewed "household domestic service" as the maintenance of a household or its premises, concluding that work performed on a remodeling project "calling for the demolition and rebuilding of significant portions of a house and the construction of new rooms" was not "household domestic service." *Id.* at 298. Therefore, Cal-OSHA did apply to the homeowners. *Id.*

Notably, the Court declined to consider whether the Legislature intended for Cal-OSHA to apply to homeowners, leaving a number of policy arguments unresolved. *See id.* at 297-298. For now, whether a homeowner qualifies as an employer under Cal-OSHA will require a consideration by the courts of the "totality of the circumstances, including, but not limited to, the scope of the project and the extent to which it involves significant demolition and construction work." *Id.* at 295, n. 4. This case demonstrates yet another reason for homeowners to ensure that they hire a properly licensed contractor for any home remodeling projects in order to avoid potential liability under Cal-OSHA as an "employer."

2. *Anders v. Superior Court (Meritage Homes of California)*, 192 Cal.App.4th 579, 121 Cal.Rptr.3d 465 (2011). In *Anders v. Superior Court*, the Court of Appeal held that a builder who elects to create contractual prelitigation procedures cannot later compel the homeowners to comply with the statutory prelitigation procedures provided in California Civil Code sections 895-945.5 if its contractual prelitigation procedures are deemed unenforceable. 192 Cal.App.4th at 589.

In this case, the homeowners of 54 homes built by Meritage Homes of California ("Meritage") filed a complaint seeking remedies for alleged construction defects in their homes. Meritage filed a motion seeking to compel those homeowners who purchased their homes pursuant to a sales contract containing alternative prelitigation procedures to comply with those procedures. The trial court found that the procedures set forth in the sales contract were unconscionable and unenforceable. *Id.* at 584. However, the trial court required that the homeowners comply with the statutory prelitigation procedures found in California Civil Code sections 895 *et seq.* ("SB 800"), which sets out a nonadversarial prelitigation procedure by which the homeowners alleging construction defects must give the builder notice and an opportunity to investigate and repair prior to initiating a court action seeking remedies. *Id.*

The homeowners petitioned for a writ of mandate, arguing that under SB 800, if a builder's alternative procedures are found to be unenforceable, then the builder may not enforce the statutory prelitigation procedures so that the homeowners could file suit without first complying with those statutory procedures. *Id.* The Court of Appeal agreed with the homeowners. *Id.* at 589. The Court looked at Civil Code section 914, which provides that "if a builder attempts to commence its alternative contractual procedures, it may not, in addition, require adherence to the statutory procedures regardless of whether the builders' own alternative nonadversarial contractual provisions are successful in resolving the dispute or ultimately deemed enforceable." Civil Code section 914 further provides that the builder must give the buyer notice at the time the sales agreement is executed of its election to either use the statutory prelitigation procedure or its own contractual procedure, which election is binding regardless of whether the alternative contractual procedure is successful in resolving the dispute. The Court interpreted these provisions to mean that if the builder elects or attempts to use its own prelitigation procedures, it is bound by that decision and it may not then enforce the statutory provisions. *Id.*

This case illustrates the potential dangers of drafting contractual prelitigation procedures that might waive statutory rights. Builders may be more likely to choose the statutory prelitigation procedures rather than trying to insert their own contractual procedures that might not withstand judicial scrutiny. Moreover, homeowners may be more likely to ignore the contractual prelitigation procedures contained in these types of contracts and argue that they are unconscionable and unenforceable.

3. Tverberg v. Fillner Construction, Inc., 193 Cal.App.4th 1121 (2011). In *Tverberg v. Filler Construction, Inc.*, the Court of Appeal held that a general contractor may be directly liable for an independent contractor's injuries where the general contractor negligently exercises control of jobsite safety that contributed to the independent contractor's injuries. 193 Cal.App.4th at 1129.

In *Tverberg*, the general contractor on a project to expand a commercial fuel facility hired a subcontractor to construct a metal canopy. The subcontractor delegated the work to another subcontractor, who, in turn, hired Tverberg, an independent contractor, as foreperson. On Tverberg's first day on the job, another subcontractor hired by the general contractor had dug holes for bollard footings at the general contractor's direction. These holes were marked with stakes and safety ribbon. Tverberg asked the general contractor to cover the holes with large metal plates, but the general contractor declined, stating that it did not have the necessary equipment to do so. Tverberg fell into a bollard hole and was injured. He filed a personal injury lawsuit against the general contractor alleging causes of action for negligence and premises liability.

The trial court found that: (1) an independent contractor could not hold the general contractor vicariously liable on a peculiar risk theory; and (2) the general contractor could not be held directly liable for failing to cover the holes because Tverberg was aware of the danger. *Id.* at 1125-1126. The case progressed to the California Supreme Court, which held that an independent contractor hired by a subcontractor may not hold the general contractor vicariously liable on a peculiar risk theory. *Id.* at 1126, *see also Tverberg v. Fillner Construction, Inc.*, 49 Cal.4th 518 (2010). The Supreme Court remanded the case to the Court of Appeal to determine whether the general contractor could be held directly liable on a theory that it maintained control over safety conditions at the jobsite. 193 Cal.App.4th at 1126.

The Court of Appeal stated that the imposition of tort liability on the general contractor turned on whether it exercised retained control over safety conditions at a jobsite in such a manner that affirmatively contributed to the independent contractor's injury. *Id.* at 1127. This requires more than a general contractor passively permitting an unsafe condition to occur. *Id.* The Court concluded that by ordering the bollard holes to be dug and requiring Tverberg to conduct work near those holes, the general contractor's conduct "may have constituted a negligent exercise of its retained control in a manner that could have made an affirmative contribution to Tverberg's injury. *Id.* at 1128-1129. Moreover, the Court concluded that there was further evidence to suggest that the general contractor may have affirmatively contributed to the injuries, including evidence that the general contractor assumed responsibility for the safety of workers near the holes by placing stakes and safety ribbon around the holes, and that the general contractor had failed to cover the holes even after being asked to. *Id.* at 1129.

The Court of Appeal further concluded that the general contractor was liable for Tverberg's injuries because it breached a nondelegable duty created by the California Occupational Safety and Health Act of 1973 ("Cal-OSHA") that all pits be barricaded or securely covered. *Id.* at 1130. The Court found that since the general contractor directed another subcontractor to dig the holes and was generally responsible for safety conditions on the jobsite, the general contractor had a nondelegable duty to ensure that the holes be barricaded or covered. *Id.* The Court concluded that the general contractor's breach of this duty could form the basis of direct liability for the independent contractor's injuries. *Id.*

This case expands the potential liability of general contractors for injuries that occur on jobsites and places a general contractor at greater risk of direct liability to independent contractors. General contractors must take great care when dealing with subcontractors and independent contractors.

Statutes:

1. SB 392, Contractors: Limited Liability Companies.

SB 392 amends California's contractor's license law to authorize the Contractors' State License Board ("CSLB") to issue contractor's licenses to limited liability companies, which were were previously precluded from holding a contractor's license law. Effective January 1, 2011, the CSLB must begin processing applications from LLCs by 2012.

SB 392 provides for heightened bonding and insurance requirements for LLC licensees. An LLC licensee must have on file a surety bond in the sum of $100,000 for damages arising out of employee wage and benefit claims. Moreover, LLC licensees must maintain liability insurance for errors and omissions and give notice of this policy to homeowners.

2. SB 189, Mechanic's Liens.

SB 189 causes the repeal of California's existing mechanic's lien statutes found at Civil Code §§ 3082-3267, and restructures and rephrases the lien laws. The majority of the provisions of SB 189 will take effect on July 1, 2012. Some of the more substantive changes include: (1) revision of the forms for conditional and unconditional waivers and releases; (2) removal of the cap on attorneys' fees awarded to the prevailing party on a petition to expunge or remove a lien; (3) a general contractor must give a 20 day preliminary notice to construction lenders on private works; (4) "acceptance by owner" shall no longer be the equivalent of

"completion"; and (5) where there are multiple direct contractors on a project, the owner may record a separate notice of completion with respect to the scope of work under each direct contract.

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Colorado

Case law:

1. In *Hildebrand v. New Vista Homes II, LLC*, ___ P. 3d. ___ , Nos. 08CA2645 and 09CA0695, 2010 WL 4492356 (Colo. App. 2010)(NYRFOP) (petition for certiori pending), the Colorado Court of Appeals considered the proper measure of damages for a construction defect claim under Colorado's Construction Defect Action Reform Act ("CDARA"). The Court determined, in relevant part, (1) that CDARA does not require plaintiffs to present alternative methods of computation of construction defect damages; (2) that noneconomic "inconvenience damages" are recoverable under CDARA; and (3) that plaintiffs are not entitled to prejudgment interest for cost of repair damages if the plaintiffs had not yet actually undertaken the repair and spent money to correct the defect.

In *Hildebrand*, the plaintiffs, Mark A. and Mark L. Hildebrand, a father and son, purchased a home being built by the defendant, New Vista Homes, LLC. Movement of the basement floor slab damaged the home, and both plaintiffs sued New Vista and its manager, Richard M. Reeves, under CDARA, pleading negligence, negligent misrepresentation, violation of the Colorado Consumer Protection Act, lack of statutory disclosures concerning expansive soils, and breach of implied warranty. *Id.* *1. The trial court entered a directed verdict for Reeves. The jury found New Vista liable and returned a verdict of $540,754 on all of plaintiffs' claims. On appeal, New Vista first argued that because the estimated repair costs exceeded the fair market value of the plaintiffs' home, the trial court erred in not capping repair cost damages at fair market value. *Id*. *10. The Court of Appeals rejected this argument. Under CDARA, "actual damages" are defined as "the fair market value of the real property without the alleged construction defect, the replacement cost of the real property, or the reasonable cost to repair the alleged construction defect, *whichever is less*…" *Id*., quoting § 13-20-802.5(2), C.R.S. (2010)(emphasis added by court). The Court of Appeals determined that because the fair market value of the house was disputed, the trial court did not err in submitting repair costs to the jury. *Id*. at *11. The Court found that CDARA does not require plaintiffs to present evidence on all three measures of damages included in the "actual damages" definition. "Any one measure could be appropriate, unless another measure is less." *Id*. Rather, the defendant, New Vista, bore the burden of proving that the fair market value of the house was less than the plaintiffs' estimate of repair costs. *Id*.

New Vista next contended that the trial court erred by awarding inconvenience damages to the plaintiffs under CDARA; the Court of Appeals also rejected this argument. CDARA limits liability of a construction professional to no more than actual damages. *Id.* at *12. Under CDARA, in addition to damages for defects as previously described, "actual damages" for personal injury means "those damages recoverable by law, except as limited by the provisions of section 13-20-806(4)." *Id.* quoting § 13-20-802.5(2). CDARA limits damages for noneconomic loss or injury in any action asserting personal injury or bodily injury as a result of a construction defect to $250,000.00. *Id*. citing § 13-20-806(4)(a), C.R.S. "Noneconomic loss or injury" is defined as "nonpecuniary harm for which damages are recoverable by the person

suffering the direct or primary loss or injury, including pain and suffering, inconvenience, emotional distress and impairment of the quality of life." *Id*. quoting, § 13-21-102.5(2)(b). Therefore, the Court found that the "plain language of CDARA permits recovery of damages for inconvenience." Finally, the plaintiffs asserted that the trial court erred by denying them prejudgment interest on repair cost damages. The Court of Appeals also rejected this argument. The plaintiffs had not yet repaired the defects and had thus not undertaken the "replacement expenditure." *Id*. at *14. The date prejudgment interest begins to accrue is the date the plaintiff undertakes the replacement expenditure. *Id*. citing *Goodyear Tire & Rubber Co. v. Holmes*, 193 P.3d 821, 825 (Colo. 2008). Therefore, because the plaintiffs had not actually spent any money to make any repairs as of the time of trial, they were not entitled to prejudgment interest. *Id*.

2. In *AC Excavating, Inc. v. Yale*, ___P.3d___, No. 09CA2184, 2010 WL 3432219 (Colo. App. 2010)(unpublished), the Colorado Court of Appeals found that Colorado's Trust Fund Statute, § 38-22-127, C.R.S., applied to loans that a developer's manager made to the developer. The Court determined that the Trust Fund Statute does not limit the source or intended use of funds that must be held in trust for the payment of subcontractors. *Id*. *1. In *AC Excavating*, a developer, Antelope Development, LLC ("Antelope"), began developing a residential golf course community in the late 1990s. The defendant, Donald Yale, was a 44% shareholder in Antelope. *Id*. Antelope also formed a separate entity, Antelope Hills Golf Course, LLC ("Antelope Hills"), to build the golf course. In 2005, due to financial problems, Antelope Hills sold the golf course. As part of the sale, Antelope was required to build a retention pond on the property after the closing date. *Id*. Antelope then contracted with AC Excavating to perform work on the retention pond. Although AC Excavating was paid for some of its work, it had unpaid invoices in the amount of $48,387.80. *Id*. In 2006, Yale personally loaned Antelope $157,500, which Antelope applied to both general business expenses and to pay some outstanding subcontractor invoices. In late 2006, Antelope's assets were depleted and it had multiple invoices left unpaid. Yale decided to give up on Antelope and foreclosed on a series of municipal bonds held as collateral for the loans Yale made to Antelope. Yale withdrew $50,000 from the Antelope account to cover the interest on the municipal bonds. *Id*.

AC Excavating then filed suit against Yale, alleging violations of the trust fund and civil theft statutes. The trial court found that Yale did not violate the statutes and entered judgment in his favor. AC Excavating appealed and asserted that the trial court too narrowly interpreted the trust fund statute; the Court of Appeals agreed with AC Excavating, and reversed and remanded the case. The Trust Fund Statute provides: "All funds disbursed to any contractor or subcontractor under any building, construction, or remodeling contract…shall be held in trust for the payment of the subcontractors…who have furnished laborers, materials, services, or labor…and for which such disbursement was made." § 38-22-127(1), C.R.S. The Court of Appeals found that a contractor breaches the statute by "diverting the trust funds from the suppliers and laborers on the project to other corporate obligations." *AC Excavating*, 2010 WL 3432219 at *2. Furthermore, "unless and until the suppliers and laborers are paid in full, the contractor cannot use any of the funds on a project to pay corporate overhead, compensation, or put them to any other use." *Id*. The Court also clarified that a person in complete control of the finances and financial decisions of an entity is personally liable if that entity violates the Trust Fund Statute. *Id*. Yale argued that the loans he made to Antelope did not fall under the Trust Fund Statute because they were "survival loans" for the company, and were not loans made specifically for the "construction project." The Court of Appeals rejected this argument, noting that the evidence in the record demonstrated that Antelope was only formed for the development of the project, its business operations only consisted of facilitating the project, and as such, the money that Yale deposited into Antelope's account "was used to pay bills that

arose only as a result of the project." *Id*. at *5. The Court concluded that "a subcontractor may avail itself of the [Trust Fund] Statute irrespective of the disburser's intended use for the funds." *Id*. at *4. Therefore, the Court reversed the trial court's ruling for Yale and remanded the case.

3. In *Weize Company, LLC v. Colorado Regional Construction, Inc.*, ___ P.3d ___, No. 09CA1369, 2010 WL 2306413 (Colo. App. 2010)(cert. denied), the Colorado Court of Appeals determined, as a matter of first impression, whether a lien claimant is required to record a *lis pendens* even though a bond has been substituted for the lien. *Id*. at *6-7. The plaintiff, Weize, was hired as a plumbing subcontractor by the defendant, Colorado Regional Construction ("CRC"). *Id*. at *1. When CRC failed to pay Weize, Weize recorded a mechanic's lien against the project and commenced the action, filing claims for breach of contract, for foreclosure of its mechanic's lien, and for violation of Colorado's trust fund statute, § 38-22-127, C.R.S. *Id*. Weize commenced the action in December 2007, and "before year end," the trial court allowed CRC to substitute a bond for the lien, and the court ordered the liens released. *Id*. at *7. Weize never recorded a notice of *lis pendens* prior to or after the release of the lien through substitution bond. The trial court dismissed Weize's lien foreclosure claim for failure to record a *lis pendens*, and the Court of Appeals affirmed.

The Court of Appeals found that, pursuant to § 38-22-110, C.R.S., bonding the lien did not excuse Weize from filing a notice of *lis pendens*. *Id*. at *8. Specifically, the Court noted that section 38-22-110, C.R.S. provides: "No lien claimed by virtue of this article…shall hold the property longer than six months after the last work or labor is performed…unless an action has been commenced within that time to enforce the same, *and unless also a notice stating that such action has been commenced is filed for record within that time*…" *Id*. at *7 (emphasis added by Court). The Court reasoned that despite bonding, the validity of a lien "would still be of concern to a person interested in title to the liened property because the surety could become insolvent." *Id*. Additionally, the Court explained that when the legislature added section 38-22-131 to the lien statutes, which allows a bond to be substituted for a lien, presumably the legislature knew of the *lis pendens* requirement, but chose not to provide that a bond obviates the need for a *lis pendens*. Accordingly, the Court of Appeals held that bonding did not excuse Weize from filing a notice of *lis pendens* even though the lien had been replaced by a bond.

4. In *JW Construction Company, Inc. v. Elliott*, ___ P.3d ___, No. 10CA0244, 2011 WL 915761 (Colo. App. 2011)(unpublished), the Colorado Court of Appeals determined that the president of a general contractor corporation was not personally liable for a homeowner's costs and attorney fees awarded upon an excessive lien claim. In *JW Construction*, the Elliotts hired JW Construction Company, a general contractor, to build their custom home. They entered into a construction contract that provided for fixed prices on certain portions of the work, allowances on other portions, and included progress payments each month based on the "costs actually expended" by JW Construction in the previous month. *Id*. at *1. The Elliotts paid the first four draw requests, but requested additional documentation for the amounts billed because the documentation submitted did not fully account for the amount billed. JW failed to do so, but submitted two more draw requests. The Elliotts refused to pay them, terminated the contract, and paid JW's subcontractors directly for the work that was documented in the final two draw requests. *Id*. The Elliotts also informed JW that it had paid the subcontractors directly for the amounts in the final two draw requests. JW then filed two mechanic's liens, for the total amount of the final two draw requests, and commenced the action against the Elliotts to foreclose the liens, among other claims. The Elliotts counterclaimed against JW and filed a third-party complaint against Joseph Wodiuk, the president of JW, asserting claims for breach of contract, negligence, and excessive liens.

The trial court determined that at the time JW filed its mechanic's liens, it was aware that the Elliotts paid to the subcontractors directly, and therefore, the liens were excessive. *Id*. at *3. The trial court awarded costs and attorney fees to the Elliotts and against JW pursuant to § 38-22-108, C.R.S. (2010), for having to defend against excessive lien claims. The trial court also imposed personal liability against Wodiuk for the costs and attorney fees awarded on the excessive lien claim. On appeal, the Court of Appeals upheld the trial court's ruling that the lien was excessive, but determined that the trial court erred in holding Wodiuk personally liable for the awarded costs and attorney fees because he did not record the lien. *Id*. Rather, JW, the corporation, was the entity that signed the construction contract and recorded the liens. The mechanic's lien statute, section 38-22-128, C.R.S., states in relevant part that: "Any person who files a lien under this article for an amount greater than is due without a reasonable possibility that said amount claimed is due and with the knowledge that said amount claimed is greater than due…shall forfeit all rights to such lien plus such person shall be liable to the person against whom the lien was filed in an amount equal to the costs and all attorney's fees." § 38-22-128, C.R.S. (2010). The Court determined that the plain language of the statute dictates that only the "person who files a lien" is liable for costs and attorney fees. Because a corporation has an independent legal identity, only the corporation is liable for costs and attorney fees, not an officer of the corporation who signed the lien in an official capacity. Therefore, the Court found that only JW, as the corporation, could be liable for the costs and attorney fees.

Legislation:

1. HB10-1394, Concerning Commercial Liability Policies Issued to Construction Professionals: HB10-1394 was codified at §§ 10-4-110.4 and 13-20-808, C.R.S. (2010) and amends Colorado statutory law concerning principals of contract construction and interpretation for commercial liability insurance policies issued to construction professionals.

Section 1 of the Bill, codified at § 13-20-808, C.R.S., imposes the following rules of contract construction to guide a court in such cases: (1) a court should presume that: (a) compliance with a construction professional's objective, reasonable expectations is intended; (b) the entire policy is to be effective and read as a whole; (c) a just and reasonable result is intended; (d) ambiguity in a policy is to be construed in favor of coverage; (e) a result that renders a part of coverage illusory is not intended; and (f) the work of a construction professional that results in property damage is an accident unless the property damage is intended and expected by the insured; (2) when weighing conflicting provisions, the court should construe the contract to favor coverage; and (3) the insurer bears the burden of proving that a policy provision limits or bars coverage.

Section 2 of the Bill, codified at § 10-4-110.4, C.R.S., voids so-called "super-Montrose" exclusions. Accordingly, section 10-4-110.4, C.R.S. prohibits a professional liability insurer from excluding or limiting coverage of acts arising before the policy is issued unless the insured knows of defects that have a likelihood to subject the insurer to damages and fails to disclose this to the insurer. A policy that conflicts with § 10-4-110.4, C.R.S. is unenforceable.

2. HB10-1278, Concerning the Creation of an Information Officer for Matters Arising Under the "Colorado Common Interest Ownership Act," and Making an Appropriation Therefor. HB10-1278 was signed by Governor Ritter on June 7, 2010, and went into effect on January 1, 2011. The Bill amends Colorado statutory law under § 12-61-101 *et seq*, C.R.S. (2010), and creates within the Division of Real Estate, an HOA Information and Resource Center that will be run by the HOA Information Officer. The HOA Information Officer will be appointed by the Executive Director of the Department of Regulatory Agencies and will act as a clearing house

for information relating to the basic rights and duties of unit owners, declarants and associations. The HOA Information Officer must also track inquiries and complaints relating to HOAs and report annually to the Director of the Division of Real Estate Regarding the number and types of inquiries and complaints received. In addition, the Bill directs the Director of the Division of Real Estate to create a registry for homeowners associations, and requires homeowners associations to register annually.

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Connecticut

Case law:

1. In *Suntech of Connecticut v. Lawrence Brunoli, Inc.*, 2011 WL 2150585, Superior Court, judicial district of Hartford (May 4, 2011)(Robaina, J.) the court ruled that the defendant-general contractor to a construction project with the State of Connecticut Department of Transportation ("ConnDOT") and its surety, could not be held liable to the plaintiff, its curtainwall subcontractor, for additional costs, expenses, damages and delays which were not caused by the defendant. Although the court acknowledged the plaintiff did not have standing to sue ConnDOT directly under the waiver of sovereign immunity contained in Conn. Gen. Stat. § 4-61 because it did not have a direct contract with the State, the court refused to hold the defendant responsible for the plaintiff's damages which resulted from other causes simply because the plaintiff lacked recourse against ConnDOT or any other party.

The plaintiff brought suit for damages including unpaid contract work, unpaid change orders and delays. In the subcontract, the plaintiff and defendant assumed to each other the respective obligations and responsibilities between the defendant and ConnDOT under the prime contract, including a clause that damages for delay caused by ConnDOT would not be compensable if experienced during a period the Contractor experienced concurrent delays for which ConnDOT was not responsible. Additionally, the plaintiff was subject to a contractual condition that ultimate authority for the approval and payment of all invoices and change orders remained with ConnDOT. The plaintiff submitted change orders, some of which were approved by the defendant but eventually denied by ConnDOT. All invoices submitted by the plaintiff were forwarded to ConnDOT by the defendant for review and processing. The project, including the curtainwall design and installation, was delayed by numerous causes, including design conflicts, engineering difficulties and the conduct of ConnDOT and other subcontractor; however, there was no evidence that the plaintiff's delays were caused by the defendant.

The trial court concluded that there was no evidence to find that the defendant was liable for breach of contract as alleged by the plaintiff because the damages and delays claimed by the plaintiff were not caused the defendant and there was no legal principle under which the defendant could be made responsible for delays caused by ConnDOT or others. The court ruled in favor of the defendant and its surety with respect to all of the plaintiff's claims against them.

2. In *Walpole Woodworkers, Inc. v. Manning*, 126 Conn.App. 94, cert. granted, 300 Conn. 940 (2011) the plaintiff, a fence-installation contractor, was not allowed full recovery under its contract with the defendant-homeowner, even though it had successfully proved that the defendant raised the Connecticut Home Improvement Act ("HIA"), as a defense in bad-faith. Instead, the plaintiff's recovery was limited to the value of the work it performed, excluding other

that would have been damages available under the parties' contract, but for the plaintiff's non-compliance with the HIA.

The plaintiff sued to collect the balance due on a contract to install a fence at the defendant's residence, including interest, costs and attorney's fees as allowed by the parties' contract. The defendant raised a defense under the HIA, because the contract did not include the start and completion times for the contract work. As such, the contract was deficient and in violation of the HIA. The trial court found that the defendant had raised the HIA as a defense in bad-faith because the plaintiff had resolved all the defendant's concerns with the fence and had completed the contract work, yet the plaintiff refused to pay the remaining contract balance. Accordingly, in this case the general rule that a home improvement contractor is barred from recovery where its contract does not conform to the requirements of the HIA was subject to the "bad faith exception" which allows recovery where the defendant-homeowner raises the HIA as a basis to repudiate the contract in bad faith. Applying the bad faith exception, the trial court awarded the plaintiff full recovery under the parties' contract, including the unpaid contract balance, attorney's fees, interest and costs.

On appeal, the court relied on prior Supreme Court decisions, ruling that the bad faith exception to the HIA limited the plaintiff's recovery to the value of the work performed. The court explained that the HIA violations rendered the contract null and void; therefore, the contractual provisions that allowed recovery of attorney's fees, interest and costs were unenforceable. The court reversed the trial court's award as to attorney's fees, costs and interest, but affirmed the award for the balance due on work the defendant had performed.

3. In *Cianci v. Originalwerks*, LLC, 126 Conn.App.18, cert. denied, 301 Conn. 901 (2011), the court discussed the rule for determining when the "last day" of work occurs for purposes of filing a mechanic's lien. Pursuant to Conn. Gen. Stat. §49-34, a mechanic's lien is not valid unless it is filed with the town clerk within ninety days of "performing the services or furnishing the materials." Although typically the time period for filing a mechanic's lien commences on the last day on which services are performed or materials are furnished, when work has been substantially completed and the contractor unreasonably delays final completion, the time for filing a lien is computed from the date of substantial completion. The date of the "substantial completion" is used as the starting date for filing a mechanic's lien when: (1) the contractor has unreasonably delayed final completion, and (2) any services or materials provided by the contractor subsequent to the date of substantial completion were furnished at the contractor's initiative, rather than at the owner's request.

In this case, in October 2007, following the signing of a contract between the parties, the contractor demolished the homeowner's existing house and began new construction. On July 15, 2008, the homeowner notified the contractor to cease construction, because he was concerned about the work being done. On September 19, 2008, the homeowner sent the contractor a list of the deficiencies in its performance, and requested the contractor to advise him when they would be corrected. On September 23, 2008, the contractor returned to the owner's premises to meet with the supplier and architect, and to examine the property. On October 2, 2008, the contractor returned to the premises again, to pick up and remove remaining tools, materials and scaffolding. The contractor filed the mechanic's lien within 90 days of September 23, 2008.

The trial court denied the owner's application to discharge the mechanic's lien, concluding that the services rendered by the contractor on September 23, 2008 and thereafter, though minimal, were done at the owner's request and not on the initiative of the defendant for the purpose of saving the mechanic's lien.

On appeal, the court affirmed the trial court's ruling, rejecting the plaintiff's claim that the contractor's actions on September 23, 2008 and thereafter were not "services" pursuant to the mechanic's lien statutes. The court found that that the term "services" in Conn. Gen. Stat. § 49-33 was not plain and unambiguous with regard to whether it encompassed the removal of tools and equipment or inspection of work already performed, therefore, the court turned to legislative history and prior case law to determine the extent of activity encompassed by the term "services." The court determined that lienable "services" were not limited to those incorporated or utilized in a building or appurtenance and noted that narrow construction of the term "services" would be improper given that that mechanic's lien statutes should be construed liberally to effect the underlying remedial purpose of providing security for those who furnish service and materials. The court concluded that the defendant's actions constituted lienable services, because they constituted the laying of groundwork for the physical enhancement of the property, regardless of the fact that the defendant did not continue to perform work thereafter.

4. In *Paragon Construction Co. v. Department of Public Works*, 130 Conn.App. 211 (2011), the court analyzed the pleading requirements that a public contractor must satisfy when suing the State of Connecticut, in order to present a "disputed claim" under the limited waiver of sovereign immunity contained in Conn. Gen. Stat. § 4-61(a). Section 4-61(a) is the sole statutory waiver of sovereign immunity for public works contract actions, the waiver being limited to contractors who have entered into a contract with the State and who have a disputed claim under such contract. There is no statutory waiver of sovereign immunity that gives subcontractors who lack a contract with the State the right to sue the State. Moreover, the general rule in Connecticut with respect to pass-through claims against the state is that to maintain a pass-through claim, the general contractor must unequivocally admit or acknowledge liability to the subcontractor whose claim it seeks to pass through.

In this case, the plaintiff entered into a contract with the Department of Public Works ("DPW") to act as general contractor on a project for the renovation of a correctional center. Thereafter, the plaintiff contracted with a subcontractor for "de-leading" and painting of security bars on windows. After substantial completion, the plaintiff sued DPW for unpaid extra work and delays. In its complaint, the plaintiff alleged claims for breach of contract and unjust enrichment, each claim containing an allegation that the plaintiff was owed money for "de-leading." After deposing principals for the plaintiff and the subcontractor, DPW filed a motion to dismiss claiming that the plaintiff's claims were barred by sovereign immunity to the extent based on de-leading, because the plaintiff had not alleged a "disputed claim" under Section 4-61(a) and because the de-leading portion of the claim merely asserted the claim of the subcontractor. The trial court denied DPW's motion on the grounds that the issue of whether the complaint met the requirements of Section 4-61(a) insofar as it related to de-leading, was a fact-bound issue that precluded dismissal.

On appeal DPW argued that the decision in *Federal Deposit Ins. Corp v. Peabody, N.E., Inc.*, 239 Conn. 92 (1996) applied to the case and that the plaintiff was therefore required to admit liability to the subcontractor to pass through the claim under its own contract with DPW. The court found the reasoning in *Peabody* to be pertinent to the case, notwithstanding that the court acknowledged that *Peabody* was factually distinguishable and the court's opinion did not

expressly identify how *Peabody* was to apply. However, the court ruled that the allegations in the plaintiff's breach of contract claim sufficiently alleged that the plaintiff, not the subcontractor, had a disputed claim with DPW regarding the de-leading, finding minimal consequence in the fact that an invoice from the subcontractor was appended to the complaint as an exhibit. The court further ruled that deposition testimony of the plaintiff's and subcontractor's principals was equivocal as to whether the plaintiff had admitted liability to the subcontractor. Therefore, the breach of contract claim could not be dismissed without an evidentiary hearing to resolve a critical dispute as to jurisdictional facts. The court did not say whether the plaintiff was required to allege that it had admitted liability to the subcontractor in its complaint. The court reversed the trial court's denial of DPW's motion to dismiss the plaintiff's unjust enrichment claim, ruling that to allow such a claim would expand the waiver of sovereign immunity in Section 4-61(a) beyond the plain statutory language to include actions "related to or connected with a public works contract" rather than actions directly "under" the contract.

5. In *A.M. Rizzo Contractors, Inc. v. J. William Foley, Inc, et al.*, No. X05-CV-106004577S, 2011 Conn. Super. LEXIS 469, Superior Court, judicial district of Stamford (January 13, 2011) (Blawie, J.), the court analyzed a subcontractor's statutory and tort-based rights of recourse against a project owner in the absence of a direct contractual relationship between the subcontractor and owner. The plaintiff-subcontractor sued the defendant-owner, a electrical utility company, alleging amongst other things negligence stemming from the defendant's issuance of allegedly defective site plans to the general contractor, as well as violations of Conn. Gen. Stat. §§ 42-158j(d), 42-158j(b)(4), and 42-158p stemming from the defendant's failure to pay the plaintiff after receiving written demands from the plaintiff or establish to retainage escrow accounts. The defendant moved to strike the plaintiff's claims.

As to the plaintiff's negligence claim, the court denied the defendant's motion to strike. The court ruled that the plaintiff alleged a valid claim because the owner owed a duty of care to the subcontractor with regard to defective plans and design documents issued by the owner that it knew would be relied on by the general contractor and subcontractors, including the plaintiff. Accordingly, the owner could be held liable for breach of that duty without a direct contractual relationship with the plaintiff.

As to the plaintiff's statutory claims pursuant to Conn. Gen. Stat. §§ 42-158j *et seq*, and 42-158p, the court granted the defendant's motion to strike the plaintiff's claims for sanctions pursuant to Section 42-158(b)(4) and for violation of Section 42-158p. The court ruled that the plaintiff could bring a claim under Conn. Gen. Stat. § 42-158j(d) against the owner for nonpayment for materials and labor it supplied, but could not recover attorney's fees and interest under Conn. Gen. Stat. § 42-158j(b)(4) from the owner, because these statutory sanctions only apply to the owner in direct actions by those having a direct contractual relationship with the owner. The court further ruled that Conn. Gen. Stat. § 42-158p, which requires an owner to establish a retainage escrow account, and if it fails to do so, to pay additional interest on unpaid retainage until the contractor's retainage is paid in full, does not apply to the relationship between the plaintiff and defendant.

6. In *Stonington Water Street Assoc., LLC v. Hodess Building Co., Inc. and National Fire Insurance Co.*, 2011 WL 861688, No. 3:08CV1359 (SRU)(March 9, 2011) (D.Conn), a surety was discharged of its obligations under a performance bond (AIA Form A-312) as a result of the owner-obligee's failure to comply with the conditions of the bond. The defendant-surety issued a bond for its principal, the general contractor on a condominium construction project with the plaintiff-owner. The bond named the owner as obligee. Following financial difficulties of the contractor and delays to the project, the contractor abandoned performance of the

construction contract. The plaintiff hired replacement contractors to complete the contractor's work and depleted the contract funds, prior to notifying defendant of the contractor's default and seeking the defendant's performance under the bond. The defendant denied coverage under the bond, claiming that the owner had failed to comply with the terms of the bond and that the damages claimed were not recoverable under the bond.

Thereafter, the owner sued the surety and principal, making various claims against the surety for nonperformance under the bond as well as violations of the Connecticut Unfair Insurance Practices Act ("CUIPA") and the Connecticut Unfair Trade Practices Act ("CUTPA"). The defendant moved for summary judgment on each of the plaintiff's claims, on the grounds that the plaintiff failed to comply with conditions precedent in the bond thereby rendering the bond null and void and discharging the defendant from any obligation under the bond.

The court granted the defendant's motion for summary judgment. The court ruled that the plaintiff materially breached the bond by not formally terminating the contractor in accordance with the procedures set forth in the construction contract, which was incorporated by reference into bond, and by unilaterally hiring successor contractors before allowing the defendant to perform under the bond, thereby depriving the surety of an opportunity to mitigate its damages. The court rejected the plaintiff's argument that it was no longer required to satisfy notice conditions of the bond because the defendant already had knowledge that the contractor had abandoned performance of the project. Additionally, the court ruled that the plaintiff materially breached the bond by depleting the contract balance after the contractor abandoned, but before requesting the defendant's performance under the bond. In doing so, the plaintiff breached its obligation under the bond to pay the balance of the contract price in accordance with the terms of the construction contract and failed to afford the defendant an opportunity to exercise its rights under paragraph 4 of the bond.

Legislation:

1. Public Act No. 11-55. An Act Concerning Discrimination. This act amends various sections of the Connecticut General Statutes to include "gender identity or expression" amongst the classes of persons protected against discrimination. "Gender identity or expression" means a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth, which gender-related identity can be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender related identity is sincerely held, part of a person's core identity and not being asserted for an improper purpose.

a. § 1-2- Nondiscrimination and affirmative action provisions in contracts of the state and political subdivisions other than municipalities: This act requires every contract to which the state or any political subdivision of the state (other than a municipality) is a party to contain a provision requiring the contractor to agree and warrant that it will not discriminate or permit discrimination on the basis of race, color, religious creed, age, marital status, national origin, ancestry, sex, gender identity or expression, mental retardation, mental disability or physical disability and to take affirmative action to insure that qualified job applicants are employed, and when employed are treated without regard to the foregoing statuses.

2. Public Act No. 11-149. An Act Concerning Offers Of Compromise In Construction Contract Arbitration Proceedings, Mediation And Arbitration of Construction Contracts, and Ethical Violations Concerning Bidding and State Contracts. This act creates a procedure in an arbitration proceeding related to a non-public work construction contract through which the party who demanded arbitration may send to the opposing party an offer of compromise, offering to settle the underlying claim for a specified amount. If the opposing party does not accept the offer, this act requires the court, upon application to confirm, vacate, modify or correct the award, to add 8% annual interest to an arbitration award and award reasonable attorney's fees and costs, if the prevailing party's arbitration award is equal to or greater than its offer of compromise after being confirmed modified or corrected by the court. These procedures are similar to those in existing law for offers of compromise in civil actions.

Under existing law, provisions in commercial construction contracts that required disputes arising from such contracts to be adjudicated in another state or according to the laws of another state, were void and unenforceable. This act amends existing law, voiding any clause in a commercial construction contract for the performance of work located in the State of Connecticut, which requires a dispute under the contract to be mediated, arbitrated or adjudicated in or under the laws of any state other than Connecticut, regardless of where the contract was executed. This amendment only applies to contracts for non-public works construction projects.

Finally, the act accords contractors, potential contractors, and consultants due process before they are deemed non-responsible bidders and precluded from bidding on state contracts on the basis of alleged past violations of state competitive bidding practices or ethics laws. This act clarifies the adjudicatory process applicable to accusations and determinations of bidding and ethics violations and requires that the bidder is formally found to have committed a violation by the Citizens Ethics Advisory Board, before an agency may declare them a non-responsible bidder.

3. Public Act 11-229. An Act Concerning The State Set-Aside Program, Filing Requirements Of State Contractors, Evaluation of Contractors And Subcontractors And A Program To Increase Contracts Awarded To Resident Bidders. This act makes changes to state contracting laws by requiring state contractors to affirm that they are in compliance with state ethics laws only when there is a change to the information contained in previously filed affirmations, eliminating the previous requirement that contractors and bidders must make such affirmations each time they enter into a state contract. This act also allows the affirmations to be provided electronically. State ethics laws covered by the affirmations include gift bans, anti-discrimination laws, and laws banning collusion. Additionally, the act modifies the submission requirements during contract prequalification, potentially allows more contractors to qualify for the state set-aside program, extends liability protections for private persons who complete evaluations of contractors or subcontractors, and requires the Department of Administrative Services (DAS) to submit a report on in-state contracting and to develop and implement a program to increase the number of state contracts awarded to in-state firms.

a. §§ 1-5 & 10 — Contractor Affirmations and Certifications: The act changes the frequency for filing certain affirmations with state contracting agencies or quasi-public agencies concerning state ethics laws, gifts, nondiscrimination policies, and consulting agreements. Under prior law, contractors and bidders had to file such affirmations each time they entered into a state contract as a condition of being awarded the contract. The act generally requires contractors to file these affirmations only when the information contained in previously filed affirmations has changed. In the event of a change, the contractor must file the updated information within 30 days of the change or upon the submittal of a new bid or

proposal (for anti-discrimination affidavits it is upon the execution of a new contract), whichever is earlier. For subcontractors and consultants, this act specifies that the contractor must obtain the affirmations before entering into a contract with the subcontractors and consultants, provide them to state institutions and quasi-public agencies in addition to state agencies, and provide them no later than 15 days after the request by the agency, institution, or quasi-public agency. The act also requires gift and anti-discrimination affirmations to be resubmitted no later than 14 days after the 12-month anniversary of the most recent submission.

b. § 2 — Gifts: This act broadens the scope of and changes the law requiring contractors, in order to be awarded a large contract with a state agency, to certify that they have not made gifts to the awarding agency. Under prior law, the recipient of a large state contract had to certify that no gifts were given between the date the agency began planning the contract and the date it was executed to (1) any public official or state employee who participated substantially in preparing the bid or request for proposal or negotiating or awarding the contract or (2) any official or employee of any agency that supervises or makes appointments to the contracting agency. The certification covered the person; business; or any officer, director, shareholder, member, partner, managerial employee of the business or their agent who participated substantially in preparing the bid or contract proposal or negotiating the contract. By law, any bidder or proposer who does not make these or related certifications must be disqualified and the agency must either (1) award the contract to the next-highest-ranked proposer or the next-lowest responsible qualified bidder or (2) seek new bids or proposals. This act:

1) allows any official of the firm authorized to sign state contracts to make the certification, rather than just the one authorized to sign the specific large contract;

2) expands the scope of the gift ban in the certification, requiring all personnel substantially involved in preparing bids or proposals or negotiating any state contracts to certify that they have not given gifts, at any time, to state contracting personnel or their supervisors; and

3) requires contractors to generally certify that all of their bids or proposals are without fraud or collusion, instead of just the present bid or proposal.

c. § 6 — Prequalification Application: By law, with certain exceptions, contracts for the construction, reconstruction, alteration, remodeling, repair, or demolition of a public building or other public work estimated to cost more than $500,000 must be awarded through competitive bidding to the lowest responsible prequalified bidder. This act eliminates the requirement that a prequalification applicant's financial statements be prepared by a CPA if the applicant is being assisted by a certified community development financial institution. Instead, the act requires such applicants to provide only the financial documents required by the institution to qualify for the program. It also eliminates a requirement that the financial statements contain information on the applicant's plant and equipment and bank and credit references. This act:

1) defines a “certified community development financial institution” as a community development bank, credit union, or loan or venture capital fund that (1) provides financial products and services in economically distressed markets and (2) is certified by the U. S. Department of the Treasury's Certified Development Financial Institution Fund; and

2) specifies that each applicant must provide a bonding company letter that states its aggregate work capacity and single project limit bonding capacity. Under prior law, the bonding company statement and maximum bonding capacity were included in the applicant's financial statements.

d. § 7 — Set-aside Program: By law, state agencies and political subdivisions, other than municipalities, must set aside 25% of the total value of all contracts they let for construction, goods, and services each year for certified small contractors. The agencies must further set aside 25% of the set-aside value (6. 25% of the total) for exclusive bidding by certified small minority-owned businesses. The act potentially expands the people and businesses that may be certified as small businesses by eliminating the requirement that a small contractor do business under the same ownership or management for a year before it is certified and at least 51% of a small contractor's ownership is held by someone with authority over daily operations, management, and policies and who receives beneficial interests. It eliminates the requirement that DAS maintain a pre-certification list of small contractors that do not meet the one-year requirement for certification since the act eliminates the need for the list. This act:

1) prohibits a small contractor from receiving certification if it is affiliated with another person and together their revenues exceed $15 million. By law, “affiliated” means one person, directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with another person. “Control” means having the power to direct or cause the direction of any person's management and policies, whether through the ownership of voting securities, by contract, or through any other direct or indirect means. Control is presumed to exist if a person directly or indirectly owns, controls, holds with the power to vote, or holds proxies representing, 20% or more of the voting securities of another person.

e. § 8 — Contractor Evaluations: By law, public agencies must, after completing a contract, evaluate the performance of contractors and, to the extent known, subcontractors. Political subdivisions may rely on the contractor's evaluation of subcontractors. Existing law protects public agencies and their employees and certifying officials from losses or injuries a contractor suffers as a result of the evaluation unless they acted willfully, wantonly, or recklessly. This act extends this protection to any person, not just government officials, for any loss or injury sustained by a contractor or subcontractor resulting from the evaluation, thus protecting contractors who complete evaluations of subcontractors.

f. § 9 — Resident Bidders: The act requires the DAS commissioner, by January 1, 2012, to submit a report on the use of resident bidders to the governor and Labor Committee, which analyzes any laws or economic factors that disadvantage resident bidders in submitting the lowest responsible qualified bid (presumably for a state contract), determines why any laws intended to give preference to state citizens for employment on public works projects are not being enforced, and (3) recommends administrative or legislative action to increase the number of state contracts awarded to resident bidders. By July 1, 2012, DAS must consider the report's findings and develop and implement a program to increase the number of state contracts awarded to resident bidders. The program may include preferences for in-state firms but must not violate the Commerce Clause.

4. Public Act No. 11-51. An Act Implementing The Provisions Of The Budget Concerning The Judicial Branch, Child Protection, Criminal Justice, Weigh Stations and Certain State Agency Consolidations. This act makes many changes to implement the state budget, including reorganizing state agencies. Among other things, it dissolves the Department of Public Works (DPW), establishes a Department of Construction Services (DCS) as its successor for purposes of construction and construction management, and shifts some DPW duties to the Department of Administrative Services (DAS) and others to the Office of Policy and Management (OPM).

a. § 42-72, 90-92, 96-104, & 112-113 — Department of Public Works Dissolution. This act:

1) dissolves DPW and transfers its personnel powers, duties, obligations, and other government functions that do not relate to construction or construction management to DAS beginning July 1, 2011. The DAS commissioner generally assumes responsibility for (1) purchasing, selling, leasing, subleasing, and acquiring property for state agencies; (2) disposing of surplus state property; (3) supervising the care and control of certain state buildings and grounds; and (4) establishing and maintaining security standards for most state property. If any of the department's orders or regulations conflict, this act allows the DAS commissioner to implement policies or procedures to resolve the conflict while adopting the policies and procedures in regulation.

2) establishes DCS as an independent executive branch agency headed by a commissioner with the authority to, among other things, designate a deputy or deputies. It makes DCS the successor department to DPW with respect to the construction of state buildings and property, including administering most state capital improvement projects and selecting consultants to assist on them.

3) requires the attorney general's office, upon request by the appropriate commissioner, to provide assistance in contract negotiations to the (1) DAS commissioner regarding the purchase or lease of real estate and (2) DCS commissioner regarding the construction. It requires the DAS commissioner to consult with the DCS commissioner when renegotiating a lease to allow the lessor to make necessary alterations or additions costing $500,000 or less.

4) requires the Minority Business Enterprise Review Committee to consult with both DAS and DCS regarding compliance with state programs for minority business enterprises. Previously, it consulted with DPW only.

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District of Columbia

Case law:

1. In *Sturdza v. United Arab Emirates*, 11 A.3d 251 (D.C. 2011), the District of Columbia Court of Appeals answered in the affirmative the following certified question from the D.C. Circuit Court of Appeals:

> Under District of Columbia law, is an architect barred from recovering on a contract to perform architectural services in the District or in quantum meruit for architectural services rendered in the District because the architect began negotiating for the contract, entered into the contract, and/or performed such services while licensed to practice architecture in another jurisdiction, but not in the District?

The background to *Sturdza* dates back to 1993 when Elena Sturdza, a licensed architect in Texas and Maryland, but not D.C., competed for a contract to design a new embassy and chancery building in Washington, D.C. for the United Arab Emirates ("UAE"). Between 1993 and 1996, Sturdza submitted a design and entered into contract negotiations with UAE before UAE sent a final draft agreement in early 1996. Although Sturdza accepted the UAE's terms and had previously deferred billing for certain work pending the contract negotiations, the UAE ceased communications with her and no contract was ever signed. Instead, UAE contracted with a D.C. architect, who Sturdza claimed "copied and appropriated many of the design features that had been the hallmark of her design." *Id.* at 253.

Ultimately, the D.C. Court of Appeals held that Sturdza could not recover under a breach of contract theory or for quantum meruit because she was not a D.C.-licensed architect. The court reasoned that Sturdza's violation of the prohibition in D.C. CODE § 47-2853.63 (2001) against the unlicensed practice of architecture invoked the "well-established" rule in D.C. that a contract made in violation of a licensing statute is void and unenforceable and also precludes recovery on a quasi-contractual basis. In doing so, the court rejected Sturdza's arguments that D.C.'s licensing requirements did not apply to an international competition to design the UAE embassy or that the Foreign Missions Act preempted the licensing requirements. Finally, the court also held that because Sturdza claimed to have performed some of the architectural services, she could not rely on the former exception (in former D.C. CODE § 2-262(6) and in effect at the time) that previously allowed an architect licensed elsewhere in the United States to agree to perform architectural services so long as the architect did not perform such services until licensed in D.C. *Id. at 258-59.*

The decision in *Sturdza* illustrates the risk of nonpayment that is inherent whenever an architect practices architecture in D.C. without a license, even if the architect later obtains the D.C. license and even if the architect is licensed elsewhere. Architects intending to practice in D.C. should become familiar with the licensing requirements, including the limited exceptions, and be sure to comply with all such requirements or risk nonpayment for services rendered.

2. In *Mazza v. Housecraft LLC*, No. 09-CV-1068, 2011 D.C. App. LEXIS 215 (D.C. Apr. 28 2011), the District of Columbia Court of Appeals upheld the trial court's dismissal of a complaint on the basis of *res judicata*. In *Mazza*, Housecraft LLC renovated Mr. Anthony Mazza's home pursuant to a home improvement contract and subsequently filed a mechanic's lien when Mazza failed to pay the amount claimed. After a writ of *fieri facias* was issued to enforce the mechanic's lien against the property, Mazza filed a separate complaint to challenge

the writ of fieri facias on the basis that Mazza's wife signed the contract, but the property was titled in Mazza's name alone.

In affirming the trial court's dismissal, the D.C. Court of Appeals found *res judicata* to apply because Mazza failed to, but could have, raised the issue of who signed the contract as a defense to the validity of the mechanic's lien. The appellate court also concluded that even though the writ of *fieri facias* was a post-judgment event, Mazza's new claim was based upon the same facts at issue in the previous action.

The appellate court also affirmed the trial court's denial of Mazza's motion for leave to amend the complaint or to appeal the prior judgment. In this regard, the appellate court found that Mazza should have appealed the mechanic's lien judgment or, as a last resort, filed a Rule 60(b) motion for relief from the prior judgment, both of which he failed to do.

The decision in *Mazza* serves as a reminder of the importance of raising all defenses to the validity and enforcement of a mechanic's lien during the enforcement action itself. The *Mazza* decision also discusses the appropriate means for challenging an adverse judgment while demonstrating how the level of difficulty increases when a timely appeal is not filed.

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Florida

Case law:

1. *LH Construction Co., Inc. v. Circle Redmont, Inc.,* 36 Fla. L. Weekly D263a (5th DCA 2011). This case primarily dealt with issues of contract interpretation and the use of parol evidence. Here, a general contractor hired a subcontractor to manufacture a staircase and flooring system. The first proposal offered by the subcontractor included the installation of the staircase, however, the general contractor requested a subsequent proposal excluding installation from the scope. The subcontractor then drafted, signed, and sent a subcontract to the general contractor based on the proposals, but because of the change, the subcontract contained conflicting terms: one which indicated the subcontractor would install the staircase and the other indicating that the subcontractor would not. The general contractor never signed the subcontract, but made payments according to the payment schedule in the subcontract. Well into the manufacturing of the staircase and flooring system, a dispute between the parties arose as to (i) whether the subcontractor was supposed to install the staircase, (ii) when payments were due under the contract, and (iii) the validity and meaning of the subcontract. On appeal, the court found that although the general contractor did not sign the subcontract, the general contractor's performance via payment created a valid and enforceable contract. The court also found that the conflicting installation terms made the contract ambiguous, and that parol evidence was admissible to determine the intent of the parties and resolve the ambiguity.

2. *Mario's Enterprises Painting & Wallcovering, Inc. v. Veitia Padron Inc.,* 36 Fla. L. Weekly D150a (3d DCA 2011). In this case, a general contractor hired a painting subcontractor to perform all painting work at a school construction contract. There were many deficiencies in the subcontractor's work, however, before the subcontractor could resolve the problems, it was discovered that lead was present at the construction site. After a lead investigation was performed, the school board notified all of the workers that the lead levels were safe at the property. The general contractor then tried to contact the painting subcontractor to schedule the

completion and correction of the paint work, but the subcontractor refused to perform until it received an official report from the school board's remediation specialist confirming that the lead levels were safe. To stay on schedule, the general contractor was forced to terminate the subcontractor to hire another painting subcontractor to perform the work. The original subcontractor then sued the general contractor for breach. On appeal, the court affirmed the lower court's determination that the general contractor was entitled to terminate the painting subcontractor as the subcontractor had no legal excuse not to perform and was just using delay tactics.

3. *MGM Construction Services Corp. v. Travelers Casualty & Surety Co. of America*, 36 Fla. L. Weekly D462a (3d DCA 2011) (reversing summary judgment). Contractor hired a subcontractor to hang drywall and perform stucco work on four projects at the University of Miami (UM). After a dispute arose, the subcontractor stopped work and filed claims of lien on all four projects. The contractor then sued for breach of contract and fraud in the inducement and sought to discharge the liens. The subcontractor counterclaimed and also sued Travelers on the bonds securing performance. The contractor, Travelers and UM raised the defense that the subcontractor was unlicensed under Miami Dade's Code of Ordinances and precluded from enforcing the contract pursuant to Section 489.128, and moved for summary judgment. While the motions were pending, the legislature changed 489.128 to exclude local licenses as a reason for invalidating a contract. Nevertheless, the parties renewed their motions, this time arguing based on Florida Supreme Court case law that any contract founded on a violation of a statute is void, whether the statute pronounces it void or not. Based on this and the fact that the subcontractor was not licensed under Miami Dade's Code of Ordinances, the trial court summarily determined that the subcontractor was not entitled to remedy as a matter of law. On appeal, the 3rd DCA noted that the Ordinance did not call for invalidation of a contract due to non compliance. The court also noted the struggle between two competing needs: one to protect the public from poor workmanship and the other to protect the subcontractor from unscrupulous owners and contractors. In doing so, it held that courts must not apply a bright-line test but rather a more flexible rule such as the one set forth in Restatement of Contracts Section 181 in determining whether a licensing requirement should render a contract unenforceable. The test outlined in the restatement is two pronged, and calls for the court to examine (i) whether the requirement which was violated has a regulatory purpose, and (ii) whether the interest in the enforcement of the contract is clearly outweighed by the public policy behind the requirement. The 3rd DCA then reversed and remanded for a factual examination of the restatement test.

4. *Hochberg v. Thomas Carter Painting, Inc.*, 36 Fla. L. Weekly D1200f (3rd DCA June 8, 2011). This case addressed when exactly the statute of limitations begins to run in latent defects cases. Here, a homeowner hired a general contractor to construct a new residence in 2000. In 2003, the homeowner took possession of the home, but was not able to move in because the homeowner immediately noted that mold was present in the home. The homeowner then hired an engineer to investigate the extent of the mold problem, and the engineer presented a report to the homeowner in early 2004. The homeowner made an arbitration demand to the general contractor in 2004 in which it alleged water intrusion, but did not file suit against any of the subcontractors involved in the construction of the residence until 2008. The subcontractors moved to for summary judgment due to the expiration of the applicable four year statute of limitations, and the trial court granted summary judgment in the subcontractors' favor. On appeal, the homeowner argued that under the latent defect provision of Section 95.11(3)(c), the statute of limitations only started to run once the homeowner discovered the precise nature of the defects, or more specifically, once the homeowner discovered that it was the negligence of the subcontractors which caused the defects. The

appellate court disagreed, holding that the statute of limitations began to run once the homeowner obtained general knowledge of the defects. Because the homeowner alleged that there were water intrusion issues in its arbitration demand to the general contractor, the homeowner had sufficient general knowledge of the mold issues at that time, making the date of the arbitration demand the latest conceivable date on which the statute of limitations began to toll.

5. *Wilson v. Palm Beach County*, Case No. 502008-CA-036527 (Fla. 4th DCA June 15, 2011). Plaintiff owned and operated a nursery on land zoned as agricultural-residential. Palm Beach County conducted a property visit and found violation of the Unified Land Development Code ("ULDC") due to operation without proper zoning. The trial court entered summary judgment in favor of Palm Beach County declaring the Right to Farm Act did not preempt the County's enforcement of ordinances enacted prior to its passage, that special permitting requirements of county ordinances were not covered by the Act, and that the development code enacted by the County was pursuant to home rule powers and Chapter 163, therefore the County has the power to regulate agricultural uses. The district court of appeal affirmed the holding that the definition of development under Chapter 163 does not preempt local government regulation of agricultural uses. The court explained that "development" includes by definition "the carrying out of any building activity or mining operation, the making of any material change in the use or appearance of any structure or land, or the dividing of land into three or more parcels," but excludes certain other operations including agricultural applications. The court also affirmed the holding that the Right to Farm Act does not prohibit enforcement of ordinances enacted at time of its passage.

Legislation:

1. HB 7223 – OGSR/Competitive Solicitations. The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

Agency procurements of commodities or contractual services exceeding $35,000 are governed by statute and rule and require one of the following three types of competitive solicitations to be used, unless otherwise authorized by law: invitation to bid (ITB), request for proposals (RFP), or invitation to negotiate (ITN).

Current law provides general public record and public meeting exemptions associated with competitive solicitations. Sealed bids, proposals, or replies in response to an ITB, RFP, or ITN, are exempt from public records requirements until a time certain. In addition, a meeting at which a negotiation with a vendor is conducted pursuant to an ITN is exempt from public meetings requirements. A complete recording must be made of the exempt meeting. The recording is exempt from public records requirements until a time certain.

The bill expands the public record exemption by extending the exemption for sealed bids and replies from 10 days to 30 days, and by extending the public record exemption for sealed responses from 20 days to 30 days. The change also makes the timeframes consistent.

The bill expands the public meeting exemption to include any portion of a meeting at which a vendor makes an oral presentation or a vendor answers questions as part of a competitive solicitation. It is further expanded to include any portion of a team meeting at which negotiation strategies are discussed.

The bill expands the public record exemption for recordings of exempt meetings to comport with the public record exemption for sealed bids, proposals, or replies. It extends the public record exemption from 20 days to 30 days. It also expands the public record exemption by including those records presented by a vendor at a closed meeting.

The bill extends the repeal date from October 2, 2011, to October 2, 2016. The bill was signed in to law by the Governor on June 2, 2011 and is effective as of June 2, 2011.

2. HB 407 – Residential Building Permits. This bill prohibits a local enforcement agency, and any local building code administrator, inspector, or other official or entity from requiring the inspection of any portion of a building, structure, or real property that is not directly related to the activity for which a permit is sought as a condition for issuance of a one- or two-family residential building permit. The provisions of this bill do not apply to a building permit that is sought for: substantial improvements, a change in occupancy, conversions from residential with nonresidential or mixed use, and historic buildings. The bill does not prohibit a local enforcement agency, or any local building code administrator, inspector, or other official or entity from:

- Citing a violation that was inadvertently observed in plain view during the course of an inspection conducted in accordance to this act;
- Inspecting a physically nonadjacent portion of the building, structure, or real property that is directly impacted by the activity for which the permit is sought;
- Inspecting any portion of the building, structure, or real property in which the owner or person having control has voluntarily consented to such inspection;
- Inspecting any portion of the building, structure, or real property pursuant to an inspection warrant issued in accordance to ss. 933.20-933.30, Fla. Stat.

The provisions of this bill will expire upon being adopted into the Florida Building Code. The bill was signed in to law by the Governor on May 31, 2011 and is effective as of July 1, 2012.

3. SB 960 – Liquefied Petroleum Gas. This bill requires all state agencies to adopt standards relating to the separation distance between liquefied petroleum gas containers and structures, property lines and sources of ignition in the 2011 edition of the National Fire Protection Association 58, also known as the Liquefied Petroleum Gas Code. It prohibits the Department of Agriculture and Consumer Services and other state agencies from requiring compliance with certain national standards for liquefied petroleum gas tanks unless the department or agencies require compliance with a specified edition of the national standards. It also provides for future expiration of such requirements. The bill was signed in to law by the Governor on June 2, 2011 and is effective as of July 1, 2011.

4. SB 142 – Negligence. The bill reverses D'Amario v. Ford Motor Co., 806 So. 2d 424 (Fla. 2001), a Florida Supreme Court decision that barred Florida juries from apportioning fault to a negligent driver and also prevented juries from hearing all the evidence surrounding the details of automobile accidents when an auto manufacturer is sued in an action challenging a vehicle's crashworthiness. D'Amario resulted in Florida being in the minority of states on this issue in direct contravention of Florida's comparative fault principles. In other words, drivers who are drunk, underage, without a license or under the influence of any manner of illegal substances, are not allocated fault in such cases because their condition is never shared with

the jury. The bill requires the trial judge to instruct the jury on the apportionment of fault in these cases and specifies that the rules of evidence apply to these actions. The bill contains intent language and legislative findings that the provisions in the bill are intended to be applied retroactively. The bill reorganizes the comparative fault statute by moving the definition of "negligence action" to the definitions subsection in the current comparative fault statute, and it also adds definitions of the terms "accident" and "products liability action." The bill was signed in to law by the Governor on June 23, 2011 and is effective as of the same date.

5. SB 1196 – Construction Liens. This bill revises the procedures for protecting a lessor's interest in leased property from construction liens when the improvement is contracted for by a tenant of the property. The bill provides that a lessor may file a memorandum of the lease, in lieu of a copy of the lease or a short form of the lease, in the official records of the county where the leased property is located. In the alternative, a lessor may file a notice advising that leases for property located on a parcel of land prohibit liens in the official records of the county where the land is located. The notice must contain the name of the lessor, legal description of the parcel of land, the specific language contained in the lease or leases, and a statement that all or a majority of the leases expressly prohibit these types of liens. The bill requires the notice to be filed prior to the filing of any Notice of Commencement for work on the leased property. The bill provides that a contractor may file a demand on the lessor for a verified copy of the terms in the lease. Failure of the lessor to comply with a demand may result in a contractor being able to file a lien against the lessor's property. In addition, the bill provides that the lessee must be listed on the Notice of Commencement as the owner of the property when the improvement is contracted for by the lessee. The bill was signed in to law by the Governor on June 21, 2011 and is effective as of October 1, 2011.

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Hawaii

Case law:

1. In *Okamura v. Williams*, 2011 Haw. App. LEXIS 166 (Haw. Ct. App. Feb. 24, 2011), the homeowner hired an unlicensed contractor to make repairs in her home. The repairs included installing a driveway entrance gate and interphone system, a mail box, custom granite kitchen countertops, custom wood trim on windows and doors, new mirrored wardrobe doors, and flagstone pavers outside the entry doors. When a dispute arose, the unlicensed contractor refused to complete the work and the homeowner refused to pay the amount remaining under the contract. The homeowner filed suit for, among other things, breach of contract and negligence. The relief sought was restitution. The homeowner argued that under Haw. Rev. Stat. § 444-22, a person contracting with an unlicensed contractor is automatically entitled to recover from the contractor where there is a dispute over the contractor's work. The statute provided that an unlicensed contractor could not recover for work done in a civil action. The Hawaii Intermediate Court of Appeals decided this statute did not allow a party who uses an unlicensed contractor to recover payments already made. Moreover, ordering restitution and having the defendant to remove some of the fixtures that had been installed to restore part of the house to its pre-construction condition was an inappropriate remedy. An adequate remedy in contract was available because the homeowner could sue and potentially recover for breach of contract, even if the contract was made with an unlicensed contractor.

2. In *Oceanic Companies, Inc. v. Kukui`ula Development Co. (Hawaii), Inc.*, 2011 Haw. App. LEXIS 255 (Haw. Ct. App. March 18, 2011), the court considered whether the contractor could compel the owner to arbitrate a dispute regarding the termination of the construction contract. After the contract was entered in October 2007, the owner reduced the scope of work by $947,287 and then sent the contractor a termination letter after the reduced work was over. The contractor asserted that the developer had to pay for lost profits under their contract and alleged that the developer attempted to evade the lost-profit provision by sending the notice of termination. The contractor sought to arbitrate the dispute and petitioned the circuit court to issue an order compelling arbitration. The circuit court denied the petition. On appeal, the Intermediate Court of Appeals noted that the first two sentences of the arbitration clause committed the contractor to be joined in any arbitration where the owner was a party and which related to the construction contract. The remainder of the provision, however, dealing with other disputes between the contractor and developer used permissive language by providing such disputes "may be resolved by binding arbitration." Consequently, the circuit court's order denying the petition to compel arbitration was affirmed.

3. In *Director, DLIR v. Permasteelisa Cladding Tech., Ltd.*, 125 Haw. 223, 257 P.3d 236 (Haw. Ct. App. 2011), the Hawaii Intermediate Court of Appeals ("ICA") confirmed the judgment of the trial court, which held that decedent had failed to use a safety device when he fell to his death. Safety standards required a fall protection system to be used by the employee. Permasteelisa had provided the decedent with a personal fall arrest system and an anchor to which the system attached. After the fall, the Hawaii Occupational Safety and Health Division cited Permasteelisa for various violations of fall protection standards. Permasteelisa contested the citations before the Hawaii Labor Relations Board, which vacated the most serious of the citations. The trial court affirmed. The Director appealed, contending the employer had not met the regulatory standards of providing fall protection unless the employee was actually using the equipment at the time of the accident. The ICA disagreed. The regulation did not require the employee to ensure the use of the fall protection arrest system by inserting the anchor for the employee. Providing a fall protection system with training and direction in use was all that was required.

Legislation:

1. HB 319, Relating to Owner-Builder. This measure amends Haw. Rev. Stat. § 444-2.5 regarding owner-builder exemptions from certain requirements for a building permit. The bill clarifies that an owner with an open permit may be exempt, upon a showing of hardship, from the prohibition on sale of lease of a property constructed or improved under an owner-builder exemption within one year of the construction or improvement. Effective July 1, 2011. The bill signed by the Governor on 6/16/11.

2. H.B. 924, Commercial Liability Insurance Policies; Construction Professionals. This measure clarifies that the terms of a liability insurance policy issued to a construction professional shall be construed according to the reasonable expectations of the parties at the time that the insurance policy was issued. The legislation attempts to address the problems created for the construction industry by the Intermediate Court of Appeals decision in *Group Builders, Inc. v. Admiral Ins. Co.*, 123 Haw. 142, 231 P.3d 67 (Haw. Ct. App. 2010), where the court held that construction defects arise from contract and are therefore not an occurrence, a prerequisite to coverage under a CGL policy. The bill signed by the Governor on 6/03/11.

3. S.B. 754, General Excise and Use Taxes. The statute would temporarily suspend the exemptions for certain persons and certain amounts of gross income or proceeds from the general excise and use tax and require the payment of both taxes at a four per cent rate. The GET exemption for amounts deducted from the gross income received by contractors described under Haw. Rev. Stat. § 237-13 (3) (B) (the "subcontractor deduction") would be suspended. In other words, the GET increase resulting from the suspension of the subcontractor deduction would fall on the general contractor. This measure was signed by the Governor on 6/09/11.

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Idaho

Case law:

1. In *Hopkins Northwest Fund, LLC v. Landscapes Unlimited, LLC,* 151 Idaho 740, 264 P.3d 379 (2011), a lender brought an action to foreclose upon deeds of trust on the borrower's golf course property, and the landscaping contractor cross-claimed, alleging that its mechanic's lien on the property was superior to the lender's interest. The Idaho Supreme Court held that a contractor performing landscaping work on several parcels on a single project need not itemize the work done on each parcel, as required for multiple buildings and improvements under I.C. § 45-508, in order to maintain the priority of its mechanic's lien.

2. In *Perception Const. Management, Inc. v. Bell*, 151 Idaho 250, 254 P.3d 1246 (2011), the Bells hired Perception to build a log home. The parties' relationship deteriorated, and the Bells terminated the contract before construction was complete. Perception filed suit to enforce the mechanic's lien it had timely filed, and the Bells filed counterclaims for construction defects and breach of contract. The district court bifurcated the mechanic's lien foreclosure from the counterclaims and then excluded evidence from the Bells regarding the construction defects. On appeal, the Bells argued that Perception failed to substantially perform the construction contact because of the defects, and thus it was error to exclude evidence regarding the construction defects. In ruling that substantial completion of the contract is a precondition to enforcing a claim of lien, the Idaho Supreme Court stated, "The question of whether the contractor's performance is 'substantial' and whether the defect is 'minor' is one of degree, 'turning upon circumstances such as the particular structure involved, its intended purposes, and the nature and relative expense of the repairs, as well as equitable considerations.'"

3. In *Harris, Inc. v. Foxhollow Const. & Trucking, Inc.*, 151 Idaho 761, 264 P.3d 400 (2011), two entities formed a joint partnership to perform construction projects. David Egan, a business manager for Foxhollow Construction and Trucking, Inc. ("Foxhollow"), met with Wayne Johnson ("Wayne") of L.N. Johnson Paving, LLC ("Johnson") to discuss a bid for excavation and paving work for a new public high school in Fremont County (the "Fremont Project"). Egan wanted to bid on the Fremont Project on behalf of Foxhollow, but Foxhollow lacked the requisite public works license. Johnson had a public works license for contracts up to $500,000.00. Wayne thought Johnson's license could cover Foxhollow if Johnson and Foxhollow submitted a single bid in Johnson's name. So, Egan submitted a subcontract bid in Johnson's name to Harris, a general contractor, for the Fremont Project's excavation, filling, grading, culvert, and asphalt paving work. Wayne and Egan planned for Johnson to handle the paving work and for Foxhollow to do the excavation, filling, grading, and culvert work. The joint venture won the bid for the Fremont Project.

After trial, Johnson was awarded attorney's fees and costs under I.C. § 12-120(3), which provides for reasonable attorney's fees in any action to recover on a contract for services or in any commercial transaction. The Idaho Supreme Court reversed the attorney's fees award because the parties had structured their agreement to circumvent Idaho's public works license requirements: 1) subcontracting more than eighty percent (80%) of the work under any contract to be performed by him as a public works contractor was illegal (I.C. § 54-1902) and 2) it is unlawful for any public works contractor to: (a) Accept a bid from any person who at that time does not possess the appropriate license for the project involved; or (b) Accept bids to sublet any part of any contract for specialty construction from a specialty contractor who at that time does not possess the appropriate license (I.C. § 54-1902(3)). Therefore, the underlying business and contractual relationship between the parties was illegal, and no fees could be awarded under the statute for an illegal contract or commercial transaction.

4. In *Hillside Landscape Const., Inc. v. City of Lewiston*, 151 Idaho 749, 264 P.3d 388 (2011), the low bidder on a public works project for replacement of the irrigation system at the city golf course brought an action against the city for declaratory relief, injunctive relief, and damages, challenging city's rejection of the bid on the grounds that the low bidder lacked sufficient experience for the project. For public works construction valued in excess of $100,000, the relevant statute provides two alternative bidding procedures named "Category A" and "Category B." I.C. § 67–2805(3). The primary difference between the two procedures is the determination of a "qualified bidder."

Under Category B, there are "two (2) stages, an initial stage determining supplemental prequalifications for licensed contractors, either prime or specialty contractors, followed by a stage during which bid prices will be accepted only from prequalified contractors." *Id*. § 67–2805(3)(b). The statute contains procedures for determining which interested contractors meet the prequalification standards. Those that do can then submit bids. Under Category A, there is no procedure for prequalification of the contractors.

Under a prior version of the statute, the words "lowest responsible bidder" were included for Category A jobs. The new statute does not contain that wording, thus the political subdivision may only consider the amount bid, bidder compliance with administrative requirements of the bidding process, and whether the bidder holds the requisite license. Under Category B, the political subdivision can consider other factors, such as experience, under the prequalification procedure. The statute provides, "Political subdivisions may establish prequalification standards premised upon demonstrated technical competence, experience constructing similar facilities, prior experience with the political subdivision, available nonfinancial resources, equipment and personnel as they relate to the subject project, and overall performance history based upon a contractor's entire body of work." *Id*. § 67–2805(3)(b)(i).

The Idaho Supreme Court held that under Category A, a bidder holding the requisite license is qualified. If the political subdivision believes that the requisite license is not, by itself, a sufficient qualification for the project contemplated, it can then proceed under Category B. Because the City of Lewiston proceeded under Category A, then it could not consider the experience of the bidders for the project.

5. In *ParkWest Homes LLC v. Barnson*, 149 Idaho 603, 238 P.3d 203 (2010), a home builder brought an action to foreclose its mechanic's lien. At the time ParkWest negotiated and signed the construction contract, it was not registered under the Idaho Contractor Registration Act, I.C. § 54-5201 *et seq.*, which states that it shall be unlawful for any

person to engage in the business of, or hold himself out as, a contractor within this state without being registered as required in this chapter. ParkWest, however, registered before it began work. The district court held that ParkWest's lien was void because it was not registered at the time it negotiated and signed the contract. The Idaho Supreme Court reversed, holding that ParkWest was entitled to a lien for work or labor it provided and materials it supplied during the time that it was duly registered. To hold otherwise would mean that a contractor who violated the Act would be forever barred from obtaining a mechanic's lien, which is inconsistent with the constitutional and statutory right to a mechanic's lien.

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Illinois

Case law:

1. *LaSalle Bank Nat'l Ass'n v. Cypress Creek 1, LP*, 2011 Ill. LEXIS 436 (Ill., Feb. 25,2011) (rehearing denied, 2011 Ill. LEXIS 1089 (May 23, 2011)). In *LaSalle Bank v. Cypress Creek 1, LP,* the Illinois Supreme Court determined the relative priorities of a lender and mechanics lien claimants to the proceeds of a foreclosure sale where the lender's mortgage was recorded before the mechanics liens attached. The court held that a lender has priority up to the value of the property when the construction contract underlying the lien was entered, plus the value of the improvements that were paid for out of the construction loan secured by the mortgage. The court concluded a mechanics lien holder has priority only to the value of the improvements for which it has not been paid. This case overruled *Mitchell v. Robinovitz*, which allowed a lien claimant's priority claim to include the value of all improvements, including those provided by others. Also, the dissenting opinion noted the majority opinion "does not apply the statute's plain language."

This case does not address projects encumbered by a mortgage recorded after the construction contract is executed. However, the court left the door open for a mortgagee that records after the date of a construction contract to claim equitable subrogation rights arising from payments that it advances for the work of that contract, and thereby claim priority to that part of the value of the improvements. Despite stating that it avoided reaching the lender's claim of equitable subrogation based on the amounts that it paid for construction, the court's rationale is not at odds with an equitable subrogation claim.

2. In *National City Mortgage v. Bergman***,** 405 Ill. App. 3d 102; 939 N.E.2d 1; 2010 Ill. App. LEXIS 1111; 345 Ill. Dec. 272 (2nd Dist. 2010), the appellate court held that a mechanics lien claim does not need to state the date of completion of work to be enforceable. The court reasoned that because the Illinois Mechanics Lien Act must be strictly construed to require only those elements listed in section 7 of the Act to perfect an enforceable lien claim and section 7 does not require a completion date to be stated, such a requirement cannot be inferred by the courts. The decision below relied on *Merchants Environmental Industries, Inc. v. SLT Realty Ltd. Partnership*, 314 Ill. App. 3d 848, 869, 731 N.E.2d 394, 246 Ill. Dec. 866 (2000), in which the First District Appellate Court inferred a requirement that a lien claim must state the date of completion of the work for which a lien is claimed.

3. In *Parkway Bank and trust Co. v. Meseljevic*, 406 Ill. App. 3d 435, 940 N.E.2d 215 (2nd Dist. 2010), the court granted summary judgment against a lien claimant and in favor of a mortgagee based on the lien claimant, Beta Electric, Inc. ("Beta"), not having satisfied requirements of the Illinois Mechanics Lien Act ("IMLA") for subcontractors. The lien claim identified the claimant as a subcontractor, which was required to give notice to lenders in order to perfect its lien claim. The lien claimant failed to give notice to the lender. The lien claimant argued that it was in fact a contractor under the IMLA and therefore could have a lien without giving notice as allowed by the IMLA. The lien stated that the "Owner" of the liened property was "1633 Farwell Ave. LLC" and two individuals, Haso Meseljevic and Samel Meseljevic" were the "Contractor." The lien claim also stated that Beta "made a contract … with Contractor, as agent for and on behalf of Owner." The lien claim was termed an "original contractor's claim for mechanics lien" in the affidavit verifying the lien claim. The court held that the statements in the lien claim established that Beta was a subcontractor and not a contractor under the ILMA and therefore required to provide notice to the lender to perfect its lien.

4. In *Advanced Concepts Chicago, Inc., v. CDW Corporation*, 405 Ill. App. 3d 289; 938 N.E.2d 577 (1st Dist. 2010), the appellate court reversed a dismissal below and held that an MBE sub-subcontractor that was listed in a exhibit of a subcontract contract that required 40% of installation work to be performed by an MBE, and therefore was intended to benefit MBEs, could bring a breach of contract action as a third party beneficiary. The subcontractor also submitted affidavits to the project's general contractor that listed the MBE as having a sub-subcontract and being owed money for work performed on the project. The court also noted that it would have been sufficient for the subcontract to have identified the class of third-party beneficiaries, rather than a specific MBE, to establish contract rights for a third-party beneficiary.

5. In *K. Miller Construction Co., Inc. v. McGinnis*, 238 Ill. 2d 284, (2011) the Illinois Supreme Court was asked to decide whether an oral contract over $1,000 for home remodeling was unenforceable as a result of being a violation of the Home Repair and Remodeling Act ("Act"). While the matter was on appeal from the First District Appellate Court, the Illinois legislature passed an amendment to the Act regarding the enforceability of oral contracts. As a result in K. Miller, the Illinois Supreme Court addressed whether the amendment was a substantive change or merely a clarification.

The facts of K. Miller appear to be fairly common, and have given rise to conflicting interpretations of the Act in the Appellate Courts. The plaintiff/contractor orally contracted with homeowners to provide renovation and remodeling services at the defendants' home. In this case, one of the homeowners was a real estate attorney with over thirty years experience. During the course of construction, the homeowners asked the contractor to provide additional services; the original cost of the work was approximately $187,000 and the cost eventually increased to approximately $500,000. The homeowners paid the first invoice, but refused to pay subsequent invoices until the work was completed. Near completion of the work the homeowners conducted a final walk-through and approved all of the construction except certain minor deficiencies totally approximately $300.

After the homeowners refused to pay for the completed work, the contractor filed a three-count complaint. Count I sought to foreclose a mechanics lien that the contractor had filed on the property, Count II sounded in breach of contract and Count III sought recovery in quantum meruit for the reasonable value of the plaintiff's work. The defendants contended that counts I and II were not proper because the oral contract violated the Act and was unenforceable. As for Count III, the defendants relied on Smith v. Bogard, 377 Ill App. 3d 842 (4th Dist. 2007), which held that a contractor cannot recover under quantum meruit when he has

breached a requirement of the Act. The Circuit Court granted the defendants' motion to dismiss, which was upheld by the Appellate Court.

The Supreme Court began with an analysis of whether a statutory violation automatically makes a contract unenforceable. The Court held that a contract will be unenforceable if the public policy involved outweighs the interest in the enforcement of the contract terms. Generally, the matter would be remanded to the Appellate Court for such a determination, however, because of recent legislative action that was not necessary.

As originally written, the Act does not address whether an oral contract for home repair or remodeling is unenforceable, even though it is a statutory violation. In Public Act 96-1023, effective July 12, 2010, the legislature rewrote 815 ILCS 513/30 and removed the word "unlawful" and provided that homeowners who sustain actual damages may bring an action under the Consumer Fraud and Deceptive Business Practices Act. The Court then held that because of legislative history and the conflicts between the Appellate Court, the amendment was a clarification of the original Act, and did not alter substantive rights. Based on the amendment, the Court held that there is no public policy that requires that oral contracts for home remodeling over $1,000 be held unenforceable or that relief in quantum meruit be denied. Under this ruling, contractors may bring a cause of action to foreclose mechanics liens and for breach of contract even if they merely have a oral contract for home repair or remodeling. Additionally, contractors may recover under a theory of quantum meruit.

6. In *1324 W. Pratt Condominium Assoc. v. Platt Construction Group, Inc.,* 404 Ill. App. 3d 611 (1st Dist 2010), the First District Appellate Court was asked to determine whether the plaintiff a condominium association can bring a cause of action against the construction company who build the condominiums, based on the theory of implied warranty of habitability. In 2005, the defendant/construction company built an eight-unit residential building for a developer who had subsequently been involuntarily dissolved by the state. Prior to dissolution, the developer sold all of the units and the residents formed the plaintiff/condominium association. At some undisclosed time after completion, the residents discovered water leaks. These leaks became substantially worse due to severe weather in September 2008. The defendant argued that the plaintiffs only had a cause of action against the developer, and recovery under implied warranty of habitability was only available from the developer or developer/contractor.

The Court began its analysis with a discussion of the implied warranty of habitability and the public policy which supports it. The Court held that the primary objective of the implied warranty of habitability was to hold builders accountable for latent defects because they are in the best position to ensure that the residences they build are habitable and free from latent defects that unsophisticated homebuyers will not be able to detect. Even though some prior cases refer specifically to "builder-vendors", the Platt Construction Court held that such a narrow application defeats the public policy goals, because the builder who created the defect would not be forced to bear the costs of correcting its own deficiencies. The implied warranty of habitability applies to builders of residences regardless of whether they are involved in the sale of the home.

Legislation:

1. Senate Bill 1564, currently pending in the Senate Judiciary Committee, would modify section 16 of the Mechanics Lien Act to, in essence, parallel the reasoning in *Cypress*

Creek (above). Also, House Bill 3636 may impact the Cypress decision, as House Amendment No. 1 would overrule it in part.

2. Senate Bill 1971, **Mechanics Lien Act, Section 6, 770 ILCS 60/6,** would amend the Mechanics Lien Act, to allow, with respect to work that is not done within 3 years from the commencement of the work or the material is not furnished within 3 years, a lien to be recorded within one year after the work is done or after the material is completely furnished, whichever is later (instead of within 3 years from the commencement of the work or the commencement of furnishing the material).

3. House Bill 1087, introduced on February 4, 2011, seeks to amend Illinois Home Repair and Remodeling Act ("Act") Section 20(c) regarding the requirement of a contractor to provide a consumer rights brochure. The Act requires that for contracts over $1,000, contractors provide the "Home Repair: Know Your Consumer Rights" pamphlet. Currently, the Act requires that this pamphlet be a separate document. This amendment would allow contractors to print the pamphlet on the back of the contract. On March 17, 2011 this amendment was referred to the Rules Committee.

4. House Bill 3034, introduced on February 4, 2011, seeks to add "Section 18. Repairs Following Damaging Weather" to Illinois Home Repair and Remodeling Act ("Act"). Under the terms of this new section, contractors cannot advertise or promise to pay or rebate homeowners any of their insurance deductable in order to induce the sale of goods or services offered as a result of severe weather damage. When a homeowner has entered into a contract with a residential contractor, which it intends to pay from the proceeds of an insurance policy, the homeowner has five business days after he/she receives written notice from the insurer that all or part of the claim is not a covered loss, in which to cancel the repair contract. Within 10 days of signing the contract, the contractor must tender any payments and partial payments it receives to the homeowner with any notes or other evidence of indebtedness.

If the contractor provided services related to a "catastrophe", it is entitled to the reasonable value of its goods and services. The section defines catastrophe as "a natural occurrence, including but not limited to flood, drought, earthquake, tornado, windstorm, or hailstorm, which damages or destroys more than one residence." A contractor may not represent the homeowner, or negotiate on his/her behalf, to the homeowner's insurer, and may not file a claim on the homeowner's behalf. A contractor can only inspect for exterior damage with the expressed permission of the insured. This amendment passed the Illinois House on April 15, 2011 and was placed on the Senate calendar to be read on May 19, 2011.

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Indiana

Case law:

1. In *Gariup Construction Company, Inc. v. Carras-Szany-Kuhn & Associates*, P.C., 945 N.E.2d 227 (Ind. Ct. App. 2011), the court held that (1) a claim under the Indiana Antitrust Act alleging restrictive bidding or collusion in the bidding process need not allege collusion with a governmental entity; and (2) a contractor's failure to comply with the bidding instructions

rendered the contractor's bid unresponsive. The court also rejected the unsuccessful bidder's numerous arguments that there was collusion between the architect and the winning contractor.

In 2001, the Lake County Public Library ("Library") entered into a contract with Carras-Szany-Kuhn & Associates, P.C. ("CSK"), whereby CSK would serve as architect for the construction and/or renovation of several branch libraries. The bidding instructions required contractors to "submit a complete list of subcontractors within twenty-four hours of the bid due date and time." Gariup Construction Company, Inc. ("Gariup") and Gil Behling & Son, Inc. ("Behling") submitted the two lowest bids, Gariup's being slightly lower. Behling timely submitted its subcontractor list; Gariup submitted its subcontractor list one hour and twelve minutes late. The Library board made the unanimous decision to award the contract to Behling, based on its attorney's advice that Gariup's bid was, by definition, non-responsive because Gariup failed to timely submit the required list of subcontractors.

The court first rejected Behling's and CSK's argument that a claim under the Indiana Antitrust Act requires the plaintiff to allege that the governmental entity was involved in the collusion. Indiana Code 24-1-2-3 provides "A person who engages in any scheme, contract, or combination to restrict bidding for the letting of any contract for private or public work, or restricts free competition for the letting of any contract for private or public work, commits a Class A misdemeanor." The court held that allegations of collusion or fraud were necessary for a claim under the Indiana Antitrust Act, but the statute has no requirement that the collusion be "with a governmental entity."

But after holding that Gariup's claim was viable under the Indiana Antitrust Act, the court ruled in favor of Behling and CSK on the issue of collusion. The court agreed that, under Indiana's public bidding laws and the applicable Advertisement for Bids, the submission of a complete list of subcontractors within twenty-four hours of the bid was required for a responsive bid. The court then concluded that the Library correctly determined that Gariup's bid was non-responsive for failure to comply with that requirement, and the "evidence does not support a violation of [Indiana's] public bidding laws." The court likewise rejected Gariup's argument that a close personal relationship between the owners of Behling and CSK was sufficient to show collusion. The court explained that being close friends, "without any evidence that the friendship impacted . . . the bidding process is insufficient to raise an issue for trial."

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Iowa

Case law:

1. In *Van Sickle v. Wachovia Com. Mortg., Inc.*, 783 N.W.2d 684 (Iowa 2010), a case discussing the economic loss doctrine, the plaintiff purchased two vehicles from a bank at a public auction and did not receive title to the vehicles for several months. The plaintiff sued the bank alleging fraudulent and negligent misrepresentation seeking compensatory and punitive damages. The Iowa Supreme Court held the district court erred in denying defendant's motion for judgment notwithstanding the verdict on a fraudulent misrepresentation claim and an award of punitive damages. However, it affirmed the district court's denial of defendant's motion based on the theory that plaintiff's negligent misrepresentation claim was barred by the economic loss doctrine.

The Supreme Court of Iowa concluded the economic loss theory was conceived to prevent litigants with contract claims from litigating them inappropriately as tort claims, and negligent misrepresentation had always been an economic tort allowing for recovery of purely economic damages. Therefore, the purpose of the economic loss doctrine would not be served by applying it to negligent misrepresentation claims. Moreover, the application of the doctrine in such cases would contravene the plain language of the Restatement section and virtually eliminate the tort as recognized in Iowa.

2. In *Schneider v. State,* 789 N.W.2d 138 (Iowa 2010), landowners sued the State of Iowa alleging its negligent design and construction of a highway project caused a flood and resulting damages. The State moved for summary judgment asserting statutory immunities. On further review, the Supreme Court concluded the defense of immunity for discretionary functions under Iowa Code § 669.14(1) was not available to the State due to the existence of statutory and regulatory prohibitions against the creation of floodway encroachments. The State employees could not choose to ignore the prohibitions and therefore did not have available to them a choice to design and build encroaching non compliant structures in the floodway.

The negligence claims for permanent devaluation of the landowners' properties based on alleged violations of common-law and statutory duties were barred by the state-of-the-art defense under § 669.14(8), since the bridge was reconstructed in compliance with prevailing engineering standards. Additionally, the landowners claim based on § 314.7 does not fail as a matter of law simply because the landowner's failed to present evidence supporting a finding that the flood water was diverted to their properties from the surface of the roadway

3. In *Seneca Waste Solutions, Inc. v. Sheaffer Mfg. Co., LLC*, 791 N.W.2d 407(Iowa 2010), a contractor was hired to clean and decontaminate a pen manufacturing plant. The owner of the plant refused to pay more than the "not to exceed" price designated in the contract. The contractor filed suit claiming entitlement to a judgment in an amount exceeding the "not to exceed" contract price because the scope of the work defined in the contract was modified by the owner after the written contract was formed. The district court granted the owner's motion for summary judgment, and the court of appeals reversed. The Iowa Supreme Court affirmed the court of appeals decision and concluded that the owner's directive to transport the wastewater off-site for treatment made the contractor's performance "substantially more onerous and resulted in a modification of the contract." Moreover, even though the written contract stated that any modifications must be in writing, the court held "a written contract may be modified by a subsequent oral contract having the essential elements of a binding contract."

4. In *Lewis Elec., Co. v. Miller*, 791 N.W.2d 691 (Iowa 2010), a contractor provided electrical work for a customer, who operated two stores. The contractor filed a breach of contract action against the customer, seeking payment for services performed at the customer's two stores. The customer filed a counterclaim for breach of contract. The district court found that the contractor had not breached the second store contract, and awarded damages to the contractor and denied the customer's counterclaim. The appellate court found no substantial evidence to support the finding that the contractor did not breach the second store contract. On further review, the contractor argued that there was substantial evidence, and the appellate court's instructions on remand were insufficiently specific. The Iowa Supreme Court clarified the instructions directing the district court to first determine the costs incurred by the customer to complete or repair the contractor's work, and if that figure is less than the remaining contract price, then damages for the differences shall be given to the contractor. However, if the customer's damages exceed the unpaid contract price, judgment for the excess will be entered in favor of the customer.

5. In *SH Dev. L.L.C, v. McAninch Corp.*, 2011 Iowa App. LEXIS 100 (Iowa Ct. App. Feb. 9, 2011), the plaintiff appealed the district court's ruling denying the plaintiff's application to vacate and confirm an arbitration award in favor of defendants. The Iowa Court of Appeals upheld the ruling finding that, although short, the arbitrator's conclusion was "adequately grounded in explanation and logic", and that "brevity by itself does not warrant an automatic vacatur." No decision regarding the publication of this opinion has been made. *Note that unpublished opinions shall not constitute controlling legal authority.

6. In *Am. Disaster Serv., Inc. v. Waggener* 2010 Iowa App. LEXIS 1698 (Iowa Ct. App. Sep. 9, 2010), defendants entered into a contract with plaintiffs to repair fire and smoke damage to a home. After plaintiff had started work, but before the project was complete, defendant terminated the contract. Plaintiff filed a mechanic's lien on the work that had been done and defendants countered. On appeal the defendant's contend that the plaintiffs are not entitled to the mechanics lien since they did not substantially perform under the contract. The Iowa Court of Appeals held that there is an exception to the substantial performance requirement if the homeowner hinders or delays the contractor's performance, and that the defendants had hindered the performance in a number of ways. Moreover, it affirmed the amount of the mechanics lien and concurred with the district court's conclusion that the defendants' counterclaims were without merit. No decision regarding the publication of this opinion has been made. *Note that unpublished opinions shall not constitute controlling legal authority.

7. In *Jones Const., Co. v. Hoot Gen. Const. Co.*, 613 F.3d 778 (8th Cir. 2010), the plaintiff was hired to perform work on a wastewater treatment facility. Specifications for holding tanks required particular liner system or its equal. The defendant, the subcontractor, submitted a bid for installation of a competitor's liner system. The defendant did not include a copy of the bid, and the project engineer rejected use of the competitor's liner system. Iowa law was applied to determine the existence of the contract, and North Dakota law to questions of interpretation or construction of the contract. The Eighth Circuit Court of Appeals found the defendant was bound by the subcontract that required installation of a liner that abided by the general contractor's specifications, since substantial evidence supported this conclusion. Moreover, the court also affirmed the district court's ruling that the contractor was entitled to certain liquidated damages, and that the attorney's fees were properly awarded to the contractor for claims against the subcontractor, but not a third party.

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Kansas

Case law:

1. In *Midwest Asphalt Coating Inc. v. Chelsea Plaza Homes Inc,* 45 Kan.App.2d 119, 243 P.3d 1106 (Kan.App. 2010), the Court reaffirmed that claims for breach of contract and quantum meruit are mutually exclusive and a quantum meruit claim is permitted only if the contract is unenforceable. Additinally, pursuant to Kansas Fairness in Construction Act (K.S.A. §§ 16-1805 and 16-1806) attorney fees and costs are recoverable only if "undisputed" sums are not timely paid. Here there was a dispute if the work was completed and thus the amount owed was disputed. The Court also reasoned that even if it was a quantum meruit claim the amount was not liquidated or still in dispute until an award was made and thus fees are not recoverable.

There may need to be more clarification by the legislature as it raises the issue that practically speaking all claims for payment are for disputed sums and thus attorney fees are not recoverable under the act.

2. In *Herrell v. National Beef Packing Co., LLC,* 292 Kan. 730, 259 P.3d 663 (Kan. 2011), the Court cited the common law of premises liability and held that an owner could be liable to an employee of an independent contractor for failure to warn of a dangerous condition. An employee of a soils testing lab, hired by the general contractor, fell in a hole that the contractor had cut in the floor for a new foundation needed for the new roof. The hole was covered by bovine renderings which resulted from the owner's ongoing operations. The Court first stated that the inherently dangerous activity exception does not apply and owners are generally not liable to employees of an independent contractor that are covered by workers compensation. The Court also reaffirmed that a landowner is not liable to those same employees for injuries sustained as a result of a breach of a nondelegable duty imposed upon the landowner by statute or ordinance (in this case OSHA violations). However, the Court concluded that the Kansas workers compensation statutes do not overturn the general common law of premises liability and owners owe the same duty to employees of an independent contractor as they owe to other entrants onto their property—a duty of reasonable care under the circumstances, including a duty to warn of any dangerous condition.

3. In *Producers Co-op. Ass'n of Girard v. Cromwell Const., Inc.*, No. 103,824, 2011 WL 2555469 (Kan.App. June 24, 2011)(interpreting Minnesota insurance law), the Court denied the insurer's attempt to rely on the commercial general liability ("CGL") exclusions because of the products-completed operations ("PCO") provision of the policy. The PCO provision was more akin to a bond or a policy that insures against a breach of warranty. The Court held that the policy's PCO coverage had separate limits of coverage than that of CGL coverage and commanded considerable increased premiums for the increased risk assumed by the insurer. The PCO coverage created a separate and distinct form of coverage from the standard CGL policy and thus separate exclusions apply. Neither the "Damage to Your Work" exclusion or any other CGL Coverage A exclusion applied.

4. In *VHC Van Hoecke Contracting, Inc. v. Lennox Industries, Inc.*, No. 101,024, 2011 WL 2039725, 7 (Kan.App. May 20, 2011), the court held that a HVAC contractor had a viable claim for tortious interference with a prospective business relationship against Lennox for failure to provide pricing information. Lennox's failure to provide requested pricing interfered with the HVAC contractor's ability to successfully bid on public HVAC projects that specified Lennox exclusively. The jury awarded damages and punitive damages but the trial court held that Lennox owed no duty to provide pricing. The Court disagreed and held that it was up to the jury to consider whether or not Lennox's actions were justified or privileged. As the Court reasoned: "In other words, the jury must have concluded that Lennox's conduct, motive, and business interests, and the social interests in protecting Lennox's freedom of action, did not outweigh the social interests in protecting VHC's prospective contractual rights in those cases involving competitive bidding on public projects paid with taxpayer funds."

5. In *Edwards v. Anderson Engineering, Inc.,* 45 Kan.App.2d 735, 251 P.3d 660 (Kan.App. 2011), a construction worker was fatally injured in the process cutting a large concrete storm sewer pipe. The Court held that the design engineer and the supplier could not be held liable for alleged negligence because causation was far too attenuated. The pipe had been installed, removed due to cracking and was then cut by the contractor to determine if it was defective. The worker was fatally injured when he attempted a longitudinal cut of the pipe, which split the pipe, causing him to fall into the pipe, and the pipe then rolled back, crushing

him. Plaintiffs alleged that the design engineer was negligent in the design of the pipe bedding and/or in failing to properly inspect the pipe as it was originally installed. They also alleged that the supplier provided defective or "green" pipe that caused the cracking. But neither the design engineer, nor the supplier had any knowledge of, or involvement with, the offsite testing, nor was there any evidence that the pipe fell on the worker due to any defect in the pipe. The construction company was found to be in violation of OSHA standards, and it was the testing engineer that directed how the pipe was to be cut. The intervening acts were not foreseeable consequences of any alleged negligence on the part of the design engineer or supplier. The Court held that lack of causation was properly ruled on at the summary judgment stage.

6. In *Osterhaus v. Toth,* 291 Kan. 759, 249 P.3d 888 (Kan. 2011)*, t*he Kansas Supreme Court reversed lower court decisions that had relied on standard provisions in residential real estate form contracts. Previously the standard seller's disclosure that becomes part of the residential sales contract was interpreted that buyers waived their rights to use the sellers' statements about the house against the seller — should any of those statements be found false. Instead, a buyer would be relying only on information about the structure that he obtains himself or through his inspector. The new ruling opens the door to more litigation against sellers by buyers alleging that sellers did not disclose problems with their homes. The reasonableness of an inspection conducted by the buyer, i.e., whether an alleged defect should have been discovered by the buyer with a reasonable inspection, is left for the fact-finder to determine.

7. In *Louisburg Bldg. & Development Co., L.L.C. v. Albright,* 45 Kan.App.2d 618, 252 P.3d 597 (Kan.App. 2011)*,* homeowners sued the builder for deficiencies in their new home. The court reasoned that in a construction contract, where the breaching contractor leaves a project incomplete and the owner pays to have the project completed by someone else, awarding the owner the cost of completing construction is one way to protect the owner's expectations of the completed contract. But the owner must make reasonable efforts to avoid excessive costs in completing the construction. In addition, the court must also reduce the recovery by any cost avoided as a result of the breach. In a cost-plus construction contract, where the contract does not contemplate a fixed price, the method of calculating damages–and thus returning the non-breaching party to its expected position–should generally be based upon how many otherwise-avoidable expenses the non-breaching party incurred as a result of the breach. The court also relied on the economic loss doctrine to dispose of tort claims but as set forth below the Kansas Supreme Court has recently nixed the economic loss doctrine as a defense for residential contractors.

8. In *David v. Hett*, Case No. 98,416, __ Kan. ___ (Kan. Dec. 30, 2011)*,* the Kansas Supreme Court summarily abolished the economic loss doctrine ("ELD") as a defense by residential contractors. Lower courts had long held that unless the alleged defective construction caused bodily injury or injury to property beyond damage to the house itself, homeowners were limited to pursuing only contract-based claims. The Court examined the tortured history of the ELD around the country, as well as in Kansas, noting that it was originally applied only in product liability cases and was later expanded to other areas of law. In refusing to allow such an expansion of the defense in Kansas residential construction, the Court referred to the common situation that a homeowner is not an expert in construction and, by implication, should be given more protections under the law. The implications are potentially significant for home builders and their insurers.

Legislation:

1. **SB150** The bill allows a county to repair buildings without competitive bidding, when an emergency is declared and the damage is so severe that it prevents the building or equipment from being used for its intended function. Construction of a replacement building remains subject to existing bidding requirements.

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Kentucky

Case law:

1. In *Giddings & Lewis, Inc. v. Indus. Risk Insurers*, 2011 Ky. LEXIS 90 (Ky. 2011), the Kentucky Supreme Court joined the majority of other states and adopted what is commonly known as the economic loss doctrine. The Court unanimously held that "a manufacturer in a commercial relationship has no duty under a negligence or strict products liability theory to prevent a product from injuring itself." *Id.* at *17. The Court wrote: "We believe the parties' allocation of risk by contract should control without disturbance by the courts via product liability theories." *Id.* at *18. The Court's holding ended years of speculation of the applicability of this doctrine in Kentucky.

In *Giddings & Lewis*, the manufacturer sold a sophisticated machining center to an industrial concern. *Id.* at *4. The parties set forth their mutual obligations in a detailed commercial contract. *Id.* at *5. .After seven years of continuous operation, and after the contract's express warranty expired, the machining center malfunctioned throwing chunks of steel weighing thousands of pounds across the factory floor. *Id.* at *5-*6. The costs to repair the machining center and to get the business up and running again were almost $3 million. *Id.* at *6. After reimbursing the machine's owner for its losses, a consortium of insurance companies asserted a subrogation claim against the machining center's manufacturer. *Id.* With the warranty expired, the insurance companies sued in negligence, strict liability, negligent misrepresentation, and fraudulent misrepresentation. *Id.* Applying the economic loss doctrine, the Kentucky Supreme Court held that the purchaser could not recover from the manufacturer under any tort theory. *Id.* at *51-*52. The consortium was limited to contractual remedies, all of which expired years earlier. The Kentucky Supreme Court also rejected the "calamitous event" exception that some states recognize even when applying the rule. *Id.* at *26.

2. In *Martin v. Pack's Inc.*, 2011 Ky. App. LEXIS 187, *1 (Ky. Ct. App. 2011), the plaintiff construction company entered into a contract for the construction of a gas station. After the project was completed, the defendant corporation was administratively dissolved by the Kentucky Secretary of State's office. *Id.* After the dissolution of the company, an owner of the defendant corporation requested that the plaintiff execute a waiver of the company's right to file a lien and promised it would then issue the final payment. *Id.* at *1-*2. Based on that request, the plaintiff executed a lien waiver; *Id.* at *2. The defendant, however, did not make the final payment. *Id.* Plaintiff filed a civil action against the defendant and filed a motion for summary judgment against the individual parties, as the parties had reached an agreement after the company was dissolved. *Id.* at *2-*3. The trial court issued summary judgment in favor of the plaintiff, ruling that the individual's conduct following their company's dissolution created personal liability for paying the outstanding debt. *Id.* at *3.

The Kentucky Court of Appeals affirmed the lower court, noting that the agreement to pay the final payment constituted a new debt. *Id.* at *5. The lien-waiver agreement was for new consideration by both parties and was enforceable as a post-dissolution incurred debt. *Id.* at *7. The defendants argued that as an officer, they should not be personally liable for their company's debts unless they acted outside of their authority. *Id.* at *9. An officer, director, or shareholder, when acting as an agent of the corporation, is shielded from personal liability when acting within its authority to bind the corporation. *Id.* at *10. The corporation was dissolved, however, and did not provide protection to conduct business on behalf of the corporation. *Id.* Further, while a company may "wind up" a business after dissolution, the defendant offered no affirmative evidence how its conduct could constitute winding up its business. *Id.* at *12. Thus, the Kentucky Court of appeals affirmed the lower court and held that the officers were personally liable for the debts incurred after dissolution. *Id.* at *5.

3. In *Ky. Ass'n of Fire Chiefs, Inc. v. Ky. Bd. of Hous., Bldgs. & Co.*, 344 S.W.3d 129, 131 (Ky. Ct. App. 2010), a group of fire chiefs throughout Kentucky sought a declaration that the state construction codes did not prohibit local governments from enacting standards exceeding those required by the state. The lower court concluded that the state codes preempted the local regulation of construction standards. *Id.*

The General Assembly delegated authority to the Kentucky Board of Housing, Buildings, and Construction (the "Board") to create uniform and comprehensive regulations for building and construction standards. *Id.* at 136. The Kentucky Court of Appeals held that the Board reasonably interpreted its authority as precluding the local adoption of construction standards that were either greater or less than those set out in the State Building Code. *Id*. at 137. Thus, to the extent the Board's exercise of authority conflicts with local ordinances regulating the same subject, the provisions of the State Building Code preempt any local requirements. *Id.*

4. In *Mullins v. N. Ky. Inspections, Inc.*, 2010 Ky. App. Unpub. LEXIS 692 *1 (Ky. Ct. App. 2010), the court, as a matter of first impression, analyzed a contract clause limiting the damages recoverable from a home inspector for negligent inspection. In this case, the plaintiff employed a home inspector, who regarded a crack in a basement wall as inconsequential. *Id.* at *2. Soon thereafter, significant waters accumulated in the basement, causing the plaintiff $7,400 in damages to repair. *Id.* The plaintiff initiated suit to recover for the defendant's negligence; the trial court found the defendant's conduct was not willful or wanton and that the limitation of damages clause was enforceable, as it was not against public policy. *Id.*

On appeal, the sole issue presented was whether the limitation of damages clause was void as against public policy. *Id.* The Kentucky Court of Appeals, while noting the doctrine of freedom contract, began its analysis by noting the scrutiny applied by the courts to exculpatory clauses. *Id.* at *3. "If a party has contracted away any legal right to be compensated for personal or economic loss caused by the other party's negligence, we will not enforce the provision if to do so would violate public policy." *Id*.

The court relied on the Kentucky Supreme Court's direction in *Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644 (Ky. 2007), particularly on its emphasis on the relative bargaining power of the parties. *Id.* at *5-*8. In doing so, the court held that the limitation of damages clause was not an arm's-length agreement between two parties with equal bargaining power and that public policy prohibited its enforcement. *Id.* at *8. Thus, in Kentucky, an exculpatory clause in an home inspection contract is unenforceable as it violates Kentucky's public policy that home inspectors be accountable for their negligence in the

performance of their duty to inspect the premises and render an opinion as to the structural soundness of a residence. *Id.* at *13.

Legislation:

1. **H.B. 242, An ACT relating to metals.** HB 242 amended KRS § 433.890, relating to the purchase of metals by recyclers, by requiring sign proof of ownership or authorization to sell any metal which has been smelted, burned, or melted.

2. **H.B. 310, An ACT relating to tax increment financing.** This act will amend KRS §§ 65.7043, 65.7045, 65.7049, and 154.30-060 to expand the application of the tax increment financing provisions to mixed-use development projects located in a research park owned by a public university and to projects that are within three miles of a military base. It also amends KRS §§ 65.7051 and 65.7053 to conform to this amendment.

3. **H.B. 428, An ACT relating to school facilities, making an appropriation therefore, and declaring an emergency.** HB 428 created a new section of KRS Chapter 157, which directs the Department of Education to determine urgent and critical construction needs. It directs the Department to provide a funding allocation to a district for a school that is closed to the public because it is structurally unsound or uninhabitable (as determined by the commissioner of education). Further, it requires funding allocation to retire the unpaid debt on the structurally unsound building or to provide semi-annual debt service payments on the current issue.

Next, the act provides that when funds are not available for the purposes listed above, the costs shall be deemed a necessary government expense and must be paid from the general fund surplus account (KRS § 48.700) or the budget reserve trust fund (KRS § 48.705).

Finally, the act directs a school district that receives an allotment under subsection (1) and, as a result of litigation or insurance receives fund, to repay the allotment to the budget reserve trust fund account.

4. **S.B. 39, An ACT relating to state government contracts.** This act amends KRS §14A.9-010 to require certain exempt foreign entities (those owning, without more, real or personal property; foreign limited liability partnerships; and foreign general partnerships) to obtain a certificate of authority from the Secretary of State in order to be awarded a state construction contract.

Further, it amends KRS §§ 45A.480 and 176.085 to require that certain persons exempt from having to obtain a certificate of authority under KRS § 14A.9-010 must produce the certificate if awarded a state construction contract within fourteen days of the bid or proposal opening.

5. **S.B. 139, An ACT relating to liens.** This act amends KRS §§ 376.100 and 376.212 to expand the class of person who may post a bond to discharge a lien. For KRS § 376.100, it expands the class to now include any subcontractor or other person in privity with the contractor. For KRS § 376.212, the class is expanded to include any person who is in privity with the contractor or the other party who contracted with the public authority.

6. **S.B. 150, An ACT relating to the licensure of journeyman heating, ventilation, and air conditioning mechanics.** This act amends KRS § 198B.662 to remove

outdated sections and allow for the licensure of journeymen heating, ventilation, and air conditioning mechanics who can document experience prior to July 1, 1995.

7. **KRS § 45A.494, Reciprocal preference to be given by public agencies to resident bidders – List of states – Administrative regulations.** Under this new law, resident bidders are to receive a matching preference if a higher-evaluated non-resident bidder's home state provides its own resident bidders a preference. KRS § 45A.494(1). Further, in the case of a tie between a nonresident bidder and a resident bidder, a preference is given to the resident bidder. KRS § 45A.494(4).

The statute defines a "resident bidder" as one that is authorized to do business in Kentucky at the time the solicitation is advertised, and has for one year prior to the advertisement filed Kentucky corporate income taxes, made payments to the Kentucky unemployment insurance fund, and maintained a Kentucky worker's compensation policy. KRS § 45A.494(2).

Further, in February 2011, the Finance Cabinet issued a regulation, 200 KAR 5:400, on how the preference is to operate. Bidders claiming resident status are to submit an affidavit affirming that they meet the statutory criteria. 200 KAR 5:400(2)(1). If requested by the public agency, a bidder failing to provide supporting documentation will be disqualified or have its contract terminated. 200 KAR 5:400(2)(2).

A nonresident bidder's state of residency will be determined based on its principal office identified in the bidder's certificate of authority to do business in Kentucky. 200 KAR 5:400(3)(1). If the bidder is not required to have such a certificate, the mailing address provided in its bid will be used. 200 KAR 5:400(3)(2).

The regulation outlines the process for applying the preference: (1) all responsive, responsible bids are scored, ranked, and then their residency is identified; (2) a preference equal to the highest evaluated non-resident bidder whose home state gives its residents a preference shall be given to all resident bidders; (3) the bids are then re-scored and re-ranked. If there is a tie, the resident bidder receives a preference. 200 KAR 5:400(4).

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Louisiana

Case law:

1. In *Solis v. NPK, LLC*, 63 So.3d 236 (La. App. 5th Cir. 2011), *writ denied* 69 So.3d 1145 (2011), a condominium owner recovered from contractor and developer under theory of breach of contract for damages incurred related to defective and incomplete work listed on punch-list. The court found that the punch-list created an additional contract between the parties that was ultimately breached.

2. In *Dennis Talbot Constr. Co. v. Privat General Contractors, Inc.*, 60 So.3d 102 (La. App. 3rd Cir. 2011), a court dismissed claims by a subcontractor for unpaid work and claims by a general contractor for increased costs to complete work not performed by the subcontractor. The court found that the subcontractor and the general contractor violated the

rules of the State Licensing Board for Contractors for dividing a contract into parts to circumvent the monetary threshold for securing a license. The court also specifically used the "clean hands doctrine" to deny recovery on the general contractor's claim finding that it knew about the licensing issue prior to entering into the illegal contracts.

3. *Lemoine/Brasfield & Gorrie Joint Venture, LLC v. Orleans Parish Criminal Sheriff's Office*, 63 So.3d 1068 (La. App. 4th 2011), *writ denied* 63 So.3d 1041 (2011), reinforces the need to consider the licensing laws when creating new business entities to perform construction work. The low bidder's bid was deemed non-responsive by the government as the bidder did not have a valid contractor's license. The bidder argued that it was a "joint venture" and as such did not require its own license and each of the joint venture partners did maintain the proper contractors' licenses. The court disagreed with the low bidder finding that simply including the words "joint venture" in its name did not create a joint venture under Louisiana law. In fact, the court found that the low bidder was a limited liability company and not a joint venture.

4. *Don Bihm Equipment Co. v. Louisiana Depart. of Transp. and Dev.*, 64 So.3d 897 (La. App. 1st Cir. 2011) reinforced the need for the proper notices to maintain status as a claimant under the Louisiana Public Works Act. The court dismissed the claims of an equipment lessor on a construction project because it failed to timely provide the statutorily required notice of the lease to the government and the general contractor prior to providing equipment on the project.

5. *Caminita v. Core*, 66 So.3d 19 (La. App. 1st Cir. 2011), *writ denied* 69 So.3d 1149 (2011) addressed the aftermath of Hurricane Katrina with the increased demand for dry wall board and import of "Chinese drywall." The product, as manufactured, contained defects that caused widespread corrosion of metal plumbing and fixtures and electrical wiring within the wall cavities surrounded by that product. The homeowners brought suit against the builder of the house under Louisiana's New Home Warranty Act for the damages caused by the Chinese drywall. The court dismissed the claims finding that the claims were not timely filed within the warranty period. The homeowners had argued that the claims were timely within the warranty period covering major structural defects in that the warranty covered defective "walls." However, the court disagreed finding that the homeowners did not present evidence that the damage was caused by the failure of a load bearing portion of the home as required under that particular warranty's language.

6. The Louisiana Supreme Court reversed the lower courts' rulings and allowed the State to pursue damages in re-bidding a public works contract against a contractor and its surety for the failure to execute a contract and provide a statutory payment and performance bond in *State, Div. of Admin. v. Infinity Surety Agency, LLC*, 63 So.3d 940 (La. 2011). The Court found that the State had stated a cause of action against the contractor and its surety for breach of contract. The completed bid form was considered an agreement between the parties to perform and the contractor and its surety could have breached the agreement by not providing a valid bond.

7. In *Harbor Constr. Co. v. Board of Supervisors of La. State Univ. and Agricultural and Mech. College*, 69 So.3d 498 (La. App. 4th Cir. 2011), the court affirmed a judgment awarding a contractor delay damages and home office overhead for the impact caused by the discovery of an unmarked, unknown, underground utility line that significantly changed the project's scope of work. The owner claimed that the contractor should not taken actions to discover the utility line before beginning work. However, the court disagreed finding that the

contractor had the right to rely upon the plans and specifications prepared by others when planning its work.

8. In a case of *res nova*, the court in *Glencoe Ed. Foundation, Inc. v. Clerk of Court for the Parish of St. Mary*, ____So.3d ___ (Case No. 2010-CA-1872) (La. App. 1st Cir. 2011), found that a "pay-if-paid" provision in a subcontract agreement cannot be used as a defense by the payment bond surety to prevent it from paying valid claims of subcontractors. On the other hand, the court upheld the "pay-if-paid" provision to prevent liability for the general contractor to pay until it was paid by the owner, but ruled that the surety did not have the same defense of its principal, the general contractor.

9. In *Ebinger v. Venus Constr. Corp.*, 65 So.3d 1279 (La. 2011), the Louisiana Supreme Court resolved an issue on the interaction of peremption (statute of repose) and claims for indemnity. The Court found that a general contractor's claim for indemnity against its subcontractor had perempted as more than 5 years had passed from substantial completion of the project and the filing of the claim for indemnity. The general contractor's claim for indemnity would not accrue until it paid a judgment on behalf of the subcontractor. The indemnity claim did not relate to the discovery of a latent defect by the homeowner and no payments had been made by the general contractor to the homeowner on the subcontractor's behalf.

10. Two issues affecting private construction contracts were addressed in *Thompson Tree & Spraying Serv. Inc. v. White-Spunner Construction Inc.*, 68 So.3d 1142 (La. App. 3rd Cir. 2011), *writ denied*, 71 So.3d 290 (2011). First, the court addressed whether the filing of a deficient notice of termination of a contract started the statutory lien and privilege period. The court found that the notice was deficient as it did not contain a legal property description holding that the subcontractor's statement of claim and privilege was timely as the statutory lien period had not yet begun. (Contributor's Note: The AIA standard form document titled "Certificate of Substantial Completion" does not comport with Louisiana's statutory requirement as it does not contain an area for the legal property description of the project.)

Next, the court struck down a forum selection clause in the subcontract that prescribed venue outside of Louisiana for resolution of disputes that arose between the parties. The court upheld Louisiana law that states that objections to venue may not be waived prior to the institution of an action.

11. *Bradley Electrical Services, Inc. v. 2601, LLC*, ___ So.3d ___ (Case Nos. 2011-CA-0627 & 0628) (La. App. 4th Cir. 2011) is a reminder for the construction law practitioner to know the statutory requirements for a statement of claim and privilege (lien) under the Private Works Act. In this lien case, the court found that the statement of claim and privilege recorded in the public record by the material supplier failed to reasonably itemize the elements of the amount and nature of the obligation that gave rise to the claim. Here the statement simply stated a lump sum amount owed. It did not refer to invoices or describe the nature of the obligation owed. Accordingly, the material supplier could not recover under the act against the owner of the project.

Legislation:

1. Act 376 adds an additional section to the Louisiana Public Works Act, specifically Revised Statute 38:2212.10, entitled "Verification of employees involved in public contract work". The statute requires that any "private employer" who submits a bid or otherwise

contracts with a public entity for Athe physical performance of services within the state of Louisiana must verify in a sworn affidavit that: (1) the employer is registered and participates in a status verification system to verify that all employees in the state of Louisiana are legal citizens of the United States or are legal aliens; and (2) that the employer will continue to utilize that system throughout the duration of the contract. The employer must also require all subcontractors to submit to him a similar affidavit about their employees, although no penalties attach for the action of a subcontractor unless the party they are working for has actual knowledge of the subcontractor's failure to comply.

Failure to provide and obtain the sworn affidavits that the employer contracted with the state entity may result in the cancellation of any public contract (the statute does not limit this penalty to the contract at issue) and make the employer ineligible for any public contract for a period of not more than three years from when the violation is discovered. Earlier versions of the bill had this penalty as a mandatory “shall,” but the enacted version provides some discretion to the awarding authority with whom the employer contracted, presumably to take into account the particular circumstances of any violation. As an additional penalty, any employer whose contract is cancelled under these provisions is liable for any additional costs incurred by a public entity, which obviously could be substantial depending on the project and when the violation is discovered.

If information obtained from the status verification system incorrectly indicates that an individual's federal legal status allows them to be hired, there is no penalty to the employer as long as the system was used. Similarly, anyone refusing to hire or retain an individual based on information obtained in accordance with the status verification system that indicated they were an unauthorized alien, as defined in 8 USC 1324a(h)(3), shall not be civilly or criminally liable.

The provisions of R.S. 38.2212.10 apply to all contracts entered into or bids offered on or after January 1, 2012, and expire if the status verification system expires and extensions are not approved by the federal government.

2. Act 402, which took effect August 15, 2011, is similar to Act 376 in that it addresses the legal status of employees, but does so by amending Revised Statute 23:995. The amendment requires all employers in the state whether in connection with private or public employment to verify the legal status of their employees either 1) through E-Verify or 2) a picture ID and US birth certificate, naturalization certificate, certificate of citizenship, alien registration card or I-94 form.

Penalties for failing to comply may be assessed by the Louisiana Workforce Commission in an amount of $500 for the first violation for each alien employed, hired, recruited, or referred; $1,000 for the second violation; and mandatory suspension of the violator's permit or license to do business in the state for not less than thirty days nor more than six months and a fine of $2,500 for third or subsequent violations.

It is unclear as to which of these two statues will govern over the other, as both have different penalties. There is a belief by some that Act 402, since it was signed last, is the "latest expression" of legislative intent, and will therefore control. It's also possible, however, that Act 376 will be viewed as more specific, while 402 is more general, and therefore both should have effect. Until such time as the Courts make a determination, or the Legislature revises one or both next session, this issue will remain unresolved. It is also unclear if Act 402, which adds a section to the Public Works Act, will also apply to professional services such as those offered by architects and engineers, since such services are typically governed by other statutes. The new

statutory language refers to "public contract work" and "the physical performance of services within the state of Louisiana", but fails to define either of those terms. Does drawing a line on a piece of paper or using a calculator rise to the level of "physical performance of services" requiring E-Verify for those private employers who contract with a public entity? Either way, contractors, architects and engineers need to be mindful of these additional requirements, and implement them as part of the regular employment hiring routine to avoid potential penalties.

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Maine

Case law:

1. In *HL I LLC v. Riverwalk, LLC,* 15 A.3d 725 (Me. 2011), the Maine Supreme Judicial Court sitting as the Law Court considered whether parties by agreement could expand the grounds for vacating an arbitration award enumerated in the Maine Uniform Arbitration Act. In *Riverwalk*, the parties sought by agreement to provide for judicial review of arbitration awards on questions of law. Under the agreement, which was governed by the laws of the State of Maine, "each party shall retain his right to appeal any questions of law arising at the hearing."

Under the Maine Uniform Arbitration Act, "[u]pon application of a party, the court shall confirm an award, unless . . . grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in sections 5938 and 5939." 14 M.R.S.A. § 5937. Section 5938 enumerates a number of grounds for vacating an arbitration award, but error of law is not among them. In its discussion, the Law Court looks to the U.S. Supreme Court's interpretation of the similar provision in the Federal Arbitration Act (FAA). In *Hall Street Associates, LLC v. Mattel, Inc., 552 U.S. 576 (2008)*, the Supreme Court held that the FAA provided exclusive grounds for vacating arbitration awards and that those grounds may not be supplemented or expanded by agreement of the parties. Though the Maine Law Court notes that the Maine Uniform Arbitration Act includes two bases to vacate an arbitration award not present in the FAA, the Law Court ultimately determines, similar to the FAA, that § 5938 of the Maine Uniform Arbitration Act provides the exclusive grounds for a court to vacate an arbitration award and the statute is not sufficiently elastic to allow parties to expand a court's role by agreement.

2. In *F.R. Carroll, Inc. v. TD Bank, N.A.*, 8 A.3d 646 (Me. 2010), the Supreme Judicial Court of Maine, sitting as the Law Court overturned a grant of Summary Judgment finding that the cross-motions for summary judgment supported conflicting, yet reasonable factual inferences, of whether the bank, as mortgagee, consented to the plaintiff's paving work at the mortgaged property. Under Maine lien law, "[w]hoever performs labor or furnishes labor or materials . . . by virtue of a contract with or by consent of the owner, has a lien thereon . . ."10 M.R.S.A. § 3251. For the purposes of this statute, the bank, as mortgagee, is considered an "owner" to the extent of its mortgage interest. The Law Court has previously interpreted "consent" as requiring that the contractor prove that (1) the owner had knowledge of the nature and extent of the work and (2) conduct by the owner justifying the contractor's belief that the owner consented.

Looking at the facts in the light most favorable to the paving contractor, it could be determined that the bank had knowledge of the specific details of the project, including the paving work, and that the bank was aware of the progress and nature of the renovations,

including that as of the last payment on the mortgage to the project developer, the paving work was not complete.

Looking at the facts in the light most favorable to the bank, it could be determined that the bank had not consented to the paving work. The Court notes that the bank had agreed to loan the project a set amount of money, which was all disbursed prior to the paving contract being entered into and the paving work being done and therefore, the bank was unaware of the paving contract, unaware of the additional expense for paving, and never agreed to advance additional funds. The Court finally rules that because on the record, the issue of consent by the bank cannot be determined as a matter of law, the grant of summary judgment was in error.

3. In *Davis v. R C & Sons Paving, Inc.,* 2011 WL 3505228, 2011 ME 88 (Me. 2011), Davis brought a two count complaint against R C & Sons after she slipped and fell in a parking area that R C & Sons was to snowplow and sand under a contractual agreement with Davis's employer, the owner of the property. Davis, in her claim, argues that her status as an intended third-party beneficiary of the snow removal agreement between her employer and R C & Sons gives rise to a tort duty of care. The Maine Supreme Court sitting as the Law Court held that Davis did not allege a contract claim against R C & Sons in her complaint, and she is not seeking to enforce the snow removal agreement between R C & Sons and her employer. As a result, her asserted status as a third-party beneficiary of the agreement is immaterial

4. In *Kohl's Department Stores v. W/S Alfred Road Properties LLC,* Docket No. CV-08-391 (Me. Super. Ct. Feb. 10, 2011), the Maine Superior Court held that it need not reach the issue of whether equitable indemnity applied because "the law will not imply a right of indemnity where the parties have entered into a written contract with express indemnification provisions." In this case, the contractor, Alfred, and the geotechnical engineer expressly contracted to indemnify each other. The Superior Court held that where there is a clear and unequivocal express agreement to indemnify, the court will not imply another intent.

5. In *Brett v. Lovejoy,* Docket No. CV-09-53, (Me. Super. Ct. Feb. 12, 2011), the Maine Superior Court ruled on a Summary Judgment Motion that the Plaintiff homeowner could not recover against a contractor under the Maine Unfair Trade Practices Act after he admitted that the contract did not specify the precise width of the driveway to be installed and that the defendant contractor completed all work within the scope of the contract before leaving the site in 2003. The Superior Court goes on to note that the Plaintiff homeowner cannot recover in tort because he failed to produce any evidence of wrongdoing and because the Economic Loss Doctrine bars tort actions where the only allegation is that the Defendant's work did not meet the standards contracted for. The Court cites other Superior Court decisions holding that the Economic Loss Doctrine bars tort recovery for a defectively designed and installed septic system, that a plaintiff cannot recover in tort for negligently manufactured and installed fireproofing absent an allegation of personal injury or damage to other property, and that there is no independent tort for bad-faith breach of contract.

Legislation:

1. **L.D. 407, Dig Safe Standards (125th Legis. 2011).** Requires the Public Utilities Commission to clarify the rules applicable to the dig safe system to include a clear enunciation of the standards applicable to excavations around state highways.

2. **L.D. 311, Maintenance Dredging Permits (125th Legis. 2011).** Clarifies that maintenance dredging may be performed with a permit by rule only if the applicant has been

issued an individual permit for maintenance dredging in the same location within the last 10 years; provides that the amount of material to be dredged may not exceed the amount originally approved by the individual permit but also provides for upgrading of such permit.

3. **L.D. 397, School Construction Bidding (125th Legis. 2011).** Changes the minimum amount of the cost of school construction, major alteration or repair requiring a competitive bid; relates to contracts for energy conservation services; provides for competitive bids and sealed proposals.

4. **L.D. 1085, Contractor Prequalification Standards (125th Legis. 2011).** Requires the Department of Administrative and Financial Services, Bureau of General Services and the Department of Transportation to jointly adopt one annual prequalification process for contractors that wish to bid on projects administered by either agency; provides that contractors and other interested parties must be involved in the development of the single prequalification process conveying real estate.

6. **L.D. 1257, Labor Contracts and Public Works Projects (125th Legis. 2011).** Provides that contract documents for a public works project may not require bidders, contractors or subcontractors to enter into or comply with certain agreements with labor organizations or prohibit such actions.

7. **L.D. 1515, Workers Compensation and Public Construction Projects (125th Legis. 2011).** Clarifies and simplifies workers' compensation insurance notification reporting requirements for general contractors for public construction projects by moving the requirement from the various state agencies to a central reporting site at the Workers' Compensation Board; provides minimum disclosure standards and does not preclude the contracting agency from setting more rigorous standards for construction work.

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Maryland

Case Law

1. In *Beka Indus., Inc. v. Worcester County Bd. Of Educ.*, No. 47, Sept. Term. 2010 (Md. 2011), the Maryland Court of Appeals determined that a county board of education being sued by a contractor for breach of a construction contract is subject to the limited waiver of sovereign immunity set forth in § 12-201 of the State Government Article of the Annotated Code of Maryland. Further, the Court determined that any judgment against a county board of education for breach of a construction contract would be funded in accordance with § 12-203 of the State Government article. Section 12-203 requires the Governor to include in the budget "money that is adequate to satisfy a final judgment that, after the exhaustion of the rights of appeal, is rendered against the State or any of its officers or units."

2. In *Salisbury Univ. v. Joseph M. Zimmer, Inc.*, No. 462, Sept. Term. 2010 (Md. App. 2011), the Maryland Court of Special Appeals determined that a Board of Public Works procurement regulation which prevented a bidder from protesting actions relating in any way to minority business entity ("MBE") status was invalid. The regulation at issue in *Zimmer*, COMAR 21.11.03.14, provided that a bid protest could not be filed to "challenge a decision whether an

entity is or is not a certified MBE; or [c]oncerning any act or omission by a procurement agency under" the MBE chapter of the procurement regulations. The Court of Specials Appeals determined that COMAR 21.11.03.14 was invalid because it was in contradiction with Sections 15-215 and 15-217 of the State Finance and Procurement Article of the Annotated Code of Maryland "which grant contractors aggrieved by agency MBE decisions the right to submit bid protests."

Legislation:

1. Senate Bill 120 / House Bill 456 (Procurement – Minority Business Participation). This bill extends the State's MBE program for one year (until July 1, 2012) and maintains the program's current overall participation goal of 25%. However, the bill repeals (1) the program's subgoals for women- and African American-owned businesses of 10% and 7%, respectively, and (2) the exemption from MBE provisions for construction contracts valued at $50,000 or less. In place of the 10% and 7% subgoals for women- and African American-owned businesses, the bill authorizes the Governor's Office of Minority Affairs, in consultation with the Maryland Department of Transportation and the Office of the Attorney General, to set guidelines for each unit to consider when deciding whether to set subgoals for individual procurements based on existing categories for minority groups. This bill was approved by the Governor on May 10, 2011 and will take effect on July 1, 2011.

2. House Bill 972 (Building Codes – International Green Construction Code). This bill authorizes the Maryland Department of Housing and Community Development (the "DHCD") to adopt by regulation the International Green Construction Code (the "IGCC") and also authorizes local governments to adopt the IGCC regardless of whether the DHCD does so. The IGCC is a new model code (the first edition is scheduled for publication in 2012) that addresses green building design and performance. The IGCC will work as an overlay with existing building codes and will not serve as an alternative to existing building codes. This bill was approved by the Governor on May 10, 2011 and will take effect on March 1, 2012.

3. Senate Bill 283 (State Board of Architects – Retired Status Licenses). This bill provides that the State Board of Architects may issue a retired status license to an experienced architect under certain circumstances, including if the architect has 25 years of experience practicing architecture, has been licensed in Maryland for at least five (5) years, is not subject to any pending disciplinary actions related to the practice of architecture, and pays the board a fee that is to be set by regulation. Pursuant to this bill, a holder of a retired status license may use the designation of "Architect Emeritus" but may not engage in the practice of architecture. A holder may also reactivate his or her license if he or she meets the board's continuing education requirements, is not subject to any related disciplinary action, and pays the Board a reactivation fee. This bill was approved by the Governor on April 12, 2011, and will take effect on October 1, 2011.

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Massachusetts

Case law:

1. In *Utility Contractors Association of New England, Inc., et al. v. City of Fall River,* 2011 U.S. Dist. LEXIS 114333, the U.S. District Court of Massachusetts overturned the city of Fall River's responsible employer ordinance ("REO") on constitutional and statutory grounds. Specifically, the Court found that the city's REO violated both the Massachusetts and the United States constitutions and unlawfully conflicted with federal ERISA law. The offensive provisions pertained to residency requirements, apprenticeship, and health, welfare and pension plans. The Court held that the residency requirement in the REO violated the Privileges and Immunities Clause of the U.S. Constitution because it unlawfully impaired a protected privilege—in this case the fundamental right to pursue a livelihood—and the City could not show a compelling justification or reason for the discriminatory requirement. The Court held that the pension plan requirements of the REO were preempted by ERISA.

2. In *Trace Construction v. Dana Barros Sports Complex LLC*, 459 Mass. 364 (2011), the Massachusetts Supreme Judicial Court held that a general contractor performing work on leased premises under contract with the tenant may assert a mechanics' lien against the tenant's leasehold interest as well as the owner's fee interest. This case focused on provisions of the Massachusetts mechanics' lien statute, M.G.L. c. 254, § 1 et seq., permitting a lien to be asserted for monies owed under a contract with the property owner or anyone acting for, on behalf of, or with the consent of the owner. The court found that the property owner had given sufficient consent to the improvements to justify attachment of the lien to the owner's fee interest. The court also held that subcontractors were not entitled to assert liens against the owner's fee interest and were limited to their lien against the leasehold.

3. In *Maverick Construction Management Services v. Fid. & Deposit Co. of MD*, 80 Mass. App. Ct. 264 (2011), the Appeals Court held that a subcontractor's lien was worthless were the amounts due or to become due the general contractor where zero prior to the filing of the lien. In a separate arbitration proceeding, the general contractor was found to have installed a defective drainage system and was accordingly due no further payments by the owner. The court held that such a finding was conclusive for the purposes of establishing that no monies were to be due to the general contractor therefore making the lien worthless.

4. In *Brait Builders Corp. v. Massachusetts, Div. of Capital Asset Mgmt.*, 644 F.3d 5 (1st Cir. 2011), the First Circuit Court of Appeals held that it lacked jurisdiction under the Eleventh Amendment barring federal suits of individuals against states or state agencies. Because the plaintiff failed to add any of the state officials as defendants, the court lacked jurisdiction to hear the case.

5. In *Suffolk Constr. Co. v. Ill. Union Ins. Co*., 80 Mass. App. Ct. 90 (Mass. App. Ct. 2011), the court held that a second tier subcontractor did not owe defense or indemnity to Suffolk or its first tier subcontractor where a certificate of insurance conferred additional insured status only if required by a contract executed prior to the loss. Where the parties never executed a written contract requiring additional insured status to be conferred, no defense or indemnity was owed.

6. In *LeBlanc v. Logan Hilton Joint Venture et al*., 78 Mass.App.Ct. 699 (2011), the court held, *inter alia*, an owner may be entitled to indemnification and contribution by the architect and its subconsultant where these parties had "abundant duties to the project

owner…of observation and notification of the quantity and quality of the work." The case arose from the wrongful death of a hotel electrician working on switch gear lacking proper warning signage. The court found that the chain of duties and risk was foreseeable to the architect and its consultant and their failure to notify the owner of the electrical contractor's failure to install warning signage as required by the plans and specifications created a genuine issue of causal negligence for trial.

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Michigan

Case law:

1. In ***Stock Building Supply, LLC v Parsley Homes of Mazuchet Harbor*, LLC, et al., Mich. Ct. App. No. 294098** (Jan 25, 2011), the Michigan Court of Appeals found that warranty work does not extend the 90 day statutory period to record a construction lien. In *Stock Building Supply*, a plumbing contractor installed materials in a residential home. The contractor returned more than 90 days after installation to perform what it considered as "Warranty Service Calls." The contractor recorded its construction lien 90 days after the original installation but within the 90 days of performing the warranty work. The contractor argued that its repair work constituted an improvement under the Michigan Construction Lien Act, therefore the Contractor had 90 days from that date of its warranty work to record its lien. The contractor's argument was dismissed by the Court which found that warranty work did not extend the date by which a construction lien was to be recorded under the Construction Lien Act.

2. In ***First Community Bank v Mountainaire, LLC*, Mich. Ct. App. No. 293005** (Oct 21, 2010), the Michigan Court of Appeals determined that the 90 day statutory period to record a construction lien began on the last day that the contractor performed work on the construction project, regardless if the work was performed under separate contracts. In coming to this conclusion, the Court determined that a contractor with several contracts to perform work on the same project need not record a lien within 90 days of completing each contract, the contractor was only required to record its lien 90 days after completing all of its work on the same construction project.

Additionally, the Michigan Court of Appeals rejected the argument that a change of ownership, the filing a new notice of commencement and/or the hiring of a new general contractor signaled the commencement of new construction for construction lien priority purposes. The Court found that the new owner "continued the same plan of improvements" which was originally financed by the mortgagee, therefore the project was deemed to be a continuation of the same project regardless of the change of ownership.

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Minnesota

Case law:

1. In *Wakeman v. Aqua2 Acquisition, Inc.*, 2011 WL 666028 (D. Minn. Feb. 14, 2011), the court held that an arbitrator cannot modify an arbitration award if the modification reexamines the merits of the controversy. However, an arbitrator can clarify the intent of the original award to cure an ambiguity.

Wakeman had a contract with Aqua2 to detail automobiles that included a two-year covenant not to compete and a mandatory arbitration clause. After the termination of the contract, Wakeman went to work for a competitor. Aqau2 started arbitration against Wakeman, requesting an injunction to enforce the noncompete provision. After the arbitrator granted that injunction, Wakeman told Aqua2 that he understood the initial award as permitting him to stay in the detailing business. Aqua2 sought clarification from the arbitrator, who modified his award.

Wakeman filed a petition in court seeking to vacate the modified award. He argued that the arbitrator improperly amended his first award. AAA Commercial Arbitration Rule 46 gives an arbitrator authority to correct clerical, typographical, and computational errors in an award, but an arbitrator cannot redetermine the merits of any claim that has been decided. An arbitrator cannot revisit a final award after the final award has been issued. However, courts recognize an exception to this prohibition when a mistake is evident on the face of an award or when the parties consent.

The court concluded that the arbitrator's action was proper, and it denied Wakeman's motion to vacate. The arbitrator's modification was a clarification of an ambiguity that became apparent only after Wakeman told Aqua2 of his interpretation of the original award. The modified award did not reexamine the merits of the controversy. It did not change the original award but rather clarified the intent of the arbitrator's initial award: to enforce the parties' contract.

2. In *Church of Saint Victoria v. Western Surety Co.*, 2011 WL 68566 (Minn. Ct. App. Jan. 11, 2011), the court held that a surety may be required to pay the owner's costs, disbursements, and attorney's fees despite a partial jury verdict in the surety's favor.

A church contracted with a general contractor to remodel its church and construct an addition. The church secured payment and performance bonds for the project. The remodeling contract authorized the project architect to approve payment applications, and its terms were incorporated into the bonds.

The contractor misappropriated some of the church's progress payments. The church notified the contractor and the surety that the contractor was in default. The contractor stopped work and the project remained unfinished. The surety did not promptly hire an on-site manager, did not account for the misappropriated funds, and did not document pay applications so the architect could certify the church's progress payments. Lacking adequate accounting and the ability to secure the architect's certification, the church made no additional payments on the construction contract.

Subcontractors filed liens on the property and sued to foreclose. The surety failed to defend and indemnify the church against the subcontractors' liens and lien foreclosure action. Instead, the surety took assignment of the subcontractors' liens and sued the church to

foreclose on the liens and recover under a breach of contract claim, arguing that the church still owed payments under the construction contract.

A jury decided that although the church owed the surety some money under the construction contract, the payment only became due on the date of the verdict, and the church was entitled to credits for changes to the contract and improper workmanship. The trial court awarded costs and disbursements to the church under Minnesota's prevailing party rule. The trial court also awarded attorneys' fees to the church because the church's need to defend itself only arose out of the surety's failure to perform under its bond obligations.

The surety objected to the award of costs and disbursements because it received a monetary award from the jury and viewed itself to be the prevailing party. The reviewing court upheld the trial court's ruling because: (1) the equities favored the church since it defeated the surety's lien foreclosure claim, the surety failed to perform its obligations by failing to timely cure the contractor's default, and the church took the necessary steps to address the surety's breach of contract claims; and, (2) the trial court properly considered the fact that although the jury awarded the surety damages, the damage award was less than the amount claimed by the surety.

The surety also argued that the award of attorneys' fees to the church was improper. The reviewing court disagreed, noting that: (1) the surety did not promptly undertake its obligations under the bond and failed to complete the construction contract; (2) the bond expressly obligated the surety to pay legal costs resulting from the contractor's default and the surety's decision to advance its own lien foreclosure action against the church caused the church to incur legal costs; (3) the church was willing to pay the amounts due to the surety under its breach of contract claim, but it was unable to do so because the surety never provided an adequate accounting for the contractor's misappropriated funds, change orders, and improper workmanship credits; and, (4) due to the surety's default and failure to fulfill its bond obligations, the court was not required to identify the church's legal costs associated with each of the parties' various legal claims and decide whether certain costs were excludable.

3. In *The Minneapolis Grand, LLC v. Galt Funding LLC,* 791 N.W.2d 549 (Minn. Ct. App. 2010), the court held that a unit owner may only exercise his or her right to tender a proportionate payment and be released from a lien before the unit is sold at a sheriff's foreclosure sale.

Chicago Commons Corporation (CCC) began developing 81 condominiums in Minneapolis in 2005 with financing from Marshall Bank. After construction was under way, CCC obtained an additional $1.5 million from Galt Funding, which was secured by a mortgage. Only four individuals purchased condominiums in the complex; the proceeds from those sales went to Marshall and the units were released from Marshall's lien. Eventually, Marshall and CCC entered into a voluntary-foreclosure agreement on the remaining 77 units. Marshall bid the balance of its loan at the sheriff's sale, giving Marshall title to the entire building except the four units it had released and releasing Galt's lien interest on everything but the four units. Minneapolis Grand acquired Marshall's interest in the condominium complex. Minneapolis Grand also purchased the units from the four individual owners, subject to Galt's lien. Galt began foreclosing its mortgage on the four units by advertisement, noting that the balance owed was almost $2 million. Eventually, those four units were individually auctioned off at a sheriff's sale,

and Galt bid the existing balance of its loan, splitting the amount among the four units. Minneapolis Grand did not respond to the notice of foreclosure or bid at the sheriff's sale.

Five months after Galt was the sole bidder on the units at the sheriff's sale, and within the redemption period, Minneapolis Grand tendered $94,148.96 to Galt, arguing it was the portion of the Galt mortgage that was attributable to the four units, and brought a lawsuit to enforce the tender. The district court judge set aside the Galt foreclosure and sheriff's sale and declared Galt was compelled to accept Grand's proportionate tender of $94,148.96 under Minn. Stat. 515B.3-117(a).

The court of appeals reversed. First, the appellate court found the district court erred in setting aside the Galt foreclosure, noting that there was no basis for setting the foreclosure aside. Galt had not overstated its claimed debt (by foreclosing the entire loan against the four units) and allowing Galt to proceed did not pose public policy concerns. Second, the appellate court found that a unit owner's right, under Section 515B.3-117(a), to tender a proportional amount of the lien being foreclosed and have the lien released against that property is time limited: after the unit is purchased at a sheriff's sale, the original lien is extinguished and the unit owner no longer has the right to make a proportional tender.

4. In *Larson v. Lakeview Lofts, LLC*, 804 N.W.2d 350 (Minn. Ct. App. 2011), the court held that a developer and declarant of a common-interest community that controls a condominium unit-owners association has fiduciary and good faith obligations to that association with respect to marketing transactions.

A developer and his condominium development company (collectively "Developer") entered into an agreement with an agent to market the remaining 17 unsold units in the development. Under the agreement, the agent would sell the units at full list price and receive a management fee of 10-11% of the sales price. Shortly thereafter, Developer surrendered control of the condominium association.

The agent sold all 17 units at full list price, but the management fee was not paid or disclosed prior to the first seven closings. Instead, the management fee was divided among, and paid from, the sales of the final 10 units. All 17 units were 100% financed, and although the declaration required that 75% of the units be owner-occupied, only one of the 17 was, violating the owner-occupancy requirement. Neither the agent nor any of the 17 buyers made a single mortgage, property tax, or condominium-association payment.

Two preexisting unit owners sued Developer, claiming that Developer breached its fiduciary duties to the unit owners by entering into the agreement with the agent because the various problems with the 17 units sold by the agent significantly depressed the property values of the other units. The court agreed, finding that Developer had fiduciary and good faith obligations in arranging the sale of the units and breached those obligations because it did not adequately investigate the nature of the sales and recognize that they were detrimental to the interests of the community. Specifically, the court found that Developer should have recognized "characteristics of a mortgage fraud scheme present in the agreement" because: (1) the management fee was not fully disclosed or applied evenly to all of the sold units; (2) the agreement with Blackstone was never put in writing despite being worth over $900,000; (3) Blackstone promised to provide purchasers who would pay full list price and hold the units as investments at a time when the market was declining; (4) multiple units were purchased by single individuals; and (5) the closings were very expedient.

5. In *Northern. Sunrooms & Additions, LLC v. Dorstad*, 2011 WL 292160 (Minn. Ct. App. 2011), the court upheld an exculpatory clause, protecting a lien filing company that failed to file a timely lien from liability.

Contractor entered into a contract with a lien filing company for the preparation, servicing, and filing of a mechanic's lien. The contract contained an exculpatory clause relieving the lien filing company of any liability for improper service or filing of the documents and limiting any damages for bad faith or willful misconduct, which were not covered by the exculpatory clause, to the cost of services rendered.

The lien filing company failed to timely file the contractor's lien, and the contractor sued. Dismissing the case, the court rejected the contractor's argument that the exculpatory clause was unenforceable, finding that the clause was not ambiguous because it expressly contemplated claims related to lien preparation, service, and filing. The court also found that there was no disparity in bargaining power because both companies were small businesses, the contractor had an opportunity to negotiate the terms, and the contractor could have obtained the same services from many other sources. Finally, the court found that the lien filing company was negligent at best and there was no evidence of bad faith or willful misconduct. Thus, the exculpatory clause was enforceable, and dismissal of the contractor's claim was proper.

6. In *Frontier Pipeline, LLC v. Metropolitan Council*, 2011 WL 2982360 (Minn. Ct. App. 2011), the court held that differing site condition claims depend on a number of factors, including: the representations made regarding the subsurface conditions; whether the contractor reasonably relied on the indications of subsurface conditions; and, whether the conditions varied from the norm in similar work. Contractor's differing site condition claim was dismissed because there were not specific representations made about the subsurface condition at issue, the contractor did not reasonably rely on any representations, and the condition was not unusual in similar contracting work. Additionally, a party may be sanctioned for destroying evidence before the other party has a reasonable opportunity to inspect the evidence.

The Metropolitan Council contracted with a firm to design and engineer a project to augment an existing sewer line with a diversion pipe. In preparation for the project, the firm's consultant prepared a geotechnical report and the firm designed a plan to install pipe at an average depth of 8-10 feet with a lift station and five forcemain access structures. The consultant's report found significant variations in the subsurface conditions and stated that additional variations could exist that would not be apparent until the start of excavation.

After being awarded the contract, the contractor proposed changes to the project, including installing the pipe at greater depths, which were approved. Before agreeing to a new price, the contractor obtained another independent geotechnical report to analyze the soil conditions at the newly proposed greater depths. The contractor commenced construction on one of the forcemain structures, and water rapidly entered the excavation from an underground aquifer. An inspection of the sewer line near the structure revealed a sag in the sewer line which the Met Council believed was caused by the contractor's work. The contractor requested to examine the pipe before it was removed by another contractor, but the pipe was destroyed before the contractor had a chance to do so.

The contractor sued the Council for, among other claims, breach of contract and breach of warranty seeking $4,100,000 for extra costs incurred to complete the project. The Council counterclaimed seeking $1,140,000 for the replacement of the sagging pipe plus $1,570,000 for delay damages. The trial court dismissed both parties' claims and both appealed.

The Court of Appeals found that the contractor's Type-I differing site conditions claim failed because the original geotechnical report did not contain any explicit statements regarding groundwater volume or flow rates, and the contract prohibited the contractor from basing a claim on its own interpretation of, or conclusions drawn from, the factual data in the original geotechnical report. The court also found that the contractor could not reasonably rely on the original geotechnical report's soil borings because: (1) soil borings do not contain a representation regarding conditions below the depth at which they terminate; (2) the original plan called for depths of 8-10 feet and the original geotechnical report contained a disclaimer that the report's conclusions were invalid if there were any changes in the nature, design, location, or elevation of the sewer; and (3) the contractor obtained its own geotechnical report to analyze the soil at the proposed greater depths, indicating that the contractor did not consider the original geotechnical report sufficient enough to rely on. The court also denied the contractor's Type-II claim because it did not prove that the high groundwater flow rates were unusual based on similar contracting work.

Finally, the court disposed of the contractor's non-water related differing site condition claims because the contract stated that the actual location of underground utilities may vary from that shown on the bid documents and that the Council would not be responsible for the accuracy or completeness of the information related to underground facilities on the site.

The Council appealed the trial court's imposition of sanctions for spoliation of the sagging pipe. The Court of Appeals found that the contractor was not given an opportunity to inspect the pipe and that the contractor was prejudiced by the Council's removal and destruction of the sagging pipe. It also found that the Council failed to prove that the contractor caused the sewer pipe to sag.

7. In *Nodland Construction Co., v. City of Avon*, 2011 WL 9184 (Minn. Ct. App. Jan. 4, 2011), a contractor's agreement to provide "assessment security" to City, in the form of increased retainage, was absolute and could not be recovered simply because the contractor completed its portion of the work.

As part of an agreement between the City of Avon and a developer for the development of a new subdivision, the City was responsible for several public improvements, which it contracted with contractor to complete. The developer not only agreed to pay a special assessment that would be imposed by the City to finance the public improvements, but to also provide collateral, or "assessment security," to secure that obligation. When the developer struggled to obtain the required amount of "assessment security," the contractor agreed to an increase in its retainage on the project from 5% to 10%, with the additional 5% retainage funds serving as the required "assessment security." With the required assessment security in place, the City and the developer entered into a Development Agreement, which recognized that the increased retainage would be designated as assessment security and also stated that if the contractor ever challenged the City's right to use the increased retainage as assessment security, the developer must immediately substitute other security.

Upon completing its portion of the work, the contractor requested final payment, including all retainage, and objected to the City's continued use of the retainage as assessment security. The City then sent a letter to the developer requesting substitute security, which the developer failed to provide. The City then refused to pay the contractor the retainage and the contractor sued to recover it.

The Court ruled that even though the contracts stated the City would look to the developer to replace the assessment security upon a challenge by the contractor, the City was not obligated to give the increased retainage to the contractor unless the security assessment was actually replaced by the developer. The Court stated that the contracts said nothing about releasing the contractor from its commitment before the developer supplied adequate replacement collateral. The fact that the City would look to the developer did not make the contractor's guarantee conditional – deciding differently would lead to an "absurd result" where the contractor could essentially revoke its guarantee at any time. Instead, the Court held that the contractor's guarantee was absolute, stating that "in the absence of language clearly indicating that the guaranty is conditional, it is usually treated as absolute."

8. In *Gage v. HSM Electronic Protection Services, Inc.*, 655 F.3d 821 (8th Cir. 2011), an exculpatory clause in contract, limiting potential liability, will not be enforced if complained-of actions are willfully and wantonly negligent.

Homeowner entered into a service contract with an alarm company, which required the alarm company to notify the homeowner or the homeowner's identified representatives if an alarm activated in the home. The contract contained an exculpatory clause that prevented the homeowner from holding the alarm company responsible for damages arising from the alarm company's improper operation of the alarm system or its services and any defects in the alarm system.

The alarm company received a low-temperature alarm from the homeowner's alarm system, but failed to properly notify the homeowner or the homeowner's identified representatives. A few months later, low temperatures caused the furnace to stop working and a pipe burst resulting in over $250,000 in damages to the home.

The homeowner sued the alarm company claiming its "willful and wanton negligence" caused the damages. The court found that while a contract provision that limits liability for damages caused by ordinary negligence will generally be enforced, a party cannot contract away or limit its liability for damages caused by the party's willful and wanton negligence. A claim of "willful and wanton negligence" is one involving a party's failure to exercise ordinary care after discovering another is in a position of peril. It does not require a showing of malice, an actual intent to injure the other person, or even negligence of a grosser degree than lack of ordinary care. Instead, damages can be recovered if the person causing the harm knew that the harmed person was in a position of peril and had sufficient time and ability to avert the harm, but failed to do so.

9. In *Engineering & Construction Innovations, Inc. v. L.H. Bolduc Co.*, 803 N.W.2d 916 (Minn. Ct. App. 2011), the court found that despite Minnesota's anti-indemnification law, contractors that are required to procure insurance to cover their indemnity obligations may still be held personally liable even when they are not negligent.

A first-tier subcontractor ("contractor") subcontracted out its work on a pipeline project to a second-tier subcontractor ("subcontractor"). The subcontract required the subcontractor to indemnify, "hold harmless," and defend the contractor from all claims and damages "caused or alleged to have been caused" by any act or omission of the subcontractor or anyone that performed work under the subcontract. The subcontractor also agreed to purchase insurance that covered its indemnity obligation and to name the contractor as an additional insured. Travelers issued an insurance endorsement covering the contractor as an additional insured under the subcontractor's commercial general liability policy.

Indemnification provisions, which contractually make one party responsible for another party's damages, are standard in any construction contract. Minnesota's "anti-indemnification" law forbids enforcement of a provision in a construction contract that tries to indemnify a contractor (or any other party, like an owner, architect, or engineer) from liability for its own negligence. However, there is an important exception to this rule: a contract can require a party to provide insurance coverage for the negligence or liability of others.

The subcontractor allegedly damaged the pipeline during its work, and the owner and general contractor demanded that the contractor repair it. The contractor did the repair work and submitted a claim to Travelers. Travelers denied the claim. The contractor then sued the subcontractor and Travelers. The court concluded that Travelers and the subcontractor could be liable, even though the subcontractor was not negligent, had not breached the subcontract, and owed the contractor nothing. A subcontractor can agree both to indemnify for another's negligence and to provide insurance for that risk. It did not matter that the subcontractor was not negligent; the language of the contract required the subcontractor to indemnify the contractor from any claim caused or allegedly caused by any act or omission of the subcontractor. The court interpreted this to mean that the subcontractor agreed to indemnify the contractor without regard to fault. A finding that the subcontractor was not negligent, the court said, was not the same as a finding that the subcontractor did not cause damage to the pipeline. Because the subcontractor agreed to indemnify and provide insurance, the fact that it was not negligent had no bearing on its obligation to indemnify the contractor. Travelers, too, was liable because its insurance policy was not limited to injury or damage caused by negligent acts or omissions. (Contributor's note: The Minnesota Supreme Court is currently considering whether to review this case.)

10. In *Midwest Family Mutual Insurance Co. v. Wolters,* 2011 WL 3654498 (Minn. Ct. App. Aug. 22, 2011), the court interpreted the "pollution exclusion" clause found in many insurance contracts to apply to interior pollutants, such as carbon-monoxide, as well as traditional environmental pollutants.

Contractor constructed a home for homeowners in 2007. At the end of the year, one of the homeowners awoke feeling disoriented and nauseous, and called 911 when she could not awaken the other homeowner. An investigation revealed that the boiler, which was purchased by the contractor and installed by a subcontractor, was not compatible with the liquid-propane used in the home. It was determined that the boiler caused high levels of carbon-monoxide and that the carbon-monoxide detector was not connected to a power source.

The homeowners sued the contractor for negligence and breach of warranty. The contractor was insured under an artisan-contractor commercial general liability policy and tendered defense of the lawsuit to the insurer. The insurance company initially defended the contractor, but it also sought a declaratory judgment stating that it had no duty to defend or indemnify the contractor under the policy.

The court concluded that the insurer had no duty to defend the contractor because of an "absolute pollution exclusion" in the policy. While the contractor argued that the pollution exclusion did not include carbon-monoxide, the court held that Minnesota law requires a broad reading of the pollution exclusion – to the point that it includes interior pollutants as well as traditional environmental pollutants. Even though Minnesota's interpretation is not shared by a majority of other states, it has been the law in Minnesota for several years. Because the exclusion included carbon-monoxide, and because the discharge of the gas occurred in

connection with the contractor's work, the insurer had no duty to defend or indemnify the contractor in the case.

11. In *Remodeling Dimensions, Inc. v. Integrity Mutual Insurance Co.*, 2011 WL 2519203 (Minn. Ct. App. June 21, 2011), the court found that a contractor's liability to homeowner for failing to disclose preexisting moisture damage to the home does not qualify as an occurrence or property damage under contractor's commercial general liability insurance policy. A contractor hired to build an addition onto a house and replace a window in the preexisting portion of the house was ordered to pay an arbitration award to the homeowners for defective work and for negligently failing to inform the homeowners of preexisting moisture damage allegedly uncovered and visible during the contractor's window installation. The contractor's insurance company defended the contractor under a reservation of rights, but refused to indemnify the contractor and pay the arbitration award because the contractor's failure to inform the homeowners of the preexisting defects and moisture damage to their home did not qualify as an "occurrence" under the contractor's commercial general liability policy. Under the terms of the CGL policy, coverage only existed if the contractor's liability arose "because of" property damage, and only if that property damage was caused by an occurrence. An "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." In turn, "accident" has been interpreted by courts to mean "an unexpected, unforeseen, or undesigned happening or consequence from either a known or unknown cause."

The court agreed with the insurance company's argument, explaining that the contractor's liability was not caused by property damage itself, but by the contractor's failure to inform the homeowners of the preexisting defects and moisture damage that it discovered during its work. The failure to inform the homeowners was not an "occurrence" because it was not an "accident" in that it was not "a continuous or repeated exposure to substantially the same general harmful conditions." Additionally, since the property damage was preexisting, the contractor's liability did not arise because of property damage. Rather, liability arose from other possible losses to the homeowners, such as the loss of a claim against the contractor that built the original part of the home. Thus, the court decided that the insurance company was not obligated to indemnify the contractor because the alleged loss was not covered by the CGL policy.

12. In *Sand Companies, Inc. v. Gorham Housing Partners III, LLP*, 2010 WL 5154378 (Minn. Ct. App. Dec. 21, 2010), a general contractor's cost to retrofit defective pipes installed by subcontractor was covered "damages because of property damage" and the "your work" exclusion did not defeat coverage provided by an additional insured endorsement. During the first winter after construction of an apartment complex, the sprinkler system had multiple pipe breaks. The general contractor ultimately performed and financed a retrofit of the entire system. The general contractor sued two insurers seeking indemnity for the costs it incurred while retrofitting the sprinkler system. In addition to its own insurer, the general contractor sought indemnity from its fire protection subcontractor's insurer on the grounds that it was an additional insured under the subcontractor's policy.

The court ultimately concluded that the general contractor was entitled to indemnity from at least one of the insurers despite multiple arguments to the contrary. Among other things, the court held that: (1) the cost to retrofit the pipes was covered "damages because of property damages" as defined in the general contractor's policy; and (2) the "your work" exclusion contained in the subcontractor's policy did not defeat coverage for the general contractor because of the overriding additional insured endorsement.

The question of whether the general contractor would be indemnified by its own insurer or its subcontractor's insurer was not determined. The court of appeals remanded the case to the trial court to decide that issue based on an exclusion contained in the subcontractor's insurer's policy.

13. In *Friedberg v. Chubb & Son, Inc.*, 2011 WL 5078777 (D. Minn. Oct. 25, 2011), the court held that an insurance policy providing coverage for physical loss to a home but excluding damage from construction defects does not provide coverage for damage from water intrusion. Homeowners' house was covered by an insurance policy providing coverage against "all risks of physical loss to your house and other property." The policy excluded coverage for losses from rot, mold, and construction defects. A contractor making repairs to the home discovered extensive water damage. Experts discovered water intrusion causing rot, mold, and damage to the wood framing, insulation, architectural beams, and underlying walls. The experts concluded that a faulty roof repair was the primary cause of the damage. Homeowners made an insurance claim, which was denied due to evidence that water had intruded the roof and walls for a period of time, resulting in gradual deterioration.

The court concluded that no coverage existed. The policy excluded "any loss caused by the faulty acts, errors or omissions of you or any other person in planning, construction or maintenance." "Caused by" meant "any loss that is contributed to, made worse by, or in any way results from" faulty construction. "Any loss" broadened the construction-defect exclusion. The exclusion therefore applied to the cost of replacing faulty construction and loss that resulted from faulty construction. The court rejected the homeowners' argument that coverage existed because the insurer could not show that the overriding cause of the loss was faulty construction. The experts agreed that a construction defect was permitting water to enter the home. The water intrusion was not independent of the construction defects; the construction defects allowed the physical loss to occur.

The court also rejected the homeowners' argument that the policy's ensuing-loss provision restored coverage. An ensuing-loss provision brings within coverage a loss from a covered peril that follows as the consequence of an excluded peril. But the ensuing loss must be distinct and separable. The rot and mold were not distinct and separable. The loss resulted from water that entered the home due to the construction defect. This was a single phenomenon that had no intervening cause other than time. The construction defect made water damage inevitable.

14. In *Minnwest Bank, M.V. v. All, Inc.*, 2011 WL 781178 (Minn. Ct. App. Mar. 8, 2011), the court held that nonexcavation work that is directly related to excavation and construction can be the first actual and visible improvement for mechanic's lien purposes.

Work on a condominium project started in October 2005 but was suspended over the winter. A mortgage for the project's financing was not recorded until April 2006, after which work restarted. The developer later defaulted on the mortgage, and its contractors recorded several mechanic's liens. The mortgage bank purchased the property at foreclosure before the mechanic's lien foreclosure lawsuit was started. The bank challenged the date that the liens attached and argued that its mortgage had priority over the liens. The court rejected both arguments and confirmed the validity and priority of the liens.

In a priority dispute against a recorded mortgage, all liens attach at the first actual and visible beginning of the improvement on the ground. The bank argued that the October 2005

work was nonexcavation work that removed existing structures, brought pipe to the property, and installed a fence, none of which was an "actual and visible improvement." The bank claimed that the first improvement did not occur until renovation work began after the mortgage was recorded. But nonexcavation work can be a first visible improvement if it is "directly connected" with excavation work. Evidence showed that removal of the existing structures was performed along with excavation for a parking garage. The pipe and fence were part of the integrated process of demolition, excavation, and construction under the contract, and neither was the sole evidence of any visible improvement. Because this nondemolition work was directly related to the excavation and served as one continuous improvement, it was the first actual and visible improvement for lien purposes.

The bank also challenged the attachment of one lien on the grounds that it was part of the retail, not residential, part of the project. The court concluded, however, that it was part of the same project and attached at the same time as the other liens. Contracting separately for different stages of a single project does not divide a project into separate improvements. A division occurs only when the work performed under separate contracts shows separate improvement projects. Here, the overall project included retail and residential spaces. The same general contractor was to finish both spaces, and much of the work on both spaces occurred at the same time. Although both parts were financed separately, that was due to problems with closing on the acquisition of the retail spaces, not because of the parties' original plan.

15. In *Hart Foundations, Inc. v. Christensen*, 2011 WL 2672235 (Minn. Ct. App. July 11, 2011), the court found that tree removal and the erection of a silt fence are not the first visible and actual improvements for lien purposes when they have no direct bearing on the demolition or construction of a house. In September 2006, a contractor removed trees at an owner's home. The contractor also exposed bare dirt and removed some grass. Two weeks later, the contractor removed the tree stumps and erected a silt fence. The owner then met with a mortgage broker to discuss building a new home on the property. In November 2006, agents of the broker walked the entire property. They saw no evidence of tree removal and saw nothing indicating that any improvement had begun. Also in November, the owner and contractor entered into an agreement to build a new house. The agreement provided that construction would start as soon as financing was in place. The owner secured a loan. On December 11, 2006, the agents again visited the property and found no evidence of an actual or visible improvement. That same day, the mortgage was recorded. Demolition at the site began in January 2007, and work continued into 2008.

Following construction, several contractors recorded liens against the property. The lienholders argued that they had priority over the mortgage because the first improvement began with the tree removal in September 2006. The mortgage holder argued that the improvement did not begin until demolition in January 2007. The court agreed with the mortgage holder. Liens attach at the actual and visible beginning of an improvement on the ground, and all liens attach at the first improvement. Construction work is considered a single improvement when it is done for the same general purpose or when their parts form a single improvement. On the other hand, a project consists of separate improvements when there is little or no relationship between the contracts under which the work is performed. The line of distinction between the two is whether the improvements bear directly on the construction of the building at issue rather than whether they are part of an overall project.

The court concluded that the removal of trees, disturbance of dirt, and erection of a silt fence had no direct bearing on the demolition or construction of the house. The trees did not

need to be removed to demolish an existing house or build the new one. The silt fence was installed only because the city required it. The dirt disturbance was not related to the demolition or construction, as no grading or site preparation occurred before demolition. Therefore, the mortgage had priority over the liens.

16. In *S.R. Wiedema v. Sienna Corp.,* 2011 WL 2201084 (Minn. Ct. App. June 6, 2011), the court held that Minnesota law excludes engineering services, land surveying, and soil testing services from being the actual and visual beginning of the improvement on the ground and where mortgage bank lacks actual knowledge that an engineering firm had not been paid for its work, then actual notice of an engineer's lien will not be imposed and the bank's mortgage will have priority over the engineer's lien.

Between May 2004, and October 2008, an engineering firm provided engineering and land-surveying services to an owner/developer related to the development of a residential project. In August 2005, the owner/developer closed on a loan with a bank to finance the purchase of the residential development, and the bank recorded the mortgage a week later. At the time of the mortgage, the bank was aware that the engineering firm had provided engineering services to the owner/developer.

In January 2008, the bank commenced foreclosure proceedings. The engineering firm filed a mechanic's lien statement in March 2008, and after performing additional work, amended the statement in November 2008. After the court entered an order of foreclosure on the mortgage, several contractors on the project started foreclosure actions on their mechanic's liens. In determining lien priority, the court stated that the engineering firm's mechanic's lien would take priority over the mortgage only if (1) the bank had actual notice of the engineer's work, or (2) if the mortgage was given after the "actual and visible beginning of the improvement on the ground." The court then ruled that the mortgage was senior and prior to the engineering firm's mechanic's lien.

Regarding actual notice, the court ruled that while the bank knew the engineering firm had worked on the project, the bank was not aware that the firm had not been paid for those services. Thus, the bank lacked actual knowledge of any lienable service by the engineering firm when it recorded its mortgage.

The court also ruled that certain types of services – including engineering and soil-testing services – are excluded from being the actual and visible beginning of the improvement to the ground on a project. Because the nature of the services provided by the engineering firm were all in the nature of engineering, land surveying, and soil-testing, that work was excluded from being the actual and visible beginning of work.

17. In *Stafne Construction & Aggregate, LLC, v. Bambenek*, 2011 WL 1466368 (Minn. Ct. App. April 19, 2011), the court found a contract to be a unit-based contract, not a lump-sum contract, where final quantities or work cannot be determined with accuracy until the job is completed and the terms of the contract show that costs would accrue based on a price per unit for various categories of work with a balance due upon agreement.

Owners purchased property in 2006 with the intent of creating a family campground and recreational facility. The owners obtained a septic-treatment plan for the campground from a septic-system designer and solicited a proposal for the preparation of building sites, grading, and road construction from a contractor. The contractor submitted a one-page, mostly handwritten proposal for the work, which listed several categories of labor, many of which

contained a per-square-foot cost and footage estimate. The proposal also included hard to read and imprecise descriptions of some listed services and the costs associated with them. The proposal indicated a total cost of $289,523, but followed that with an amount due as a down payment, an amount due when the buildings were finished, and "Bal. at agreeable amounts later." After the owners accepted the contractor's proposal, the septic plan was submitted to the municipal septic inspector, who determined that eight septic mounds would be necessary, rather than the two in the original proposal.

A couple of months later the contractor finally reviewed the updated septic plan that showed the six additional septic mounds. After reviewing the plan, the contractor informed the owners that the new plan would be significantly more expensive. The owners instructed the contractor to continue, however they failed to pay the contractor's invoices, and the contractor eventually recorded a mechanic's lien and brought a lien foreclosure action.

The main dispute in the case was whether the contract between the owners and the contractor was a lump-sum or unit-based contract. The contractor argued the contract was unit-based, in which the contractor submits a price per unit for the various categories. The owners stated that it was a lump-sum contract where the contractor agreed to complete the work for a set price, regardless of actual costs incurred. The court ruled that the contract was a unit-based contract because, by its plain terms, the contract indicated an intent to enter into an agreement in which costs would accrue according to a unit formula as the work progressed with a balance due upon agreeable amounts. Thus, the owners breached the contract, were unjustly enriched by the contractor's work, and were obligated to pay the contractor for its completed work.

18. In *Voigt Consultants, LLC v. Plymouth Crossroads Station, LLC,* 2011 WL 1119697 (Minn. Ct. App. March 29, 2011), the court held that, in order for a mechanic's lien to have priority, a mortgage holder must have actual notice that the lien claimant had not been paid. Moreover, the mortgage holder has no affirmative duty to inquire about whether the mechanic's lien claimant has been paid in full.

In July 2006, an owner obtained engineering services from an engineering firm in anticipation of an improvement to the owner's property. The owner then gave a mortgage on the property to a bank and the mortgage was filed in July 2007. At the time the mortgage was recorded, the bank knew that the owner had obtained engineering services from the engineering firm in anticipation of an improvement to the property. In March 2008, the engineering firm filed a mechanic's lien on the property. The owner defaulted on the mortgage, the bank foreclosed, and the bank purchased the property at the sheriff's sale in August 2008. In September 2008, the engineering firm started a foreclosure action on its lien.

The trial court ruled that Voigt's lien had priority over the mortgage because the bank had actual notice of the lien when the mortgage was recorded. The Court of Appeals reversed that decision, however, stating that the bank lacked the required notice.

For the engineering firm's lien to be senior and prior to the mortgage, the bank must have actual notice of **unpaid** lienable work. Thus, even though it was undisputed that the bank knew that the engineering firm had provided work on the project at the time the mortgage was recorded, that knowledge, alone, was not enough. Anything less than actual knowledge that the engineering firm had not been paid did not satisfy Minnesota's mechanic's lien statute for priority determinations. The court also held that the bank had no affirmative duty to inquire as to whether the engineering firm had been paid in full. Because it lacked actual knowledge of nonpayment, the bank's mortgage had priority over the engineering firm's lien.

19. In *Eclipse Architectural Group, Inc. v. Lam*, 799 N.W.2d 632 (Minn. Ct. App. 2011), the court held that a mechanic's lien statement, unlike a summons, may be served on the owner by the contractor, personally.

A general contractor was hired to renovate a hotel. The hotel owner obtained two mortgages from a bank to finance the renovation. Several mechanic's liens statements were ultimately filed against the hotel property, including a lien statement filed by the general contractor. The owner of the general contracting company personally delivered its company's mechanic's lien statement to the hotel owner.

During a mechanic's lien foreclosure action, the mortgage bank contested the service of the general contractor's lien statement. According to the bank, the court rule prohibiting a party to an action from personally serving a summons or other process on the opposing party also applied to the service of mechanic's lien statements. The bank argued that a mechanic's lien statement was "other process" and, therefore, the owner of the general contracting company could not personally serve the lien statement on the hotel owner. The bank asserted that such service invalidated the entire lien foreclosure action.

The court rejected the bank's argument, finding that the terms "summons or other process" both denote some type of civil action. A mechanic's lien statement does not constitute a summons or a civil action. Rather, a mechanic's lien statement is a notice of a party's intention to claim and hold a lien on real property. The filing and service of a lien statement is a statutory step required to enforce the lien in a subsequent civil action. The acceptable custom in the construction industry is for the person providing labor and/or materials to personally prepare, personally serve, and personally record or register the lien statement. The court rule prohibiting service of a "summons or other process" by a party to the action does not apply to service of mechanic's lien statements.

20. In *Premier Bank v. Dan-Bar Homes, Ltd,* 2010 WL 4941681 (Minn. Ct. App. Dec. 2, 2010), the court held that a contractor's mechanic's lien does not "relate back" to site demolition work if that work was performed two years before the contractor's work and the demolition was not directly related to the construction of the new building.

In this mechanic's lien case, the developer hired a contractor to demolish an existing house and remove some trees to make room for the planned development. That work was done in April of 2005. After that contractor's work was complete, the developer took out a $1.8 million loan with a bank and a mortgage was filed on March 21, 2006.

The developer then hired a general contractor, who did not begin building until April of 2007, two years after the original contractor had finished its work on the site. The developer did not pay the general contractor, and the general contractor served a mechanic's lien. When the bank sought to foreclose, the general contractor asserted that its mechanic's lien was superior to the bank's mortgage because it related back to the original contractor's work in 2005.

The district court and court of appeals disagreed with the general contractor's position and found the bank's mortgage was superior to the general contractor's mechanic's lien. The courts found the general contractor's work did not relate back to the demolition work done by the original contractor because they were "separate and distinct improvements," as evidenced by the two year gap between the work, and the fact that the original contractor's work did not bear directly on construction of the new building.

21. In *Tonna Mechanical, Inc. v. Double A1, LLC*, 2011 WL 2437387 (Minn. Ct. App. June 20, 2011), foreclosure of contractor's mechanic's lien on commercial property over 5,000 square feet was valid despite an unintentionally inaccurately listed first date of improvement and lack of pre-lien notice.

A developer hired a contractor to provide and install ventilation, plumbing, gas-piping, and refrigeration work for a new grocery store. During the mechanic's lien foreclosure action, the developer argued that the foreclosure was invalid and should have been dismissed because the mechanic's lien statement contained several material misrepresentations, the contractor failed to provide pre-lien notice, and failed to properly serve the lien statement.

First, the developer claimed that the foreclosure was improper because the amount of the lien was grossly overstated. Minnesota's lien statute provides that a lien will not be upheld if the amount of the lien has been knowingly overstated in the lien statement. Here, however, the contractor submitted evidence supporting the exact amount of the lien claim.

Second, the developer claimed that the foreclosure was invalid because the lien statement inaccurately identified the contractor's first date of improvement. Although the contractor conceded that it mistakenly listed an inaccurate date as its first date of improvement, the reviewing court found that the misrepresentation was unintentional. An unintentional inaccuracy is immaterial to the validity of a lien unless prejudice can be shown from the error. No prejudice was shown by the developer.

Third, the developer argued that the foreclosure should have been barred because the contractor did not properly serve the lien statement. The record proved otherwise. The contractor showed that the contractor served the lien statement on the developer at the address listed on the company's tax statements and on the developer's agent at the project's worksite.

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Finally, the developer asserted that the contractor failed to provide the pre-lien notice required to foreclose on a lien. Minnesota's lien statute requires a contractor to give notice to property owners as of the date of the delivery of goods or the beginning of service unless an exception applies. An exception applied in this case; the pre-lien notice was not required here because the project involved a commercial property with more than 5,000 useable square feet of floor space.

22. In *Consolidated Lumber Co. v. Northern Lakes Construction of MN, Inc.*, 2011 WL 1545794 (Minn. Ct. App. Apr. 26, 2011), the court held that a contractor's lien related back to the date of a different contractor's pre-excavation work on the same property improvement for the purpose of establishing the lien's priority over a mortgage where both contractors' work related to one continuous, single improvement to the property.

A property owner hired contractors to build townhomes on several lots including a five-plex on one lot. The lot was subject to a mortgage held by the company that provided construction financing for the project. Some of the contractors were not paid by the owner and at least one sued to foreclose on its mechanic's lien. The mortgage holder agreed that the contractor had a valid mechanic's lien for the stated amount, but argued that the court should not have found that the lien was prior and superior to its mortgage.

Minnesota's lien statute provides that liens take effect from the first actual and visible improvement on the property and are superior to unrecorded mortgages. In this case, pre-excavation work performed three months before site excavation and a week before the

mortgage was recorded, including tree removal, staking building corners, and clearing debris qualified as an actual and visible improvement on the property. Excavation work is generally, but not always, the first actual and visible improvement on the property. Non-excavation work that is directly connected with excavation can be the first visible improvement on the property. Indeed, clearing and grubbing are both types of work that are identified as lienable work under Minnesota's lien statute.

Additionally, the contractor's work would relate back to the earlier performed non-excavation work, and thus be prior and superior to the mortgage, if both pieces of work related to one continuous, single improvement to the property. In determining whether work is part of a single, continuous improvement, courts look at the parties' intent, what the contracts covered, the time lapse between the projects, and financing. Although the contractor billed the non-excavation work on a time-and-materials basis and the excavation work on a per-lot basis, and there was a slight time lapse between these two stages, the Court nonetheless concluded that the non-excavation work was part of one continuous improvement with the excavation work. The entire project was discussed with the excavator at the outset of the project, including the clearing, grubbing, and digging of the footings for the buildings, making all of the excavator's work a part of the same improvement. Therefore, the contractor's lien related back to the pre-excavation work and was prior and superior to the mortgage.

23. In *Kalenda v. Veit & Co.*, 2011 WL 589619 (Minn. Ct. App. Feb. 22, 2011), the court held that a worker not following proper safety or industry standards and injured by a known and obvious danger in a building cannot sustain a negligence claim against the owner or higher-tiered contractors.

A shopping mall hired a general contractor to do a remodeling project. The general contractor subcontracted out the demolition work, and the demolition subcontractor sub-subcontracted the transformer removal work. An employee of the sub-subcontractor removed transformers from an overhang that was 20 feet above the ground. The preferred method was to use a lift, cut a hole in the overhang, then remove the transformer while standing on the lift. Because of concerns about the safety of people below, the employee climbed inside the overhang through an access panel and crawled along an 18-inch wide support beam. While removing the transformers from the inside, he lost his balance and fell through the ceiling of the overhang.

The employee sued the shopping mall, the general contractor, and the demolition subcontractor for negligence. The court dismissed the claim. To establish negligence, an injured person must show that the defendant owed him a legal duty. Possessors of land owe a legal duty to use reasonable care for the safety of people invited onto the premises. But possessors have no duty to warn of a known or obvious danger unless the possessor should anticipate the harm despite its obvious nature. The employee had several years of experience working at heights, received fall-protection training, and was provided with safety equipment. This showed that he knew of the danger involved in working in an overhang. Likewise, the danger of crawling along the beam was obvious; the employee even testified that he knew the ceiling below the beam would not support him. The court rejected the employee's argument that the access panel and the beam should have alerted the land possessors that someone would crawl along the beam to work on the transformers. There was no evidence that this was the beam's purpose, however. Moreover, the employee's method of removing the transformers contradicted the preferred method.

24. In *SFM Mutual Insurance Co. v. Hawk & Sons, Inc.*, 2011 WL 3903284 (Minn. Ct. App. Sept. 6, 2011), a subcontractor was not liable for the fall of a general contractor's foreman after the subcontractor completed its work, as the subcontractor was not required to provide fall protection after it left the jobsite.

The Mayo Clinic hired a general contractor to add a mezzanine in a mechanical room. The general contractor subcontracted to erect the steel framing and decking. Following the plans, the subcontractor cut a hole in the decking so that materials could be dropped to the floor below. The subcontractor wrote "hole" on a piece of plywood and placed it over the hole. A guardrail around the landing prevented access to the deck unless someone climbed over the railing. The general contractor's foreman instructed a Mayo Clinic employee to remove the guardrail for easier access. The foreman saw the hole and even lifted up the plywood. While working on the landing, the foreman fell through the hole and was injured. He received worker's compensation benefits from the general contractor's carrier.

The carrier sued the subcontractor to recover the paid benefits, alleging that the subcontractor's failure to properly cover and guard the hole caused the foreman's injuries. The court concluded that neither the subcontractor nor the Mayo Clinic owed a legal duty to the foreman and dismissed the lawsuit. The carrier first argued that the subcontractor owed a duty of care to the foreman under federal OSHA guidelines because they provide general fall protection regulations that were not followed by the subcontractor. But the foreman's injury occurred after the subcontractor had finished its work, and the subcontractor had no duty under OSHA to leave any fall protection in place. The subcontractor's duty to provide fall protection was only to its own workers while it completed its work. After the subcontractor left the site, the general contractor owed the duty to its foreman to provide fall protection.

The carrier next argued that the subcontractor was required by its bid to install a guardrail around the hole. But the carrier brought only a negligence claim and did not plead breach of contract. Minnesota does not recognize a claim for negligent performance of a contract. Moreover, the plans issued to the subcontractor did not require the subcontractor to install a rail. The plans indicated that a hatch would be installed by others and that it would not be installed until after the subcontractor and general contractor finished their work.

Lastly, the carrier argued that the subcontractor had a duty to provide adequate protection for the hole because the subcontractor made it. Under OSHA, more than one employer can be cited for a hazardous condition that violates an OSHA standard. But this policy does not impose a duty of care on the subcontractor for purposes of negligence or tort liability. OSHA provides that an employer "may be citable" for a hazard. This only creates guidelines for issuing citations where OSHA has already been violated, but it does not set forth separate standards that could create a legal duty of care.

25. In *Wolf v. Don Dingmann Construction, Inc.*, 2011 WL 9169 (Minn. Ct. App. Jan. 4, 2011), the court held that a general contractor and subcontractor did not owe a duty of care to a homeowner who primarily assumed the risk associated with an open hole in his home's floor.

A general contractor and subcontractor worked on a remodeling project for a homeowner. Part of the remodeling project, which was designed by the homeowner, called for a ventilation pipe to run from a fireplace in the den up through a loft in the upstairs floor of the home. At the homeowner's direction, the subcontractor left a 42–by–42 inch opening in the loft's floor during the construction to accommodate the ventilation pipe. Since a railing had not yet been installed at the edge of the loft, the subcontractor suggested removing the temporary

stairs to the loft to prevent any risk of injury. The homeowner declined the safety precaution. The homeowner continued to live in the home during the construction and make regular visits to the jobsite.

The subcontractor saw the homeowner climb the temporary stairs from the den to the loft. Shortly after, the subcontractor saw the homeowner lying unconscious on the ground below the hole in the loft floor. The homeowner sued the general contractor and subcontractor claiming that they negligently caused him to fall. To succeed on the negligence claim, the homeowner had to demonstrate that: (1) the contractors owed the homeowner a legal duty of care; (2) the contractors breached that duty; (3) the homeowner suffered an injury; and, (4) the contractors' breach was the proximate cause of the homeowner's injury.

The contractors argued that they did not owe a duty to the homeowner because the homeowner assumed the risk that came from being present on a jobsite with an open hole. The court sided with the contractors, deciding that the homeowner's primary assumption of the risk negated the contractors' duty of care. A party primarily assumes a risk when they have knowledge of the risk and appreciate the risk, but nonetheless voluntarily expose themselves to the risk rather than avoiding it.

The homeowner urged the court to decide that, at most, the homeowner had only secondarily assumed the risk. A party undertakes a secondary assumption of risk when they know and appreciate the risk, but do not evidence their consent to relieve the other party of its duty. The secondary assumption of a risk is a form of contributory negligence that apportions fault between the parties whereas primary assumption of a risk prevents the injured party from recovering from the other party.

Deciding whether the homeowner assumed the risk of the open hole required the court to analyze the homeowner's subjective knowledge and appreciation of the risk. Here, the homeowner had personal knowledge of the risk and appreciated the risk. Specifically, the homeowner was familiar with the jobsite, he lived in the home during construction, he regularly inspected the jobsite, he understood the level of caution that should be used on a job site, and he vetoed the subcontractor's offer to remove the temporary stairs as a safety precaution until a guardrail had been installed around the hole. The court determined that these facts supported a finding that the homeowner primarily assumed the risk of injury, and, therefore, could not recover from the contractors.

26. In *Eleria v. City of St. Paul,* 2010 WL 5293742 (Minn. App. Dec. 28, 2010), the court held that neither a city nor its engineers owed a duty to an employee who drowned while working on a sewer project given their lack of control over the project. A contractor's employee drowned while working in a St. Paul storm-sewer tunnel. His heirs sued the City of St. Paul and its consulting engineers for wrongful death. The court dismissed the wrongful death claim against both the City and its engineers. For more than one hundred years, the Minnesota Supreme Court has been reluctant to hold that an entity that hires an independent contractor is liable for injuries to that contractor's employees. Such liability is only appropriate when the hiring entity retains detailed control over a project. In this case, the employee's heirs argued that provisions in the contract between the City and its engineers supported their position that the engineers owed the employee a duty of care and that the City was vicariously liable for the engineers' actions. The court disagreed. It found that nothing in the engineers' contract with the City required them to be responsible for the safety of the employee. Further, because the engineers had no duty to the employee, the City could not be vicariously liable for the employee's death.

27. In *Horizon Engineering Services Co. v. Lakes Entertainment, Inc.*, 2011 WL 2303613 (Minn. Ct. App. June 13, 2011), the court held that an agent working on behalf of a known, disclosed principal is not liable to an engineer for payments to be made by the principal.

A Native American tribe entered into a gaming development consulting agreement (GDCA) with a casino management company to assist in the development and construction of a casino. The tribe instructed the management company to use a specific civil engineer on the project. The engineer and the tribe negotiated several drafts of a contract during the engineer's work, but they never finalized the contract. The tribe eventually abandoned the project, and the engineer claimed it was owed $200,000. The engineer then sued only the management company on various legal theories. The court rejected them all and dismissed the lawsuit.

The engineer first argued that it had an implied contract with the management company, which the management company breached when it did not pay the engineer. The management company argued it was merely an agent of the tribe. A contract can be implied from the circumstances when the parties clearly and unequivocally indicate their intent to enter a contract. Generally, an agent is not a party to a contract entered into by the agent on behalf of a disclosed or known principal. At a minimum, the engineer should have known that the management company was an agent, as the evidence showed that the engineer received emails stating that the management company was acting on behalf of the tribe. The engineer also received the public announcement of the tribe's consulting agreement with the management company. Most significant, the engineer prepared draft contracts identifying the tribe as the owner of the project and the party responsible for payment.

The engineer also argued that the management company promised to pay the engineer. The only evidence of this was that representatives from the management company told the engineer that the engineer would be paid for its work. This evidence was insufficient to establish a separate contract between the management company and the engineer. No evidence showed that the management company promised that it would pay the engineer. The court also rejected the engineer's argument that the management company controlled the funds. The GDCA barred the management company from advancing funds unless it first had approval from a committee controlled by the tribe, and the tribe – not the management company – had previously wired payments to the engineer.

The engineer further argued that the management company promised that the engineer would get paid for its work and that the engineer relied on these statements in continuing its work. The court dismissed this claim because the alleged statements came months after the engineer completed its work and after it submitted a final invoice.

Lastly, the engineer claimed that the management company should be responsible for the tribe's lack of payment because the management company and the tribe were a joint enterprise. However, the engineer conceded that the tribe solely owned the casino. The management company was not liable because its skill was necessary to the completion of the project, as the engineer argued. That merely showed that the management company was significant to the success of the project, not that it had a proprietary interest in the casino. Also, the GDCA provided that the tribe had the sole proprietary interest in the casino. Thus, there was no joint enterprise.

28. In *R.C. Smith Co. v. Commercial Environments, Inc.*, 2011 WL 3795149 (Minn. Ct. App. Aug. 29, 2011), a subcontractor was sanctioned and ordered to pay $13,000 in

attorney's fees after the subcontractor insisted on pursuing an equitable claim of unjust enrichment, after contractor was willing to admit liability for full amount of the contract.

A contractor was hired to remodel the office of the University of Minnesota's men's head basketball coach. The contractor hired a subcontractor to provide and install custom woodwork on the project for $58,436. After completing the work, the contractor invoiced the University of Minnesota for $74,847. Even though the University paid the contractor in full, the contractor never paid the subcontractor.

The subcontractor sued the contractor for breach of contract, account stated, and unjust enrichment. For its part, the contractor admitted liability for breach of contract and account stated, and offered to stipulate to an entry of judgment for the full contract amount plus interest. However, the contractor denied liability for the unjust enrichment claim because it argued that unjust enrichment claims only apply where there is no contract between the parties. Since it was admitting the existence of the contract, and that it owed the money to subcontractor, the contractor moved the court to sanction the subcontractor if it continued to pursue the unjust enrichment claim in the litigation.

The subcontractor maintained that it could recover on all of its claims, including unjust enrichment, and attempted to do so. Ultimately, the court granted judgment to the subcontractor on its breach of contract and account stated claims, but denied its unjust enrichment claim, reasoning that the existence of an express contract precluded the subcontractor from recovering under an unjust enrichment theory. The court ruled that the contractor's billing of the University for more than it owed the subcontractor did not mean that the subcontractor was entitled to the difference. The court also levied $13,000 in attorneys fees as sanctions against the subcontractor. The court stated that "pursuing a claim for unjust enrichment when [the contractor] had agreed to stipulate to liability on the contract and account stated claims both presents a claim that is not warranted and needlessly increased the cost of litigation."

29. In *Miller v. Lankow*, 801 N.W.2d 120 (Minn. 2011), the court held that the duty of a custodial party to preserve evidence may be discharged when the custodial party has a legitimate need to destroy the evidence and gives the noncustodial party notice sufficient to enable the noncustodial party to protect itself against the loss of evidence.

Miller purchased a home from Lankow that had been extensively remediated by several contractors because of moisture intrusion damage. After the purchase, Miller discovered more moisture intrusion damage and notified the three contractors in September 2005. Between September 2005 and March 2007, Miller contacted the contractors multiple times, inviting them to inspect the property, and told the contractors that he needed the problem fixed immediately due to mold concerns. Two of the contractors inspected the home at least once, but nothing was done. In March 2007, Miller again gave the three contractors notice that they could conduct an inspection and that he intended to begin remedial work on the home in a week. One of the contractors inspected the home again, but none of the other contractors did so.

In March 2007, more than 18 months after providing the first notification, Miller began making repairs to the home. He then sued the contractors and the former owners in April 2007. Two of the contractors and the former owners moved to exclude Miller's expert reports on the grounds that Miller destroyed or spoliated the evidence by removing the stucco without giving the defendants an opportunity to independently inspect the home.

The Minnesota Supreme Court reversed the trial court's dismissal of Miller's case, finding that a custodial party's duty to preserve evidence is not boundless, and it must be tempered by allowing them to dispose of or remediate evidence when the situation reasonably requires it. In this case, the court found that Miller's remediation of the moisture intrusion problem was necessary, even essential, to address immediate health concerns for him and his children. The court concluded that a custodial party must give the other side sufficient notice of a potential claim and a full and fair opportunity to inspect the relevant evidence. However, this rule does not apply where a party destroys evidence without a legitimate need to do so, in bad faith, or unintentionally. The court also abandoned the "absolute notice requirement" in favor of a totality of the circumstances test to determine whether the notice given was sufficient to satisfy the custodial party's duty to preserve evidence. The court noted that a meeting or letter indicating the time and nature of any action likely to lead to the destruction of evidence, and offering a full and fair opportunity to inspect will usually satisfy the notice rule. The court also emphasized that the best practice is to explicitly provide notice in written form.

30. In *Caldas v. Affordable Granite & Stone*, 2011 WL 1938307 (Minn. Ct. App. 2011), the court held that the Prevailing Wage Ordinance does not confer a benefit upon, or provide a private right of action to, employees. A contractor entered into a contract with the City of Minneapolis. The contract required the contractor to submit a Prevailing Wage Certificate (PWC) of compliance with the City's Prevailing Wage Ordinance (PWO).

A group of the contractor's employees sued the contractor alleging that they should have been paid $44.31 per hour instead of the $16.28 that they received. They argued that: (1) they were third-party beneficiaries of the contract between the contractor and the City requiring payment of prevailing wages; (2) they had a right of action under the PWO; and (3) the City was unjustly enriched by paying them an inadequate wage. The court found that the employees could not recover as third-party beneficiaries because the City did not owe a duty to pay money to the employees and the PWO was an ordinance, not a contract. Additionally, neither the contract, the PWC, nor the PWO, revealed an intent to benefit the employees.

The court also found that the employees had no private right of action because the contract made no mention of them and gave no indication that the parties intended to enable the employees to enforce the PWO. On the contrary, the City's intent was to have the right to compel the contractor's compliance with the PWO, and that right was provided to the City, not the employees.

Finally, with respect to the employees' unjust enrichment claims, the court found that they accepted the lower wage and continued to work for the contractor. There was no indication that they complained about their wages or that any of them quit because of inadequate wages. They also waited until 6 months after the project was completed before complaining about their wages, barring them from seeking the higher wage.

31. In *Nelson v. American Home Assurance Co.*, 2011 WL 4640889 (D. Minn. 2011), the court held that a Miller-Shugart agreement is binding on the stipulating parties, but the insurer still has the opportunity to test its policy defenses, and the plaintiff's allegations do not control the coverage question.

Homeowners sued the Metropolitan Council and its contractor, for damages caused to their property arising out of a public construction project. The Council was denied coverage as an additional insured under the contractor's insurance policy. The contractor was dismissed from the case, and the Council eventually entered into a Miller-Shugart agreement with the

homeowners. A Miller-Shugart agreement is a settlement in which an insured consents to a judgment in favor of the injured party, on the condition that the injured party will satisfy the judgment only out of proceeds from the insurance policy and will not seek recovery from the insured party personally. In this case, the agreement required the Council, arguably an additional insured under the contractor's policy, to make a $250,000 cash payment to the homeowners, released the Council from personal liability and limited the homeowners' recovery to the amount obtained from the proceeds of the contractor's CGL policy. The homeowners then sued the insurance company seeking the $900,000 policy limits.

The court dismissed the homeowners' claim, finding there was no insurance coverage because the homeowners failed to show "property damage" caused by an "occurrence." The court said that while the Miller-Shugart agreement's language tracked the policy's definition of an "occurrence," the agreement itself did not bind the insurance company on the coverage issue. To do otherwise would undermine the insurer's opportunity to contest coverage. In addition, the homeowners failed to provide evidence that the amount of damages stipulated to in the Miller-Shugart agreement were caused by an "occurrence."

Finally, the homeowners did not have to prove a specific amount of damages when entering into the Miller-Shugart agreement; as long as the stipulated $900,000 judgment amount fell within a reasonable range of potential recoveries, the stipulated amount would be recoverable upon a later showing of insurance coverage. However, in this case, the homeowners failed to establish coverage under the policy and could not recover the stipulated damages amount from the insurer.

32. In *A & T Development, LLC v. Lester Building Systems*, 2011 WL 2437445 (Minn. Ct. App. June 20, 2011), the court held that a statute-of-limitations defense is not barred, despite ongoing settlement discussions, where the defendant never promised to settle a dispute without litigation.

Owner ordered two buildings from contractor, which contractor built onsite in 2000. In March or April 2005, owner discovered issues with the walls. In September 2005, it hired an expert to investigate. According to owner's attorney, in April 2007, the parties' attorneys discussed delaying any lawsuit and the applicable statute of limitations. The parties engaged in settlement discussions and, in July 2007, agreed to toll the statute of limitations. After discussions broke down, owner sued in 2008. The court dismissed the lawsuit, concluding that the statute of limitations had run.

Owner argued that contractor could not rely on a limitations defense due to the parties' ongoing settlement discussions. Generally, a defendant cannot rely on a statute-of-limitations defense when the plaintiff delayed filing its lawsuit because it reasonably relied on the defendant's representations that it would repair or pay for repairs. The court rejected owner's argument. Here, contractor never promised to settle the matter without litigation, and owner could not have relied on such a promise. Furthermore, owner did not raise this argument until after trial, meaning it implicitly consented to contractor's reliance on the defense.

33. In *American Fire & Casualty Co. v. Kraus-Anderson Construction Co.*, 2011 WL 691662 (Minn. Ct. App. 2011), the court held that a statute of limitation incorporated into an arbitration agreement was binding on the parties, and a request to stay litigation pending arbitration at trial does not constitute a formal demand tolling the statute of limitations.

Owner hired contractor for construction of a condominium project. The contract contained an arbitration clause requiring the parties to arbitrate any disputes not resolved by mediation. Owner later formed a condominium association, which was insured by American Fire and Casualty Company ("American"). Approximately two years after construction, sprinkler pipes in two of the buildings failed, causing $239,701 in damage. Owner notified contractor and submitted an insurance claim, which American paid. Contractor did not reimburse owner or American.

American sued contractor, but the court dismissed the case finding that American and contractor were contractually obligated to arbitrate the dispute. American then demanded arbitration with contractor, who refused to arbitrate claiming that the contractual limitations period for demanding arbitration had expired. American sued contractor for breach of the arbitration provision seeking an order to compel contractor to arbitrate.

Affirming dismissal of the second lawsuit, the court concluded that: American stepped into the shoes of the owner and was, thus, bound by the terms of owners contract with the contractor; the contract contained a limitations period for arbitration demands; and American's claims for breach of contract, breach of implied warranty, and negligence were time barred because American did not demand arbitration until January 16, 2009 – well beyond the 2-year statute of limitations. However, the Court of Appeals sent the case back to the trial court to determine when American first discovered that contractor would not honor its warranties, which was the trigger for commencement of the 2-year statute of limitations related to statutory and express warranty claims. Finally, the court held that American's request to stay the litigation did not constitute a formal demand for arbitration, which would have tolled the statute of limitations.

34. In *Knoll v. MTS Trucking, Inc.*, 2011 WL 3557806 (Minn. Ct. App. Aug. 15, 2011), the court found that adding fill to real property to prepare it for development or sale constitutes an improvement to real property for purposes of the statute of limitations. If the fill is contaminated, it can constitute a permanent trespass and is subject to the two-year statue of limitation for improvements to real property.

An owner allowed a contractor to dump several thousand cubic yards of excavated fill material on his property. The fill came from two street reconstruction projects. A couple of years later, in July 2005, a potential buyer of the property had environmental testing conducted prior to purchase. The tests revealed the soil was contaminated with pollutants from asphalt millings.

In August 2007, after removing the contaminated fill, the owner sued the contractor that dumped the fill material and the street reconstruction contractor alleging they misrepresented to him that the fill deposited on his property was clean fill, and that the fill was the cause of the contamination on his property. The court found that the owner's claims were barred by the two year statute of limitations for defects in improvements to real property because: (1) the owner brought the fill in to prepare the property for sale, and it was a permanent addition to the property making it more useful; and, (2) by preparing the property for development, the owner intended to improve the value of his property, thereby constituting an improvement to real property. The court also determined that the contractors' intent was irrelevant in determining whether dumping the fill on the owner's property constituted an "improvement" to the property, and that pollutants constitute a "defective condition" for purposes of the statute. The owner knew of the contaminated soil more than two years before suing and, thus, his claim was barred.

The court further held that while the longer 6-year statute of limitation could apply to some of his claims, raising a direct conflict in the law, the 2-year imitations period for defects to improvements to real property trumped the 6-year catch-all provision and applied to the owner's claims because it was more specific in nature.

The court also found that the owner's trespass claim constituted an injury to his property, not his possessory interest in the property, and thus fell within the two-year construction defect statute of limitations. It also found that dumping the fill was a permanent rather than continuous trespass because once the fill was deposited, the trespass ended and there was no reoccurring intrusion that would possibly extend the statute of limitation.

35. In *Auto-Owners Insurance Co. v. Wensmann Homes, Inc.*, 2011 WL 69086 (Minn. Ct. App. Jan. 11, 2011), the court held that a defective construction lawsuit must be brought within the two-year statute of limitation period unless the case falls within the "equipment and machinery" exception.

A general contractor hired a subcontractor to install a fire sprinkler system on its condominium construction project. The sprinkler system froze twice and burst. After discovering the breaks in the sprinkler system, the condominium owner filed a claim with its own insurance company. Then, more than two years after the condominium owner's discovery of the damage, the insurance company sued the general contractor for reimbursement.

The general contractor argued that the insurance company's claims were barred because it waited too long to sue. In Minnesota, a lawsuit based on defective construction cannot be started more than two years after the discovery of the injury unless fraud is involved. This two year limitation does not apply, however, to equipment or machinery installed on the property.

The insurance company claimed that its lawsuit was timely because the breaks in the sprinkler system occurred in the sprinkler heads, which qualify as "equipment and machinery." The court rejected this argument and found that the sprinkler heads are merely ordinary building materials, not equipment or machinery. The court went on to explain that if the sprinkler heads had failed due to a defect then a claim against the manufacturer could have been brought more than two years later under a different legal theory and statute of limitation. In this case, however, the insurance company claimed that the sprinkler system froze because of negligent construction, not because the sprinkler heads were manufactured or designed incorrectly. Therefore, because the claim was not brought within the two year statute of limitation period and did not fall within the "equipment and machinery" exception, the court dismissed the claim.

36. In *Minch Family, LLP v. Estate of Gladys I. Norby*, 652 F.3d 851 (8th Cir. 2011), property owners were prevented from seeking damages for flooding caused by a neighbor's field dike because owners did not start the lawsuit within the two-year statute of limitations period for claims arising from an improvement to real property.

A family claimed that their land was damaged from flooding caused by a field dike on a neighbor's property. According to the family, the dike disrupted the natural flow of water and caused water to backup onto their land. Although the dike was built in the 1950s, the family first complained about it to their local watershed district in 2000, following a flood on their land. The area flooded again in 2001 and the neighbor made repairs to the dike. In the years following the dike repair work, the family continued to raise concerns to the watershed district about the dike causing flooding on their land, resulting in crop losses.

In 2008, the family sued their neighbors alleging various claims. The neighbor's argued that the family's claims were time barred because they were not brought within the two-year statute of limitations period for claims arising from the improvement of real property. The family responded that a longer statute of limitation should apply, such as the six-year limitations period for trespass or nuisance claims or the fifteen-year limitations period for adverse possession claims.

The court disagreed with the family and dismissed all of the claims because they were not made within the applicable two-year limitations period. Minnesota has a two year statute of limitations period for claims that arise from an improvement to real property. The two-year statute of limitations period begins to run when the actionable injury is discovered, or with due diligence, should have been discovered, regardless of whether the precise nature of the defect causing the injury is known.

The court explained that the two-year statute of limitation period applied to all of the family's claims because the dike was an improvement to the neighbor's property. The dike was constructed to make the neighbor's property more valuable and useful by preventing the accumulation of excess water, and required the neighbor to expend labor and money to build the dike. Additionally, the Court concluded that the family's claims arose out of the defective and unsafe condition of the dike, meaning the dike was faulty because it caused flooding on the family's land. Finally, the family first discovered their injury in 2000 with the first flooding and continued to experience flooding problems after the 2001 dike repair, but did not file their lawsuit until 2008. Therefore, the two year statute of limitation period barred the family's claims.

37. In *Amcon Block & Precast, Inc. v. Suess, 794 N.W.2d 386 (Minn. Ct. App. 2011),* the Minnesota Court of Appeals ruled that a corporate principal cannot be held personally liable under Minnesota's theft of proceeds statute for improvements to commercial, as opposed to residential, real estate.

In the *Amcon* case, a contractor entered into agreements with a supplier to provide concrete materials on five commercial construction projects. At the time that the contracts were executed, Suess was the president and sole shareholder of the contractor. The supplier provided the required materials but was never paid for its contributions, even though the owner had paid the contractor. The supplier sued the contractor for breach of contract and won, but it could not collect on the judgment because the contractor went out business. The supplier then sued Suess individually, arguing that Suess was liable for theft of proceeds under Minn. Stat. § 514.02. The Minnesota Court of Appeals held that Suess was not personally liable for the unpaid funds because the contributions were for improvements to commercial real estate. In interpreting Minnesota's theft of proceeds statute, the court held that corporate principals can only be subject to personal liability when the payment is for an improvement to residential real estate.

Legislation:

1. **Minn. Stat. § 325E.66 – Insurance claims for residential contracting services.** The legislator amended Minn. Stat. § 325E.66 related to insurance claims for residential construction. The former statute prohibited residential contractors providing "residential roofing" materials and services from advertising or promising to pay a homeowner's insurance deductible when the repair was paid for by insurance. The revision applies the statute to roofing and siding materials and services, and bars any agreement to "directly or

indirectly" pay the deductible. In other words, roofing and siding contractors cannot agree to reimburse a homeowner's insurance deductible, through a discount, cash, or otherwise, in exchange for making repairs that are covered by insurance. It also gives the Department of Labor and Industry the authority to enforce the statute through consent decrees and licensing orders. (Ch. 63; S.F. No. 249)

2. **Minn. Stat. Ch. 89 – Workers' Compensation.** A number of changes were made to Chapter 89 of the Minnesota Statutes, Workers' Compensation, effective August 1, 2011. The most relevant of these include:

- an increase in the allowance furnished to a workers' compensation permanently disabled employee for alteration of a principal residence from $60,000 to $75,000; and
- expanding allowances so that remodeling or alteration projects do not require an architect's certificate and supervision if the project is:
  - approved by the Council on Disability;
  - performed by a residential building contractor or residential remodeler licensed under § 326B.805, subd. 1; and
  - approved by a certified building official or certified accessibility specialist under § 326B.133, subd. 3a, paragraphs (b) and (d), who states in writing that the proposed remodeling or alterations are reasonably required to enable the employee to move freely into and throughout the residence and to otherwise accommodate the disability. (Ch. 89; S.F. No. 1159)

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Mississippi

Case law:

1. In *Humphries v. Pearlwood Apartments Partnership*, 70 So.3d 1133 (Miss.App. 2011), property owners sued an apartment partnership and others seeking to recover damages from flooding caused by defendants' negligent construction and maintenance of their property. The appellants purchased a home, which was located downhill from the Pearlwood Apartments, in June 2002. Thereafter, in October 2002, their property flooded and neighbors informed them that the area began flooding after trees were cut down to build the apartment complex. On February 23, 2006, the property owners filed suit against the apartment partnership alleging that the partnership's construction and maintenance of the apartments resulted in negligent disruption of the natural flow of rain water, which caused flooding and damage. The trial court granted the defendant's motion for summary judgment on the basis that the property owners failed to file suit within three years of first learning of the flooding in October 2002. The Court of Appeals of Mississippi affirmed.

The court held that the continuous tort doctrine did not apply to toll the three-year statute of limitations period governing the property owners' suit. The property owners argued that the flooding caused by the construction of the apartment complex was a continuing tort that tolled the statute of limitations. However, the court noted that a 'continuing tort' is one inflicted over a period of time that involves a wrongful conduct that is repeated until desisted, and each day creates a separate cause of action. Moreover, a continuing tort sufficient to toll a statute of

limitations is occasioned by continual unlawful acts, not by continual ill effects from an original violation. Here, the court concluded that the construction of the apartment complex, and related removal of trees, was the one event that initiated the flooding, which the property owners admitted they first discovered in October 2002. Accordingly, no repeated action sufficient to toll the statute of limitations was present.

2. In *Trustmark Nat. Bank v. Roxco Ltd*., 2011 WL 6091153 (Miss.2011), a general contractor filed suit against a bank for beach of contract and conversion after the bank transferred funds in a contractor-owned account, which the contractor had substituted for retainage, to a state-owned account at the state's direction.

Over a four-year period the State of Mississippi contracted with general contractor for numerous public-construction projects. State law requires that three percent (3%) of the cost of public-construction contracts be retained to ensure completion. However, Miss. Code Ann. § 31-5-15 allows the contractor to access that retainage by depositing other acceptable security with the State. In this instance, the contractor chose to substitute securities in lieu of retainage, and authorized the bank to accept for safekeeping a United States Treasury bill and directed that the safekeeping receipt be sent to the State Treasurer's Office.

When contractor ceased work on all its active state construction projects and was declared to be in default of it contracts, bank was directed by the State to deposit $1,055,000.00, the amount pledged in lieu of retainage, into a State-owned account. The back complied. Contractor objected to the transfer and filed suit against the bank. After a jury verdict in favor of the contractor, the Mississippi Supreme Court concluded that Mississippi Code Section 31-5-15 permitted bank to release the funds. Contractor argued that the subject statute did not apply to the contract between it and the bank because no securities were deposited with the State Treasurer. However, even though contractor's securities were not deposited with the State Treasurer, the court determined that, under general principles of agency law, the bank became the agent of the State, thus satisfying the statute's requirements.

3. In *Rushing v. Trustmark Nat. Bank*, 66 So.3d 729 (Miss.App. 2011), homeowners sued their construction lender and contractor to recover damages in connection with a construction-loan agreement for the construction of a new home. The homeowners alleged that the bank failed to monitor, verify, and inspect the contractor's work, which was discovered to be deficient, defective and in need of remediation prior to the home passing inspection, before remitting draws to the contractor. The bank moved for summary judgment asserting waiver as a defense. On appeal the court affirmed the trial court's grant of summary judgment.

The court concluded that because the homeowners met with bank personnel, renewed the original construction loan, and borrowed additional money from the bank subsequent to discovering the defective and deficient work, the homeowners waived any right of action they might have had against the construction lender. Accordingly, where a borrower has knowledge of the facts giving rise to a claim of wrongdoing against a lender in relation to a contract, the borrower cannot affirm the contract and continue to accept the benefits and then complain about the alleged wrongdoing at a later date.

4. In *McKee v. Bowers Window & Door Co., Inc.,* 64 So.3d 926 (Miss. 2011), the Mississippi Supreme Court addressed a general contractor's qualification as an expert in the specific field of window manufacture and design. Homeowners sued their general contractor, a window manufacturer, and a window vendor alleging that the wooden windows installed in their home leaked and were a defective product. To support this assertion homeowners designated

a local contractor with twenty-four years of contracting experience whom they had retained to inspect their home as an expert witness. In response, the window manufacturer moved to exclude the witness, which the trial court granted after applying the *Daubert* standard.

On appeal, the Mississippi Supreme Court concluded that the trial court did not abuse its discretion in excluding the homeowners' designated witness. While the prime contractor's twenty-four years of experience would have qualified him as an expert in the broad field of general contracting, the court held that he was not qualified as an expert in the specific field of window manufacture as he had no special education, training, or experience specific to windows. Thus, general contractor was not qualified to testify as a window expert on behalf of the homeowners.

5. In *Harry Baker Smith Architects II, PLLC v. Sea Breeze I, LLC*, 2011 WL 3804568 (Miss. App. 2011)("*HBSA*"), the court held that a trial court does not have jurisdiction to review an arbitrator's decision to consolidate multiple arbitration proceedings. In *HBSA*, Sea Breeze contracted with Harry Baker Smith Architects to provide design services for the construction of a condominium complex. Sea Breeze also contracted with Roy Anderson Corporation to provide construction services for the same project. Both contracts contained arbitration agreements. After some dispute over an alleged defect in the condominium complex, Sea Breeze sought arbitration against HBSA and Roy Anderson in separate proceedings. SeaBreeze and Roy Anderson moved for a consolidation of the arbitrations. The arbitrator consolidated the actions finding that they arose from common questions of fact and law and single arbitration would therefore facilitate complete relief for the parties involved.

HBSA subsequently filed an action in chancery court seeking injunctive relief and reversal of the arbitrator's decision to consolidate. Sea Breeze and Roy Anderson then filed a joint motion to compel a consolidated arbitration and to dismiss HBSA's petition for injunctive relief. The chancery court determined that it lacked jurisdiction to overrule the decision of the arbitrator and denied HBSA's order for injunctive relief and granted the motion to compel the consolidated arbitration. HBSA appealed.

HBSA first argued on appeal that the trial court incorrectly refused to exercise jurisdiction because Mississippi circuit and chancery courts have jurisdiction to independently review the arbitrability of a dispute. However, the appellate court affirmed the trial court's ruling, holding that an arbitrator's decision to consolidate separate arbitrations was not a question of arbitrability. There was no question that both HBSA and Roy Anderson contractually agreed to arbitrate the merits of any dispute related to the design/construction agreements. As such, HBSA's petition was not related to arbitrability. Rather, HBSA questioned whether the parties agreed to consolidate the separate arbitrations. When reviewing arbitration agreements, courts are limited to an analysis of certain gateway matters of arbitrability, such as whether a particular arbitration is valid and binding or whether an arbitration clause applies to a certain controversy. In the case *sub judice*, those matters were undisputed and there was no evidence of fraud, duress, misconduct, or another circumstance that would allow the trial court to invoke its jurisdiction to independently review the arbitrator's decision. The arbitrator's decision to consolidate was one on the merits of a dispute and not a reviewable gateway matter such as arbitrability. Affirmed.

6. In *Scruggs v. Wyatt*, 60 So.3d 758, 767 (Miss. 2011)("*Wyatt*"), the court held that a non-signatory will be bound by an arbitration agreement if the party seeks recovery under other terms in the contract featuring the arbitration clause. In *Wyatt*, the appellee, Wyatt, entered into an unwritten employment agreement with the law firm, Nutt & McAlister. Nutt & McAlister was a

member of the Katrina Joint Venture (which included the Scruggs Law Firm), a joint venture governed by an agreement entitled the “In Re: Katrina Joint Venture Agreement" (the "Katrina JVA"). The Katrina JVA was created to bring lawsuits on behalf of those who were denied insurance coverage for property damage arising out of Hurricane Katrina, The Katrina JVA included a mandatory arbitration provision.

In April 2008, all Katrina Joint Venture attorneys and associates were disqualified from Mississippi federal court cases against State Farm after it was determined that the paid material witnesses to the claims. Following the disqualification, Nutt & McAlister, despite the protest of Wyatt, withdrew from the Katrina Joint Venture and relinquished any interest in the cases. Subsequently, Wyatt filed a complaint against the Scruggs Firm and Scruggs individually for breach of contract and breach of fiduciary duty claiming that was a fee sharing attorney under the Katrina JVA and that the Scruggs Defendants were jointly and severally liable to him for fees owed under the Katrina JVA. The Scruggs Defendants filed a Motion to Compel Arbitration and to Stay, which the Court denied. The Scruggs Defendants appealed.

Since arbitration provisions are contractual in nature, the general rule is that a party cannot be required to submit a dispute to arbitration if he has not agreed so to submit. On appeal, Wyatt claimed that he was not a signatory to the Katrina JVA and therefore there was no agreement to arbitrate between he and the Scruggs Defendants. In denying this argument, the court held that under certain circumstances, a non-signatory party may be bound to an arbitration agreement if he would be obligated under ordinary principles of contract and agency. For example, a signatory may enforce an arbitration agreement against a non-signatory if the non-signatory is a third-party beneficiary or if the doctrine of estoppel applies. A non-signatory can embrace a contract containing an arbitration clause in two ways: by knowingly seeking and obtaining direct benefits from that contract, or by seeking to enforce the terms of that contract or asserting claims that must be determined by reference to that contract. The doctrine of direct-benefit estoppel precludes a non-signatory such as Wyatt from embracing the obligations and/or benefits of a contract during the life of the contract, then attempting to repudiate the arbitration clause in the contract during subsequent litigation. The alleged joint and several damages Wyatt claims flow from the Katrina JVA, which was the sole and only agreement of the members of the Katrina Joint Venture. As such, the direct-benefit estoppel theory requires the nonsignatory claimant, Wyatt, to arbitrate his claims against the Scruggs Defendants.

Alternatively, Wyatt argued that the Scruggs Defendants should be able to invoke the arbitration provision under the "clean hands" doctrine. Wyatt noted that the Scruggs Defendants previously entered into a criminal conspiracy to enforce the arbitration provision in another lawsuit, and should be estopped from invoking that same arbitration provision in this case. The Court held that "clean hands" doctrine is only applicable when the party is guilty of willful misconduct in the transaction at issue. There was no evidence of such misconduct in the instant case and the doctrine was therefore inapplicable. Reversed and rendered.

7. In *Citigroup Global Markets, Inc. v. Braswell*, 57 So.3d 638 (Miss.App. 2011), the court held that an assignee/successor corporation may be bound by an arbitration clause signed by its predecessor. In *Citigroup*, Randy Braswell opened two accounts at Smith Barney in 1996. Smith Barney, Inc. is a division of Citigroup. Braswell executed a client agreement containing an arbitration clause.

In 2008, Braswell filed a complaint alleging that Citigroup failed to follow his instructions regarding his investment accounts, negligently handled his investments, and breached its fiduciary duty. Braswell and Citigroup then filed a joint motion to stay the proceedings pending

arbitration. Braswell filed a motion to withdraw the joint motion to stay the proceedings and amended his complaint to add Smith Barney and Smith Barney's agent as defendants in the suit. All defendants responded with a motion to compel arbitration. The circuit court held that the client agreement between Braswell and Smith Barney created an ambiguity as to whether claims against Citigroup, as a successor to Smith Barney, are subject to the arbitration clause contained within the client agreement. The circuit court also found that the arbitration agreement was substantively unconscionable because all of the once available arbitration have merged into FINRA and left Braswell with no choice of forum. The circuit court granted Braswell's motion to withdraw the joint motion to stay pending arbitration and denied Citigroup's motion to compel arbitration and Citigroup appealed.

The appellate court overruled both of these determinations. The court held that the agreement was unambiguous and that the parties intended for the term "SB" to refer not only to Smith Barney but also to Smith Barney's subsidiaries, affiliates, successors and/or assigns. The arbitration agreement stated that "all claims or controversies . . . between [Braswell] and SB . . . shall be determined by arbitration . . . ." Further, clause seven of the contract states: "[t]he provisions of the Agreement shall . . . inure to the benefit of SB's present organization or any successor organization or assigns." The contract as a whole unambiguously binds any successor of Smith Barney. Both parties concede that Citigroup is a successor of Smith Barney therefore Citigroup is a party to the agreement and Braswell's claims against Citigroup are encompassed by the arbitration agreement. Therefore, the circuit court's application of general contracting principles was in error.

The appellate court also found no evidence in the record that the arbitration clause was substantively unconscionable. Unconscionability is defined as an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party. Substantive unconscionability may be proven by showing the terms of the arbitration agreement to be oppressive. Braswell claims that his lack of choice of a forum for the arbitration is unfair and that the costs of the arbitration in FINRA would be oppressive. The parties admitted that since the signing of the agreement all of the qualifying organizations have merged into FINRA leaving no other choice of forum under the clause. However, the court held that this fact alone does not render the arbitration agreement unconscionable. Braswell provided no evidence that FINRA arbitration would be biased or unfair. The formation of FINRA did not limit his damages or legal rights. Nor did it affect the liability of Citigroup. As to Braswell's argument related to costs, the arbitration agreement did not mention fees, much less require Braswell to bear the entire cost of the arbitration fees. Further, Braswell has made no showing that his fees for arbitration would be more costly than pursuing his claim in the court system. Reversed and remanded.

8. In *Lemon Drop Properties, LLC v. Pass Marianne, LLC*, 73 So.3d 1131 (Miss. 2011), the court held that a party had waived its right to arbitration by substantively invoking the litigation process and taking action inconsistent with an intent to arbitrate the dispute. In *Lemon Drop*, Pass Marianne entered into a contract with Carl E. Woodward for the construction of a new condominium development in 2005. Shortly thereafter, Pass Marianne and Lemon Drop entered into a "Preconstruction Sales and Purchase Agreement" ("Purchase Agreement") for Unit No. 209 within the complex. The Purchase Agreement included an arbitration clause.

Hurricane Katrina delayed completion of the project until 2007. At that time, Pass Marianne executed a warranty deed conveying Unit No. 209 to Lemon Drop, and Woodward furnished a construction warranty to Lemon Drop. In 2008, Lemon Drop filed a complaint against Pass Marianne and Woodward seeking rescission of the Agreement and damages due

to alleged defects in design and construction. Pass Marianne filed an answer wherein it made a cross-claim against Woodward, demanded a jury trial and did not invoke any right to arbitrate. In 2009, Pass Marianne joined in agreed order setting a trial date and exchanged discovery with both Lemon Drop and Woodward in the suit.

Later in 2009, Lemon Drop amended its Complaint to add Alfonso Realty as a defendant. Pass Marianne and Alfonso both answered the amended complaint and filed motions to compel arbitration under the clause of the Purchase Agreement. The circuit court entered an order compelling arbitration. Lemon Drop appealed.

On appeal, Lemon Drop argued that Pass Marianne waived its right to arbitrate. A party may waive the right to arbitrate by substantially invoking the judicial process and taking actions took inconsistent with the right to arbitration to the detriment or prejudice of the other party. In this case, Pass Marianne failed to assert arbitration as an affirmative defense in its Answer and demanded a jury trial. It also joined in an order setting trial and engaged in discovery. Although the Court noted that Lemon Drop failed to attach a copy of the Purchase Agreement to its lawsuit, this failure did not excuse Pass Marianne's failure to demand arbitration and its 252 day delay in seeking arbitration. Even then, Pass Marianne's demand of arbitration was contingent upon a finding of liability to Lemon Drop. All these actions were inconsistent with the intent to invoke a mandatory arbitration clause. Based on the foregoing, the court held that Pass Marianne waived its right to arbitrate and reversed the order of the trial court with respect to Pass Marianne.

Lemon Drop also argued on appeal that Alfonso has no right to compel arbitration as a nonsignatory to the agreement and that, even if Alfonso did, its right was waived by its delay and the delay of its principal, Pass Marianne. The court held that Alfonso was an express agent of Pass Marianne under the Purchase Agreement. Consistent with Mississippi law and the law of other states, an agent of a contracting party has the right to compel arbitration under the principal's agreement. Further, the court held that Alfonso invoked its right to arbitrate in its first responsive pleading in the matter and that Pass Marianne's waiver of arbitration cannot be imputed to Alfonso. Given the presumption against the waiver of arbitration and Alfonso's prompt motion to compel arbitration once being named in the suit, the court held that there could be no dispute that Alfonso timely and properly asserted its arbitration rights and affirmed the trial court's decision that Alfonso was entitled to arbitration. Reversed in part and affirmed in part.

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9. In *Trustmark Nat. Bank v. Roxco Ltd., 2009-CA-00559-SCT, 2011 WL 6091153 (Miss. Dec. 8, 2011)*, the Mississippi Supreme Court reversed and rendered a $3.72 million jury verdict awarded to Roxco Ltd. against Trustmark National Bank. Under Mississippi law, public construction contracts awarded by the State are subject to retainage withholding; however, a contractor may substitute securities in lieu of having retainage withheld pursuant to Section 31-5-15 of the Mississippi Code. Specifically, and at issue in this case, the statute requires "a contractor to deposit funds with the State Treasurer, or to deposit a certificate of deposit issued by a commercial bank provided that the certificate is negotiable or accompanied by a power of attorney executed by the owner of the certificate in favor of the Treasurer of the State." In this case, Roxco a general contractor on several state public-works construction projects, chose to avail itself of this code provision. Roxco deposited securities valued at $1,055,000 in a safekeeping account at Trustmark and provided written instructions to Trustmark pledging the

securities to the State of Mississippi in accordance with Section 31-5-15. Upon notification that Roxco was in default, the State instructed Trustmark to transfer the securities into the State's treasury account. In response, Roxco directed the bank not to transfer the funds from its safekeeping account. Trustmark followed the State's instructions and deposited the funds into the State's account. Roxco filed suit against Trustmark for breach of contract and conversion. At trial, Trustmark argued that Section 31–5–15 permitted the release of the funds in the safekeeping account. The jury, however, found in favor of the general contractor and awarded Roxco $3,720,000 in damages. On appeal, the Mississippi Supreme Court found that Roxco's formal pledging of the treasury bills to the State of Mississippi was effective as delivery and Trustmark's actions were in accordance with the requirement of Section 31-5-15. A unanimous Court ruled that the trial court should have granted Trustmark's motion for judgment notwithstanding the verdict.

10. *Fid. & Guar. Ins. Co. v. Blount, 63 So. 3d 453, 456 (Miss. 2011), reh'g denied (June 30, 2011)*, is a consolidation of separate appeals brought by sureties for construction companies (Fidelity and Guaranty Insurance Company (F&G), St. Paul Fire and Marine Insurance Company, Travelers Casualty and Surety Company of America, and the United States Fidelity and Guaranty Company) (collectively, the "sureties") challenging the constitutionality of certain practices of the Mississippi State Tax Commission when bonded principals defaulted on state taxes. Under Mississippi law, construction companies involved in construction activities are required to pay a tax in the amount of three and one-half percent of the total contract price or compensation received. To ensure that all taxes owed to the State will be paid when due, Mississippi Code Section 27-65-21 requires that on construction contracts valued at $75,000 or more, construction companies must pay the tax in advance of beginning the performance of the contract or execute and file a bond with the Tax Commission. At issue before the Court was: 1) whether the sureties and similarly situated sureties are entitled to notice by the Tax Commission of their principals' defaults and tax audits and subsequent status resulting from such audits; and 2) whether a surety is liable for the total sum of the unpaid taxes, damages, penalties and interest assessed or merely the unpaid taxes. The Mississippi Supreme Court held that: 1) the sureties were liable for all taxes, penalties, damages and interest owed to the State of Mississippi after construction companies defaulted on contractor's taxes, pursuant to clear and unambiguous rider in bond agreements; 2) the sureties were not entitled to notice and hearing relating to tax audits of construction companies and resulting tax, penalties, interest and damages; 3)the sureties lacked standing to challenge alleged lack of notice and hearing of audits, and resulting taxes, interest, penalties and damages; and 4) the sureties were not entitled to reimbursement from the Tax Commission for any overpayment of tax, interest, penalties, and damages. In reaching its decisions, the Court opined that the Mississippi contract law is decisive – "the sureties entered into contracts with the principals on various bonds, in which the payment of taxes, damages, penalties, and interest were *expressly included*." (emphasis in original).

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Legislation:

1. **Miss. Code § 31-3-21(3) Bidding and Awards.** The Mississippi Legislature amended the public bid law to require all non-resident contractors who bid on Mississippi public works contracts to attach to their bid a copy of their own state's preference law. If a non-resident contractor fails to do so, the Mississippi public agency must reject the bid.

2. **Miss. Code § 85-7-141 Commencement of Suit to Enforce Lien.** Under prior Mississippi law, lien foreclosure actions were required to be brought in the circuit courts. The law, as amended, allows foreclosure actions for lien claims less than $200,000 to be brought in county courts. Additionally, the amendment clarified the statute of limitations begins to run on the day that labor or services were last provided.

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Missouri

Case law:

1. In *River City Drywall, Inc., et al. v. Raleigh Properties, Inc., et al., 341 S.W.3d 716 (Mo. App. 2011)*, the court held that pursuant to Missouri's Mechanic's Lien Law, contractors that had contracted with the agent of the record owner of a subdivision were thus considered original contractors, and no 10-day notice was required under RS Mo. § 429.100. One company owned the real estate and another had actually contracted with the lien claimants, but the two companies were essentially one and the same. They had the same person as the owner, the same sole employee and sole decision maker and he admitted that due diligence was not exercised in maintaining separation between the two companies.

2. In *Ball v. Friese Const., Co., 348 S.W.3d 172 (Mo.App. 2011)*, the Court held that the statute of limitations begins to run when the circumstances would place a reasonably prudent person on notice of a potentially actionable injury. The statute of limitations is not tolled on a homeowner's claim related to the cracking of a basement floor slab because of the failure to identify the specific cause of the cracking when a reasonably prudent person could have discovered the cause much sooner. The Court also held that although damages continued over time, there was only one wrong and not multiple continuing wrongs so as to toll the statute.

3. In *Brooke Drywall of Columbia, Inc., V. Building Const. Enterprises, Inc., et al.,___S.W.3d__, 2011 WL 5335410 (Mo. App. Nov. 8, 2011), rehearing/transfer to Mo. Sup. Ct. denied (Dec. 20, 2011)*, the Court agreed with the trial court that the payment bond surety was liable for interest and attorneys' fees awarded to a subcontractor. The general contractor and subcontractor settled the principle amount during trial and interest and attorneys' fees as allowed by the subcontract, was determined by the trial court. This Court agreed with the trial court and reasoned that the language of the bond was broad enough to cover "such sums" as may be due under the subcontract. The Court rejected the surety's argument that bond coverage was limited to "materials, insurance premiums and labor" as specifically called out in the bond. The general contractor did not "perform all its obligations" under the contract with the owner and, although the general contractor's contract with the owner was not part of the record, the Court assumed that it imposed an obligation to fully pay all subcontractors. The Court found that obligation was breached by the general contractor's failure to pay interest as allowed by the subcontract, and therefore the surety was obligated to pay the subcontractor for interest and attorneys' fees as allowed by the subcontract.

4. In *Westfield, LLC, et. al. v. IPC, Inc., et al., No. 4:11CV00155, ___ F.Supp.2d___, 2011 WL 4008117 (E.D.Mo. Sept. 8, 2011)*, claims of negligence were permitted against the designer of precast parking structures but not the design-build contractor. The Court first discussed the acceptance doctrine and stated that exceptions to that doctrine include: "a) departure from specifications that could not be discovered by reasonable investigation; b) the

dangerous character of the structure or condition, unknown to the owner; c) hidden defects in the project which were not discoverable by the proprietor; and d) specifications that are 'so imperfect or improper that the ...contractor should realize that the work done thereunder will make the structure or condition unsafe ...' " Plaintiffs' allegations fell within an exception to the acceptance doctrine because the alleged defects were or should have been foreseeable by the design engineer as a likely result of negligent design. Then, surprisingly and without any discussion of the caselaw on which it cited and ostensibly relied, the Court made a bold and unsupported statement of Missouri law. That "[t]he economic loss doctrine, however, does not apply and preclude tort liability in an action based on the negligent rendition of services by a professional." Finally, the Court held that although the designer was the design-builder's subcontractor, the economic loss doctrine does apply to bar claims of negligence against the contractor. This was justified because the owner had direct claims of negligence against the designer and the Court did not permit the same to be asserted against the design-builder.

5. In *City of Kansas City, Mo, et. al, v. Ace Pipe Cleaning, Inc., et. al., 349 S.W.3d 399 (Mo.App. 2011)*, the Court denied a fourth-tier supplier's attempt to make a claim against a public works payment bond because such bonds protect only down to third-tier subcontractors or suppliers. Conversely mechanic's liens are offered even to laborers and materialmen on a project, regardless of privity. The Court outlined the reasons why public works bonds and mechanic's liens offer different protections and cover different risks. The Court thus affirmed long held precedent, cited the failure of the legislature to change the statute, and stated that Missouri's "Little Miller Act and mechanic's lien laws are disparate by necessity and by design."

The Court also held that the supplier did not show grounds for "telescoping," which it defined as: "If the substance of a relationship warrants, then a tier in the contract chain is collapsed, moving all parties beneath that tier up a level in the chain of contractual privity." Like Federal Courts applying the Miller Act, and not specifically referred to as "telescoping", Missouri courts applying the Little Miller Act will also look at substance over form in determining contractual privity for protections afforded by a public works bond.

6. In *RLI Ins. Co. v. Southern Union Co., 341 S.W.3d 821 (Mo.App. 2011)*, the owner of a hog plant that was under construction and was partially destroyed in a natural gas explosion brought action against natural gas utility and several other defendants to recover consequential and lost business income damages and almost $8 million in subrogation damages that owner's builder's risk insurer paid owner. The contract between the utility and the contractor to provide gas service was silent on the subject of the right of subrogation. The utility was allowed to claim that it was an intended third party beneficiary to a waiver of subrogation provision contained in a separate contract between the contractor and other trades who participated in the construction of the plant, even though the utility/contractor contract contained an "integration" clause.

The AIA contract entered into between the contractor, a construction manager hired by the contractor, and various trades who participated in the construction of the plant, expressly identified "[Contractor's] other contractors and own forces" as a class of persons intended to benefit from the waiver of subrogation provision. The "other contractors and own forces" was defined in the AIA contract as someone undertaking activities on behalf of the contractor relating to the "construction or operations" of the plant. Because the utility constructed and installed gas pipelines and set meters and equipment it was involved in "construction or operations" related to the plant and was therefore, one of the Contractor's "other contractor's or own forces", and was within the intended class of third party beneficiaries to the waiver of subrogation clause.

7. In *Winters Excavating, Inc. v. Wildwood Development, L.L.C., 341 S.W.3d 785 (Mo.App. 2011)*, the excavator began doing work directly for the owner after the owner terminated the general contractor and advised subcontractors that the subcontracts were likewise terminated. The excavator's lien claim for the post-termination work was invalid for failure to provide the proper notice required of general contractors. The trial court's decision was granted deference as to whether or not the excavator was misled to believe who was the record owner. Moreover the evidence did not support a claim by the excavator that the subcontracts had actually been assigned (which would mean differing notice provisions) rather than terminated upon the general contractor's termination.

8. In *Bob DeGeorge Associates, Inc. v. Hawthorn Bank, No. WD72651, ___S.W.3d___, 2011 WL 1988416 (Mo.App. May 24, 2011), rehearing and/or transfer denied (Jul. 05, 2011), cause ordered transferred to Mo.Sup.Ct. (Oct 04, 2011)* the Court held that mechanic's liens are not superior to a purchase-money mortgage for the purchase of the lot itself upon which the improvements were erected. This is true even if the mortgage is executed and/or filed after the improvements were commenced. However, mechanic's liens are granted priority in the improvements. The Court reasoned that RS Mo. § 429.050 provides that a lien for erections or improvements shall have a priority in interest over a prior encumbrance, but that such lien only attaches to "the buildings, erections or improvements for which they were furnished or the work was done." "Otherwise stated, section 429.050 protects lien priority in new construction over a prior mortgage on the land." But mechanic's liens are not given priority over repairs.

9. In *Utility Service Co., Inc. v. Department of Labor and Indus. Relations 331 S.W.3d 654 (Mo. 2011)*, the Court held that statutes requiring prevailing wages does not apply to maintenance, but only to construction. But that includes reconstruction, "major repairs", painting and other activities that occur on existing structures.

10. In *City of Kimberling City v. Leo Journagan Const. Co., Inc., 337 S.W.3d 48 (Mo.App. 2011)*, the Court held that the city contractually granted the engineer the authority to reject work, make minor variations in the work, and to be the initial interpreter of contract documents related to the construction of sanitary sewer system, but that did not constitute a waiver of any rights the city had under its separate contract with contractor. City was, by implication, the "final interpreter" of the contract requirements since the engineer was merely the initial interpreter. The Court also held that a contract provision requiring the city to initially submit claims and disputes regarding sanitary sewer system construction project to the engineer did not constitute a condition precedent that required any warranty issues to be first submitted to the engineer.

11. In *Haren & Laughlin Const. Co., Inc. v. Jayhawk Fire Sprinkler Co., Inc. 330 S.W.3d 596 (Mo.App. 2011)*, the general contractor sought damages, which its insurance company paid, against the fire sprinkler subcontractor for damages caused by the sprinkler system. The Court acknowledged that a subcontractor has an affirmative defense of waiver of subrogation if: (1) the contract contained a provision waiving the general contractor's right to subrogation to claims covered by insurance, (2) the general contractor's contractual obligation to maintain insurance was still effective at the time of property damages, and (3) the property damages were covered under that required property insurance policy. As to the first issue, the general contract contained a waiver of subrogation stating that the contracting parties and owner parties waive subrogation rights to claims against each other covered by insurance and defined the contracting parties to include the general contractor and its subcontractors. The Court held that subcontractors are entitled to the waiver contained in the general contract as third-party beneficiaries. The remaining issues involved disputed facts and the case was remanded.

Legislation:

1. HCS SB 220. Governor vetoed this bill attempting to establish a peer review process for design professionals. The Governor's veto letter stated that the more troubling aspects were that: it lacked procedures for the review; peer reviewers could be co-workers or persons with an interest in the design at issue; the confidentiality clause was overly broad; and it provided immunity from civil liability to not only the reviewers and witnesses in the process but also to the design professional (presumably even the one being reviewed)...who in good faith "acts upon the recommendation of, or otherwise participates, in the operation of, such process."

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Montana

Case law:

1. In *Gaston Engineering & Surveying, P.C. v. Oakwood Properties, Inc.*, 2011 MT 44, ___ P.3d ___ (2011), the Montana Supreme Court held that an engineering firm's construction lien had priority over a lender's purchase money mortgage even though the developer the engineering firm had worked for did not own the property which was the subject of the lien until after the lender filed its purchase money mortgage.

The case arose out of a proposed residential subdivision near Bozeman, Montana. The developer entered into a buy-sell agreement contingent on acceptance of water monitoring and percolation tests. The plaintiff engineer began performing these tests on June 12, 2006. Thereafter, the developer approached the lender seeking financing for the project. The developer accepted the water monitoring and percolation tests on September 20, 2006, which coincided with the purchase of the subdivision property. On that same date, the lender advanced $4.5 million for the purchase of the property and recorded its mortgage on the same day. In addition to advancing $4.5 million for the purchase of the real property, the lender also agreed to commit an additional $1.5 million for operating costs to help establish the subdivision. The developer began making draws out of this $1.5 million operating budget to pay various trades, including the plaintiff engineer. Eventually, the developer stopped paying the engineer, prompting the engineer to file a construction lien against the real property on October 12, 2007.

The engineer eventually sued to foreclose on its lien, suing both the developer and the lender. After the developer agreed to a stipulated judgment with the engineer, the engineer sought to enforce its rights against the lender. The trial court held that the lender was entitled to summary judgment on the priority issue based on a finding that the engineer's lien could not attach prior to September 20, 2006, the date the developer became the owner of the real property at issue.

On appeal, the Montana Supreme Court held that the engineering firm had priority because although the developer was not the fee owner of the real property at issue on the date the engineer began providing services, the developer had an interest in the real property at the time it entered into the contingent buy-sell agreement and thus was a "contracting owner" under Montana's lien statutes. Therefore, because the engineering firm commenced its work for the "contracting owner" on June 12, 2006, prior to the recordation of the lender's mortgage, the

engineer's construction lien was entitled to priority over the lender's purchase money mortgage under Mont. Code Ann. § 71-3-542(1).

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Nebraska

Case law:

1. In *Chicago Lumber Co. of Omaha v. Selvera,* 282 Neb. 12, ___ N.W.2d ___ (2011), the Nebraska Supreme Court overturned an award of attorney fees to a homeowner for bad faith relating to the failure to release a construction lien and remanded the case for further proceedings. In *Selvera*, a material supplier sought to foreclose a construction lien it filed pursuant to the Nebraska Construction Lien Act ("NCLA") on property owned by a residential homeowner (further defined as a "protected party" under the NCLA). The homeowner brought a counterclaim asserting that the supplier's lien was filed in bad faith because (1) she had not been provided a copy of the lien within ten days of recording as required by the NCLA; and (2) she previously provided evidence to the supplier that its lien was unenforceable. The basic dispute centered on whether or not the homeowner had already paid the prime contract in full and whether the supplier had sufficient knowledge of the status of payment to release its lien. In the context of the NCLA, the Court stated that "to act with bad faith, one must either know his or her lien is invalid or overstated or act with reckless disregard as to such facts." Initial documentation submitted by the homeowner in late 2007 with her answer in the foreclosure action was found by the Court to be confusing and internally inconsistent and thus the supplier's refusal to release the lien at that time was not in bad faith. The supplier sought clarification through the discovery process and eventually in February 2009 the homeowner provided an affidavit from the prime contractor that stated it had been paid in full. The supplier dismissed its foreclosure action immediately but waited until May 2009 to release its lien. The Court found that the three month delay in releasing the lien was not bad faith as a matter of law but that a question of fact remained as to whether the delay was "merely innocent reluctance or bad faith" and remanded the case for further proceedings. With regard to the issue of whether a copy of the lien was provided to the homeowner, the Court found that the homeowner failed to present evidence that the supplier "actually knew she had not received a copy of the lien or that it was reckless to that fact." The supplier had presented evidence that its usual custom was to send a copy of the lien to the homeowner and that it followed that same procedure in this case. Thus, the Court found that the supplier "had a reasonable basis for believing that [the homeowner] had received a copy."

2. In *Federated Service Ins. Co. v. Alliance Construction, LLC,* 282 Neb. 638, 805 N.W.2d 468 (2011), the Court reversed a summary judgment for the insurer which had sought a declaratory judgment that it had no duty to defend or indemnify a general contractor for claims arising out of an injury sustained by a subcontractor's employee. The subcontractor maintained CGL coverage with the insurer and as required by the subcontract included the general contractor as an additional insured through an "Additional Insured by Contract Endorsement". The Court found that "a requirement in the underlying contract that the subordinate party make the promisee an additional insured on the subordinate party's CGL coverage unequivocally shows that the parties intended the subordinate party to insure against the promisee's negligence." The Court further found that the additional insured endorsement was broad enough to include coverage for the general contractor's negligence even absent any negligence

by the subcontractor. The endorsement provided coverage for "[a]ny person or organization . . . for which you [subcontractor] have agreed by written contract to procure bodily injury or property damage liability insurance, *arising out of operations* performed by you [subcontractor] or on your behalf . . . ." Questions of fact remained with regard to whether a "sole negligence" exclusion barred coverage of the general contractor for a loss caused by its own negligence and the case was remanded for further proceedings on that issue.

3. In *Associated Eng'g, Inc. v. Arbor Heights, LLC,* 2011 WL 6090238, No. A-10-1211 (Neb. Ct. App. Dec. 6, 2011) (unpublished opinion), the Court upheld the district court's submission of an owner's breach of contract claims to the jury with instructions that pertained to whether the engineer performed in a "workmanlike manner." In *Arbor Heights*, an engineer initially brought suit against the owner for non-payment. In response, the owner brought counterclaims for breach of contract, ordinary negligence and professional negligence arising out of alleged design errors and the engineer's alleged failure to "supervise the project and ensure construction was completed according to project specifications." The engineer asserted that all of the claims raised by the owner were assertions of professional negligence and the owner's failure to introduce evidence concerning the standard of care for a professional engineer should entitle it to a directed verdict. The district court declined to grant the directed verdict and the Court affirmed that decision noting that the district court properly submitted only the breach of contract claim (for failure to supervise the project and to ensure construction was completed according to specifications) to the jury and in instructing the jury appropriately removed all references to alleged design errors. Thus, in this case the Court drew an apparent distinction between claims relating to design errors which it categorized as negligence/professional negligence and claims relating to failure to supervise which it categorized as a breach of contract.

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Nevada

Case law:

1. In *U.S. x rel. Russel Sigler, Inc. v. Associated Mechanical, Inc., et al.*, U.S. District Court, District of Nevada, Case No. 2:09-cv-01238-RLH-GWF (2010 U.S. Dist. LEXIS 129834), the U.S. District Court held that a Miller Act surety can validly include a limitation deadline in its payment bond, and thereby be relieved from liability for subcontractor or supplier claims that arise after that deadline regardless of the status of the bonded project.

In *Sigler*, Amerind was the general contractor on a U.S. Air Force construction project located at Creech Air Force Base in Indian Springs, Nevada ("project"). Amerind obtained a payment bond in the amount of $1,028,422 in accordance with the Miller Act, 40 U.S.C. 3131, *et seq*. As described by the Court, the bond stated that it "terminated at the end of the project or after 12 months from the effective date, whichever occurs first. The effective date was November 16, 2007 ..." Amerind subsequently subcontracted with Associated Mechanical, Inc. ("Associated") for a portion of the project work. Associated, in turn, contracted with Russel Sigler, Inc. ("Sigler") to provide certain heating, ventilation and air conditioning ("HVAC") materials for use on the project. Sigler delivered its HVAC materials on December 29, 2008

(and after the effective date of the bond). Sigler was not paid the $203,550.53 it claimed was owed.

Sigler filed suit against Associated, Amerind's Miller Act surety, and others seeking payment. Sigler then filed a motion for summary judgment against Amerind and Amerind's Miller Act surety, and Amerind and its surety filed a cross-motion. Sigler argued that a Miller Act bond cannot be of a limited duration. Per Sigler, allowing a surety to limit the bond duration for less then the actual project length would be contrary to the purpose of the Miller Act. Conversely, Amerind and its Miller Act surety argued that there is no language in the Miller Act that prevents a bond from expiring and that time limitations are allowed.

In its decision, the Court stated, "[t]he ultimate issue here is whether or not a surety may contractually limit the duration of a payment bond under the Miller Act." The Court found no federal cases addressing whether a Miller Act payment bond can contain a limitation/expiration provision, except in the context of option contracts. The Court observed that in *U.S. for the use of Modern Electric, Inc. v. Ideal Electronic Security, Inc.,* 868 F.Supp. 10 (D.D.C. 1994), *rev'd on other grounds,* 81 F.3d 240 (D.C. Cir. 1996), it was held that work that was performed outside of the first bonded year under an option contract was not covered by the bond. The Court also observed that in *B&M Roofing of Colorado, Inc. v. AKM Associates, Inc.,* 961 F.Supp. 1441 (D.CO. 1997), a motion for summary judgment was denied because the surety's acceptance of additional premium creates an issue of fact as to whether the surety intended to provide coverage during subsequent option years. The Court then ruled in *Sigler*:

> Although this case does not involve the option year issues discussed in *[Modern Electric and B&M]*, those cases stand for the proposition that a surety can limit durational liability as they [the Miller Act surety] did here. Following that reasoning, the Court finds that the Miller Act does not prevent a surety from setting an expiration date in a payment bond.

Based upon its analysis, the Court determined that the Miller Act surety's payment bond liability expired on November 16, 2008. The Court further determined that, because Sigler delivered its HVAC materials on December 29, 2008 (and after the November 16, 2008 expiration date in the bond), the surety was not liable for Sigler's claim. In light of this analysis, the Court denied Sigler's motion of summary judgment, and granted Amerind's and the Miller Act surety's cross-motion as to Sigler's claim on the bond.

Legislation:

1. AB 144, the so-called "Nevada First" act. The act adds additional requirements for a Contractor to obtain a 5% bidder's preference for public works under NRS 338.1389, NRS 338.147, NRS 338.1693, NRS 338.1727 and NRS 408.3886. Specifically, a Contractor seeking to exercise the preference must provide an affidavit upon the award of public works contract that it will ensure that:

* At least 50% of the work force on the project holds NV driver's licenses or identification cards;

* All non-apportioned vehicles used on the project are registered in NV;

* At least 50% of the design professionals who work on the project have NV driver's licenses or identification cards;

* At least 25% of the materials used on the project are from suppliers located in NV; and

* Certified payrolls will be maintained in NV for the project's duration.

The penalties for failing to comply with the obligations in the affidavit are harsh: The imposition of a 10% gross contract price liquidated damage assessment against the Contractor (or voiding of its bid), the prohibition of bidding again on a public work for one (1) year on contracts exceeding $25 million, and the prohibition of being issued a preference certificate for five (5) years on contracts exceeding $5 million.

By the affidavit, the Contractor is not just obligating itself to meet the requirements; it is also bearing the risk that its subcontractors and suppliers, over whom the Contractor has little practical control, will also comply. The Contractor can include indemnification language in its subcontracts that apportions by the percentage of relative fault for the failure to comply and resulting LDs. Nothing is mentioned in the act, however, about the Contractor's loss of bidding and preference rights.

Contibutor's note: While AB 144 is law, there are currently efforts to alter it by adding amendments to other pending legislation in the current legislative session. Accordingly, it is recommended that a detailed analysis of the final language of the act and any amendments thereto be undertaken.

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Nevada

Case Law:

1. In *Simmons Self-Storage Partners, LLC., v. Rib Roof, Inc.,* 247 P.3d 1107 (Nev. 2011), the Nevada Supreme Court held that final judgment in a mechanic's lien enforcement action must include both a judgment on the lienable amount and a determination on whether the property's sale is to proceed. In *Simmons*, Rib Roof Inc. sought to foreclose upon mechanics' liens for work performed on several different properties. The district court determined the lienable amount and entered judgment thereon. The district court however failed to allow for the sale of the properties to which the liens were secured.

Under Nevada Rules of Appellate Procedure a court's jurisdiction to consider an otherwise timely appeal depends on whether the district court has entered a final judgment. Rib Roof argued that the district court's judgment was final despite its failure to order the property sold or foreclosed upon, because doing so is merely a post-judgment enforcement issue. The Supreme Court disagreed.

The Supreme Court reasoned that by including sale language in the final judgment, the merits of the compliant are finally resolved, leaving no question as to whether the foreclosure can proceed. Following the law in other jurisdictions, the Supreme Court held that the final judgment in a mechanic's lien enforcement action must include whether the property's sale is to proceed and any litigation concerning the actual sale then occurs in post-judgment enforcement

proceedings. Subsequently, because a final judgment was not entered, the Supreme Court denied the appeal based upon lack of jurisdiction.

2. In *Dynalectric Company of Nevada, Inc. v. Clark & Sullivan Constructors, Inc,* 255 P.3d 286 (Nev. 2011), the Nevada Supreme Court affirmed the lower Court's award of expectation damages in a promissory estoppel claim where a general contractor reasonably relied upon a subcontractor's unfulfilled promise.

In *Dynalectric* Clark and Sullivan solicited bids for a project. Dynalectric submitted a proposal to Clark and Sullivan. Clark and Sullivan incorporated Dynalectric's proposal into its bid to the Owner and was subsequently the low bidder and was awarded the project. Dynalectric repudiated its obligations to Clark and Sullivan. Clark and Sullivan sued Dyanlectric for damages under the theory of promissory estoppel and was awarded damages. Dynalectric appealed the award and asserted the district court should not have awarded Clark and Sullivan expectation damages. The Nevada Supreme Court disagreed.

Citing to the Restatement (Second) of Contract, the Nevada Supreme Court held that the district court may award expectation, reliance, or restitutionary damages for promissory estoppel claims. In this case the Supreme Court decided that the proper measure of damages was the difference between the nonperforming subcontractor's original bid and the cost of the replacement subcontractor's performance.

Legislation:

1. In 2011 Nevada Legislature passed AB 144, also know as the "Nevada First" act. This act modified the Nevada bidder's preference laws. The original bill had some unintended results. Contractors and bonding companies testified that the penalties were too harsh and that a Bonding company would not provide a bond for a contractor seeking the bidder's preference. AB144 was subsequently modified by AB 574.

The original AB 144 required a Contractor to submit a signed affidavit certifying that for the duration of the project:

- 50% of workers employed on the project hold a valid Nevada drivers license or ID;
- 100% of vehicles used primarily on the project be registered and/or registered and partially apportioned in Nevada;
- 50% of design professionals working on the project hold a valid Nevada drivers license or ID;
- 25% of the suppliers of materials used on public work are located in Nevada; and
- Contractor and subcontractors on the project maintain and make available for inspection payroll records.

The penalties for failing to comply with the affidavit were severe. The public body could assess liquidated damages in the amount of 10% of the contract price and void the contractor's

bid. The public body could also prohibit the contractor from bidding on a public work for one year and impose a five year ban on a contractor being eligible for the preference.

By signing the affidavit, the contractor was not only responsible for its compliance but also the compliance of all of its subcontractor's and suppliers. The public body could only seek its remedy through the contractor.

AB 547 addressed some of the contractors' and bonding companies' concerns by modifying AB 144. A majority of the bill stayed intact. The major changes are as follows: first, the requirement of 25% of the suppliers of material be located in Nevada was changed by adding the caveat, "unless the public body requires the acquisition of materials or equipment that cannot be obtained from a supplier located in this State", second, the public body can recover liquidated damages against the party responsible for a failure to comply with the affidavit, not just the contractor and third, the liquidated damage amount was reduced from 10% to 1% of the contract price.

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New Hampshire

Case law:

1. In *General Insulation Co. v. Eckman Construction,* 992 A.2d 613 (N.H. 2010), the New Hampshire Supreme Court reviewed its unique statutes governing performance and payment bonds. Pursuant to New Hampshire RSA 447:17, a Claimant must file with the appropriate public entity office "a statement of the claim" within 90 days after the completion and acceptance of the project by a contracting party. A copy of that statement is then sent by mail by the office where it is filed to both the principal and the surety. Then, pursuant to RSA 447:18, within one year after the filing of the Notice of Claim, a Claimant must file a petition in the Superior Court to enforce the claim "with copy to the principal and surety, and such further notice as the Court may order." In this case, the NH Supreme Court had an occasion to analyze the latter filing requirement and interpreted it strictly in disallowing a payment bond claim.

On March 15, 2007, the Claimant, a materialman, filed its notice of claim pursuant to RSA 447:17. On March 6, 2008, the claimant filed a petition in the Superior Court to enforce the statutory bond pursuant to RSA 447:18. The claimant, however, failed to provide the defendants with copies of the petitions until August 2008, after the Court issued Orders of Notice to provide the copies. The Defendant general contractor and sureties moved to dismiss the petitions for failure to comply with the statute by failing to provide them with copies of the petition within the one-year time frame provided in the statute.

The NH Supreme Court concluded that strict compliance was required by the claimant. The Court concluded that the failure to provide copies of the petitions to the defendants until August 2008, more than one year after the filing of the March 2007 claim barred the payment bond claim. The Court recognized that this would result in the defendant receiving two copies of the exact same pleading, but the Court determined that similar statutes from other states, including New Mexico, require the potential double notices under similar circumstances.

Chief Justice Brock dissented concluding that the petitioner timely filed its Statement of Claim, petitioned in the Superior Court at the appropriate time, and when ordered to provide

notice by the Superior Court, did so in a timely fashion. For Chief Justice Brock, the use of the words "such further notice as the Court may order" made clear to him that the claimant need not provide an additional copy of the petition to the principal and surety until the Court orders the claimant to do so.

But given that the majority opinion strictly implies the New Hampshire bond statutes, counsel must be very prudent and ensure the filings that need to be made within the 90 days are done and provided to the principal and surety within the 90 days, and that the filing of the petition be done within the one-year time frame and that the "copy" is delivered to the principal and the surety in the same time frame.

2. In *Alex Builders and Sons, Inc. v. Michael Danley,* 7 A.3d 1219 (N.H. 2010), when the homeowner failed to pay an outstanding balance of $45,391.75, the builder petitioned the Superior Court for an ex parte attachment pursuant to the lien statutes. In New Hampshire, which still operates on the "writ" system, liens are achieved by an ex parte attachment. In the motion, the builder referred to the property as "any and all real estate" not limited to the specific address of the homeowner's property, and titled the pleading "Petition for Ex Parte Mechanics Lien." The Court granted the proposed writ of attachment; however, the proposed writ did not say that it was expressly for the purposes of securing a mechanics lien, even though the accompanying petition clearly contained that information. The trial court sustained the homeowners' objections that the writ of attachment was defective because it did not explicitly specify that it was securing a mechanic's lien.

The New Hampshire Supreme Court reversed the trial court's decision and reinstated the mechanic's lien. The Court concluded that the writ of attachment was sufficient so long as it stated the purpose for which the attachment was being sought, described the property to be attached with reasonable accuracy and specificity, and directed the appropriate officer to attach that specific property. While the New Hampshire Supreme Court indicated that it had long insisted upon strict compliance with the statutory provisions for an ex parte attachment, in this case, the Court concluded that the writ of attachment and underlying motion for the ex parte mechanic's lien should be read together as a whole and that failing to do so fell short of adhering to the statutes' remedial goal of providing effective security to those who furnish labor or materials that enhance the property of others. Finally, the Court concluded that the "any and all" language in the writ did not make the writ overbroad as to the property secured and that the better reasoned decisions concluded that the writ would simply be void and inapplicable to the extent that someone argued that it applied to property that was not improved by the services or materials provided.

3. In *Concord General Mutual Insurance Company v. Green & Company Building & Development Corp.,* 8 A.3d 24 (N.H. 2010), an insurance coverage action, a thirty-four home development known as Thurston Woods fell victim to numerous defective chimneys that had incorrectly sized flues. The homeowners filed suit against the general contractor, Green & Company Building, and the contractor made a demand upon Concord General to provide defense and indemnification coverage under the contractor's Commercial General Liability Policy. Concord General did so under a reservation of rights but also initiated a declaratory judgment action to resolve the insurance coverage issues. While the lawsuits were pending, the general contractor placed carbon monoxide detectors in each of the homes and discovered unacceptable levels of carbon monoxide in numerous homes and began to receive complaints that flue gases were seeping into some of the homes. The general contractor ultimately either paid to have the defective chimneys repaired or reimbursed several homeowners who already

had made repairs. Although the opinion is silent on this issue, presumably, this was done with the insurance company's knowledge.

In the insurance coverage action, Concord General was successful in arguing that no occurrence had triggered under its insurance policy. The New Hampshire Supreme Court agreed with the trial court's analysis and concluded that leaking carbon monoxide did not constitute property damage under the policy and therefore was not an occurrence within the meaning of the policy. The Court reaffirmed its previous holdings that "defective work, standing alone, does not constitute an occurrence." Instead, the Court defined an occurrence in the familiar manner as an accident caused by or resulting from faulty workmanship including damage to other work but not the faulty work itself. In this well-known context, the Court found that there was no occurrence under the policy. The Court also concluded that the carbon monoxide did not cause any physical tangible alteration to any property and thus did not constitute physical injury to tangible property or property damage. In fact, the Court indicated that the repairs made to the chimney flues were preventative and were being made so that the carbon monoxide leaks did not ultimately lead to any actual bodily injury or property damage.

4. In *George v. Al Hoyt & Sons, Inc.,* No. 2010-015, 2011 WL 2184367 (N.H. June 2, 2011), a residential real estate developer brought an action against a contractor in relation to the contractor's failure to complete a roadway and bridge project necessary for a residential development. In interpreting the New Hampshire Consumer Protection Act (CPA), the New Hampshire Supreme Court determined that the statute is not limited to "consumers" but instead, the plain language of the statute provides a private right of action to business entities. Specifically, under the CPA, "[i]t shall be unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice declared unlawful under this chapter" and "person" is defined broadly to include "natural persons, corporations, trusts, partnerships, incorporated and unincorporated associations, and any other legal entity." RSA 358-A:1,10. The Court goes on to note that the defendant contractor's action of taking $10,000 for the manufacturing of the bridge, and then not providing those sums to the bridge manufacturer as a deposit, met the "rascality" test that governs violations of the CPA, in that the objectionable conduct attained a level of rascality that would raise the eyebrow of those who regularly conduct themselves in the world of commerce.

The Supreme Court went on to interpret the Act to note that nothing in the CPA mandates that a jury, rather than a judge, determine that defendant's conduct was "willful or knowing." Rather the CPA states that "[i]f the court finds that the use of the method of competition or the art or practice was a willful or knowing violation of this chapter, it shall award as much as 3 times, but not less than 2 times, such amount." RSA 358-A:10. Therefore, it is the Court that is vested with the power to decide damages under the CPA and here, the trial court's award of double damages amounts to a finding that defendant's conduct was willful or knowing, as required by the statute.

The residential real estate developer also brought a claim against the contractor for improper removal of loam from the site. Though the contractor attempted to defend against the claim on theories of contract, such as impossibility and commercial frustration, plaintiff's claims were based on the tort of trespass and therefore the defenses presented were not available to defendant.

5. In *J&M Lumber & Construction Co., Inc. v. Smyjunas,* 20 A.3d 947 (N.H. 2011), the action was based on an earlier action in 2000 in which J&M brought an equity claim against an LLC to enforce its easement rights. In 2003, the New Hampshire Superior Court ordered the

LLC to pay J&M's attorneys fees and costs related to the 2000 action. In 2008, J&M brought this action against the LLC as well as the sole owner of the two corporations that owned the LLC, Smyjunas. Ultimately, the LLC and the corporations were dismissed, leaving only the individual, Smyjunas, as a defendant. In the action J&M sought to pierce the corporate veil and hold Smyjunas liable for the order against the LLC for attorneys fees and costs from the 2000 action.

In this appeal of the jury award in favor of J&M against Smyjunas, the New Hampshire Supreme Court held that the trial court improperly denied Smyjunas's Motion to Dismiss J&M's Breach of Implied Covenant of Good Faith and Fair Dealing. The Supreme Court ruled that J&M had failed to plead a contractual relationship between J&M and Smyjunas and therefore no cause of action for breach of the implied covenant for duty of good faith and fair dealing. The New Hampshire Supreme Court refused to extend the doctrine of good faith and fair dealing beyond the contractual context. Ultimately though, the Court upheld the jury award because Smyjunas failed to establish that the only possible basis for the jury award was the improperly alleged breach of the duty of good faith and fair dealing. Since the jury should not have found Smyjunas liable on the breach of the duty of good faith and fair dealing without also finding him liable on the unjust enrichment claim, the court concluded that the jury award had a legitimate basis through the unjust enrichment claim.

In *J&M*, the court also discussed pre-judgment and post-judgment interest dating back to its 2000 action against the LLC. In its case against Smyjunas individually, J&M proved its entitlement to the actual attorneys fees and costs, but failed to plead and prove its entitlement to pre-judgment and post-judgment interest relating all the way back to the 2000 writ against the LLC, barring recovering of the interest.

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New Jersey

Case law:

1. In *66 VMD Associates, LLC v. Mellick-Tully & Associates, P.C.,* 2011 N.J. Super. Unpub. LEXIS 2164 (N.J. App. Div. August 11, 2011), the New Jersey Appellate Division held a contract provision limiting a remediation contractor's liability to $25,000 was enforceable where the contractor was paid about $20,000, but the claimed damages were $2 Million.

The plaintiff contracted with defendant to provide a remediation plan for a lot that plaintiff had recently purchased. Five separate contracts were entered into between plaintiff and defendant, each of which limited defendant's liability to $25,000. Although defendant eventually issued a report estimating remediation costs to be between $13,000 and $17,000, plaintiff never instituted the remediation but paid defendant about $20,000 for its plan. Instead, plaintiff put the lot up for sale. The buyer hired its own remediation contractor which found the remediation would cost around $94,000, leading the prospective buyer to cancel the contract of sale with plaintiff. Plaintiff then had another report prepared for submission to the NJDEP which found that remediation costs would exceed $3 million. Plaintiff sued defendant alleging professional negligence. The court granted defendant summary judgment on the issue of damages, finding the contractual limitation of liability clause in defendant's contract was enforceable. The Appellate Division affirmed.

In affirming the lower court, the Appellate Division found the limitation of liability clause enforceable because it did not violate public policy. Prevailing case law provides that a limitation of liability clause violates public policy where there is "inadequate economic compulsion to perform diligently when a party's potential liability, pursuant to a limitation of damages clause, is far less than the expected compensation pursuant to the contract." Typically, courts have found no compulsion where the limitation is close to the amount of the compensation. Since in this case plaintiff's liability was twenty-five percent more than the total contract price it was to receive, the court found defendant was under sufficient economic compulsion to complete the work diligently.

Next, the court considered whether limitation of liability clauses in professional services contracts violate public policy. The court found that such clauses in professional services contracts are unenforceable when they cap damages so low as to as to be 'tantamount to an exculpation clause.' In this case, the court found the limitation was not so low as to be the equivalent of a exculpation clause.

Last, the court found plaintiff's argument that enforcing the limitation would violate New Jersey's public policy favoring remediation of contaminated sites inapplicable as defendant did not cause the contamination. The court was similarly not persuaded by plaintiff's argument that he had lesser bargaining power than defendant. Although this was plaintiff's first purchase of land that had potential contamination, he was an experienced businessman who signed the contracts with the benefit of counsel.

2. In *Fairview Heights Condominium Association, Inc. v. R.L. Investors,* 2011 N.J. Super. Unpub. LEXIS1314 (N.J. App. Div. May 23, 2011), the New Jersey Appellate Division clarified that the statute of repose only applies to construction defects that render the building "unsafe". As the trial court failed to consider whether plaintiffs' claims rendered the building unsafe, the appellate court remanded for findings on that issue.

In 1987, developer broke ground on a condominium project, which was completed a year later. The developer served as the sponsor of the condominium in accordance with the Public Offering Statement until sixty days after 75% percent of the units had been sold, which did not occur until 1992. At some point, the exact date of which was unclear from the record, condominium owners began to notice serious water seepage. The association sued the developer and its related building management company and its owners for negligence and breach of fiduciary duty. The claims against the developer were based on defective construction whereas the claims against the management company and its fiduciaries were based on their failure to address the water problem.

Following pretrial discovery, all defendants moved for summary judgment. The trial court dismissed the complaint as against the developer, finding that it was time-barred under the ten year construction statute of repose. Although the court initially denied defendants' motions to dismiss plaintiff's negligence claims against the building manager and breach of fiduciary duty claims against the owners of the management company, it reversed and granted summary judgment on reconsideration.

The plaintiff appealed, and the Appellate Division reversed the dismissal of the complaint against the developer because the lower court did not address the requirement in the statute of repose that the alleged construction defect must have rendered the building "unsafe". The court therefore remanded for further findings on that issue.

The plaintiff also appealed the grant of summary judgment to the management company on the fiduciary claim. The court agreed with the lower court's conclusion that an expert opinion was necessary on the issues of causation and damages, without which the claims against those defendants could not proceed. Even assuming that the management company and its members had an obligation as fiduciaries to periodically investigate the cause of the water problem, plaintiff could not demonstrate without expert testimony how such an inspection would have been conducted; how often such inspections should have occurred; what repairs should have been made; when they should been made; and the consequences of failing to make the repairs. As such, the court affirmed the grant of summary judgment to the management company on the fiduciary claim.

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3. In *Port Imperial Condo. Ass'n, Inc. v. K. Hovnanian Port Imperial Urban Renewal, Inc.*, 419 N.J. Super 459, 17 A.3d 283 (App. Div. 2011), the New Jersey Appellate Division considered the application of New Jersey's statute of repose, *N.J.S.A.* § 2A:14-1.1, to work performed by subcontractors. While the statute of repose bars claims against parties that completed work on a construction project more than 10 years before the filing of the claims against them, it will only apply to causes of action "arising out of the defective and unsafe condition of an improvement to real property," *N.J.S.A.* § 2A:14-1.1. At issue in *Port Imperial* was whether the pleadings and expert reports supporting the claims against the subcontractors provided a sufficient basis to conclude that the work completed by the subcontractors caused the condominium buildings to be unsafe.

The case involved the construction of a 445-unit residential condominium developed by K. Hovnanian Port Imperial Urban Renewal, Inc. ("Hovnanian"). The construction of the project took place between 1996 and 2002 and involved a number of subcontractors, including U.S. Wick Drain, Inc. ("U.S. Wick"), Drainage and Ground Improvement, Inc. ("DGI"), and New Jersey Drilling Co. ("N.J. Drilling"). These subcontractors were retained in connection with the pre-drilling, drilling, and installation of wick drains that were installed to address problematic soil conditions at the construction site. The work performed by these subcontractors was completed in May of 1998.

Control of the condominium ultimately transitioned from Hovnanian to Plaintiff Port Imperial Condominium Association ("Association"). As part of the transition process, the Association retained Falcon Engineering ("Falcon"), to assess whether there were any construction defects. After Falcon reported numerous defects, the Association filed a complaint against Hovnanian and its design professionals. On July 2, 2008, Hovnanian filed a third-party complaint against a number of subcontractors, but not U.S. Wick, DGI, or N.J. Drilling. Thereafter, the Association's geotechnical expert issued an expert report opining that the wick drains were causing settlement and damage to the buildings. Hovnanian then filed an amended third-party complaint on February 2, 2009 that named U.S. Wick, DGI, and N.J. Drilling. These subcontractors filed motions for summary judgment on the basis of New Jersey's statute of repose, arguing that their work had been completed more than ten years before the filing of the third-party claims against them. The trial court agreed and dismissed the claims.

On appeal, Hovnanian contended that there was no unsafe condition at the Port Imperial condominiums and, as such, the statute of repose did not apply to the claim asserted against U.S. Wick, DGI, and N.J. Drilling. Rejecting this argument, the Court noted that the Association's Complaint alleged, among other things, that the condominium had been

constructed and erected with a "willful and wanton disregard for the safety" of the Association and its members, that the defendants "recklessly disregarded the likelihood of the potential serious harm resulting from the negligent construction and erection of the condominium," and that the condominium units "were unreasonably dangerous to unit owners and to personal property." In addition, the Association's geotechnical expert had opined that improper wick drain installation was causing settlement with unpredictable consequences that could only be remedied by demolishing the buildings and installing a new foundation. Accordingly, the Court concluded that "both the nature of the allegations and the proof advanced in support thereof" implicated the statute of repose and compelled dismissal of the claims against U.S. Wick, DGI, and N.J. Drilling.

The *Port Imperial* decision clarifies critical concepts regarding New Jersey's statute of repose. First, although the statute of repose generally begins to run from the date of substantial completion of the improvement to real property, where a subcontractor provides discrete services on a project without further involvement, the statute will begin to run from the time that subcontractor's work on the project is completed. Second, while the need for expensive and inconvenient repairs do not necessarily constitute an unsafe condition within the meaning of the statute of repose, where construction defects prevent a building from functioning as intended and require repairs to ensure safety, the statute of repose will apply.

4. In *Atl. City Assocs., LLC v. Carter & Burgess Consultants, Inc.*, 2011 U.S. App. LEXIS 9191 (3d Cir. May 4, 2011), the Court of Appeals for the Third Circuit clarified the permissible scope of traditional indemnification clauses in construction contracts and held that under New Jersey law such clauses do not apply to first-party disputes between parties to a construction contract. The case involved a dispute between Atlantic City Associates ("ACA") and Carter & Burgess Consultants, Inc. ("C&B") relating to the construction of a development in Atlantic City, New Jersey. The parties' contract contained an indemnification provision that provided in relevant part that "[C&B] agrees to indemnify, hold harmless, protect [ACA] . . . against any and all claims, loss, liability, damage, costs and expenses, including reasonable attorneys' fees to the extent caused by the negligent acts, errors, or omissions of [C&B]." When delays arose on the project, ACA sued C&B. The District Court held that the indemnification provision governed and applied to ACA's claims against C&B. Ultimately, ACA recovered $13 million, which included attorneys' fees, costs, and interest.

On appeal, C&B argued that the District Court erred in applying the indemnification provision to the first-party claims asserted by ACA against C&B. The Third Circuit agreed, holding that, under New Jersey law, an indemnitor's obligations under a indemnification provision can only be triggered by claims of third-parties against the indemnitee. As a result, ACA could not use its direct claims against C&B as a basis to receive the benefits of the indemnification provision in the parties' agreement.

Parties to a construction project typically include indemnification provisions in their agreements. The *Atl. City Assocs.* decision makes clear that such provisions are not implicated by direct claims between the parties. Instead, the obligations imposed by standard indemnification provision are only imposed where third-party claims are involved. If a party wants to receive some of the potential benefits that are typically associated with an indemnification provision in the event that there are direct claims between the parties to the contract, it could include a prevailing party provision in the agreement that permits the recovery of reasonable attorneys' fees, costs, etc. by the prevailing party in such a dispute. However, unlike indemnification provisions that often flow in only one direction, prevailing party provisions typically apply equally to both parties.

5. *Brockwell & Carrington Contrs., Inc. v. Kearny Bd. of Educ.*, 420 N.J. Super. 273, 20 A.3d 1165 (App. Div. 2011) addressed the law that prospective bidders for governmental contracts must be preclassified by the New Jersey Department of Treasury to bid on a government project. As part of the process, prospective bidders receive an aggregate rating from the Department of Treasure, which is based on a variety of financial factors and determines the amount of the proposed contracts on which it may bid. *N.J.A.C.* § 17L19-2.13(c) provides that firms are required to submit with their bids a statement of the current value and status of their backlog of uncompleted construction work as of the bid date as well as a certification that the award of the subject contract would not cause the firm to exceed its aggregate rating. The regulation also precludes a government entity from awarding a contract if the award would caused the firm to exceed its aggregate rating when added to its backlog of uncompleted construction work. In *Brockwell & Carrington Contrs., Inc. v. Kearny Bd. of Educ.*, a case of first impression, New Jersey's Appellate Division considered the application of *N.J.A.C.* § 17L19-2.13(c) to a subcontractor identified on a contractor's bid on a public school project and held that the requirements of this regulation apply to both subcontractors and contractors.

Plaintiff Brockwell & Carrington ("Brockwell") was the second lowest bidder on a project for the Kearny Board of Education ("Board") involving renovations to the Kearny High School ("Project"). The Board awarded the contract to the lowest bidder, Dobco, Inc. ("Dobco"). Dobco's bid identified Environmental Climate Control, Inc. ("ECC") as the heating, ventilation and air conditioning subcontractor and provided that ECC would perform its portion of the work for $7,500,000. ECC, which had an aggregate limit of $15,000,000, also submitted a form indicating that its backlog of uncompleted contracts was $3,500,000. When Brockwell challenged Dobco's bid,. it was ultimately determined that ECC's backlog was more than $10,000,000 and, when combined with the work on the Project, would exceed ECC's $15,000,000 aggregate limit. When Brockwell filed an action to disqualify Dobco's bid on this basis, the trial court found in favor of Brockwell, concluding that the aggregate limit requirements of *N.J.A.C.* § 17L19-2.13(c) applied to subcontractors.

On appeal, Dobco argued that a subcontractor is not subject to *N.J.A.C.* § 17L19-2.13(c) because a subcontractor is not a "firm" within the meaning of the regulation. The Appellate Division disagreed. The Court noted that the intention of both the Public Schools Contract Law, *N.J.S.A.* § 18A:18A-1 *et seq.*, and the Educational Facilities Construction and Financing Act, *N.J.S.A.* § 18A:7G-1 *et seq.*, is to ensure that only qualified bidders perform work. This intention would be frustrated if, as Dobco argued, the aggregate limit requirements did not apply equally to contractors and subcontractors. Thus, the Court held that ECC was a "firm" that was required to certify that it was bidding within its aggregate rating limit. The Court also held that, under the same reasoning, a subcontractor is, if applicable, entitled to use the 85% reduction provision in *N.J.A.C.* § 17:19-2.12(c) and (e), which allows a "firm" that has a "single prime" contract (in which it has subcontracted a portion of the work) as part of its backlog of uncompleted work to deduct 85% of the value of subcontracted work on that prime contract when it calculates the value of its backlogged contracts for future bids. Here, however, there was no evidence that ECC was a single prime contractor with respect to any of its other projects and, as such, it was not entitled to rely on the 85% reduction. Accordingly, because ECC was an unqualified subcontractor in that working on the Project would exceed its aggregate rating limit, the Court held that Dobco's bid was defective and the Board was required to award the contract for the Project to Brockwell.

Going forward, contractors submitting bids on projects that are subject to the requirements of *N.J.A.C.* § 17:19-2.12(c) should ensure that their subcontractors comply with the aggregate rating limits of the regulation. Failure to do so could result in the contractor's bid being disqualified regardless of whether the contractor itself is in compliance.

6. In *Allen v. V & A Bros., Inc.*, 208 N.J. 114, 26 A.3d 430 (2011), the New Jersey Supreme Court held that a business entity's officers and employees can be liable under the New Jersey Consumer Fraud Act ("CFA"), *N.J.S.A.* § 56:8-1, *et seq.*, for violations of the CFA, including violations of the Home Improvement Practices regulations enacted pursuant to the CFA. In doing so, the Court rejected the argument that such individuals can only be liable under traditional corporate veil-piercing theories and, instead, found the CFA can impose direct liability on corporate officers and employees.

Plaintiff homeowners hired V and A Brothers, Inc. ("V and A Brothers") to level a portion of their property and build a retaining wall so that a separate company could install a pool. After the work was completed and the pool installed, plaintiffs noticed that the pool was tilting in place. Plaintiffs hired an engineer who determined that the retaining wall constructed by V and A Brothers was built too high and that unsuitable backfill was used to support it, both of which were causing the wall to move. Thereafter, plaintiffs filed a complaint asserting a breach of contract claim against V and A Brothers and a CFA claim against V and A Brothers, the two owners of the company, and the company's sole employee. The CFA claim asserted that the defendants violated the Home Improvement Practices regulations by failing to execute a written contract, failing to obtain final approval for the construction before accepting final payment, and failing to obtain plaintiffs' consent before modifying the design of the retaining wall and using inferior backfill. The trial court dismissed the CFA claims against the individual defendants, but the Appellate Division reversed and held that plaintiffs were entitled to pursue claims of CFA liability against the individual defendants.

On appeal, the New Jersey Supreme Court noted that the CFA imposes liability for "[t]he act, use or employment by any person of an any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation . . . in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid," *N.J.S.A.* § 56:8-2, and defines "person" broadly to include "any natural person or his legal representative, partnership, corporation, company, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestuis que trustent thereof," *N.J.S.A.* § 56:8-1(d). Based on the broad definition of "person" and the broad, remedial purpose of the CFA, the Court concluded that any corporate officer or employee who commits an affirmative act or knowing omission that violates the CFA can be held individually liable even if it is only the business entity that contracted with the plaintiff consumer.

With respect to violations of regulations enacted pursuant to the CFA, such as the Home Improvement Practices regulations, the Court held that corporate officers and employees can also be held liable under the CFA, but only after a fact-sensitive inquiry that explores the role that the individual had in the regulatory violation. As the Court noted, the determination of whether a corporate officer or employee can be individually liable for regulatory violations is complex and involves consideration of the facts and circumstances of the claim and the regulations at issue. The Court did, however, provides some guidelines, noting that principles of a corporation are more likely to be liable under the CFA for regulatory violations than a corporation's employees because the principals are the ones who set the policies that the

employees only implement. Ultimately, the Court remanded the case back to the trial court to consider the CFA claims against the individual defendants.

The CFA is a consumer-friendly statute that imposes treble damages and attorneys' fees on parties found liable under the statute. The *Allen* decision broadens the range of potential defendants that can be culpable for CFA claims that arise our of a transaction. Not only can the corporate entity that contracted with the plaintiff consumer (which can be an individual consumer, or in certain instances, a business entity) be held liable under the CFA, but any officers or employees of that company now face potential exposure to such claims. To the extent that a construction contract implicates the CFA or the regulations enacted thereunder, corporate employees who deal directly with a CFA plaintiff and corporate officers involved in setting the policy that is complained of will likely be targeted as CFA defendants. Moreover, because the relevant inquiry to determine individual liability under the CFA is highly fact-sensitive, courts will likely be reluctant to dispose of such claims at the summary judgment phase, which will significantly increase the cost and risk of litigation to the individual CFA defendant.

7. In *Horizon Group of New Eng., Inc. v. New Jersey Sch. Constr. Corp.*, 2011 N.J. Super. Unpub. LEXIS 2271 (App. Div. Aug. 24, 2011), the New Jersey Appellate Division addressed the issue of whether a contractor can assert professional negligence claims against the design professional retained by the owner for economic loss incurred as a result of errors in the design professional's plans and specifications. In an unpublished decision, the Court's held that the economic loss doctrine barred the contractor's claim for economic loss. While the decision represents the most current New Jersey jurisprudence on the issue, the Court's decision did not impose a *per se* bar on such claims and arguably leaves open the possibility that a contractor could assert viable claims for economic loss against design professionals in certain circumstances.

Plaintiff Horizon Group of New England, Inc. ("Horizon") was the contractor retained by New Jersey Schools Development Authority ("NJSDA") to construct a school's athletic field, including bleachers, lighting, and paving. Defendant EI Associates ("EIA") provided design and construction management services, and EIA's consultant, GZA GeoEnvironmental, Inc. ("GZA"), performed environmental and engineering services for the project. After a series of delays on the project relating to a variety of issues, including the discovery of contaminants, Horizon filed an action against NJSDA, GZA, EIA, and others, asserting that it had incurred damages in the amount of $7,775,000. Among other claims, Horizon asserted that GZA and EIA were liable for professional negligence. After Horizon settled its claims against all parties except GZA and EIA, these defendants moved for summary judgment on Horizon's professional negligence claims. The trial court granted summary judgment, holding that Horizon could not assert a tort claim against these entities.

On appeal, Horizon argued that the decision in *Conforti & Eisele, Inc. v. John C. Morris Assocs.*, 175 N.J. Super. 341, 418 A.2d 120 (Law Div. 1980) *aff'd* 199 N.J. Super. 498, 489 A.2d 1233 (App. Div. 1985), compelled reversal because in that decision the court concluded that a contractor who suffers economic damages caused by a design professional's negligence can assert claims for such damages against the design professional. The Court essentially agreed with Horizon's interpretation of *Conforti*, but distinguished that decision on the ground that the contractor in *Conforti* had no contractual relationship with the design professional. Here, the Court found that although Horizon did not have a direct contractual relationship with EIA or GZA , the construction project as a whole had a contractual scheme to address delays and changes. Specifically, the Court noted that Horizon entered into a contract with NJSDA,

which identified the various relationships between and among Horizon, NJSDA, EIA, and GZA and required that all of the parties deal with NJSDA and not each other. Horizon could assert contractual rights against NJSDA during the project for delay and changes and, if necessary, sue NJSDA for breach of contract. Accordingly, the Court held that *Conforti* did not apply and the economic loss doctrine precluded Horizon from pursuing its claims against EIA and GZA.

It remains to be seen what impact the *Horizon* decision will have on contractor claims for economic loss against design professionals. On its face, the decision appears to significantly limit such claims. However, the Court's focus on the specifics circumstances of the contractual relationships on the project and the fact that Horizon had a contractual remedy against NJSDA suggests that there likely remain circumstances in which a contractor could assert viable claims against a design professional for economic loss. For example, it is unclear how the Court would rule where an owner is bankrupt and unable to satisfy any claims the contractor might have or where the contractual relationships (or lack thereof) between and among the owner, contractor, and design professional are less defined.

Although there is some ambiguity as to its breadth, the *Horizon* decision emphasizes the importance to a contractor of identifying and preserving all contractual rights and remedies that may exist. In the event that a contractor is precluded from asserting negligence claims against a design professional, its remedy could be limited to its contract with the owner. Attention to contractual claim pre-requisites (*i.e.* notice, timing, etc.) will be important in ensuring that the contractor ultimately can pursue those claims. In addition, the *Horizon* decision demonstrates the risk a contractor can face when it settles its contract claims with the owner before there is a determination of whether it can recover its remaining economic damages from the design professionals. In the event that the economic loss doctrine is ultimately found to bar such claims, the contractor would potentially be without the ability be made whole if it had already settled with the owner for less than the full value of its loss.

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Legislation:

1. NJSA 2A:44A-1 et seq. Construction Lien Law

On January 5, 2011, New Jersey Governor Chris Christie signed into law considerable revisions to New Jersey's construction lien law. The previous version of the lien law promulgated in 1993 was ambiguous in various respects and revisions were long overdue. Outlined below are the more noteworthy changes:

Residential Liens

Definition - The definition of "residential construction", also known as "residential housing construction" or "home construction", has been broadened to encompass construction of or improvement to a dwelling, or any portion thereof, or any residential unit, or any portion thereof. With regards to a development, the definition also includes: "(1) all offsite and onsite infrastructure and sitework improvements required by a residential construction contract, master deed, or other document; (2) the common elements of the development, which may also include by definition the offsite

and onsite infrastructure and sitework improvements; and (3) those areas or buildings commonly shared."

Filing - Lien claimants must file a Notice of Unpaid Balance ("NUB") within 60 days following the last date of work, services, material or equipment underlying the lien. Thereafter, unless the parties have agreed to an alternate way to resolve disputes, within 10 days of filing the NUB a Demand for Arbitration must be filed to determine the validity of the amount of the lien claim. The lien must be filed within 10 days of receiving the arbitrator's determination, but no later than 120 days from the furnishing of work or materials.

Multiple Liens Against the Same Residential Project - Residential arbitrations involving the same residential construction project may be consolidated in a single arbitration and, where possible, determined by the same arbitrator.

Clarification of the Lien Fund

The lien fund is defined as the "pool of money from which one or more lien claims may be paid." The statute provides that in the case of a first or second tier lien claimant, "the lien fund shall not exceed the earned amount of the contract between the owner and the contractor minus any payments made prior to service of a copy of the lien claim." Whereas, in the case of a third tier lien claimant, the lien fund shall not exceed "the lesser of: (a) the amount in paragraph (1) above; or (b) the earned amount of the contract between the contractor and the subcontractor to the contractor, minus any payments made prior to service of a copy of the lien claim." The statute also sets forth how to calculate the lien fund to make sure that an owner will not pay more than once for the same work.

Expansion of Lien Claimants

A supplier to a supplier who is not lower than third tier of the contracting chain may file a lien if it has a written contract. Under the definition of "contract", in the case of a supplier, a delivery or order slips that refer to the project site and are signed by the owner or its authorized agent are sufficient.

Lodged for Record

Various deadlines are now measured from the date on which a filing is "lodged for record". A document is lodged for record when it is delivered to the county clerk and marked by the clerk, as opposed to indexing or filing.

New Procedures for Discharging Liens

Additional mechanisms to discharge a lien have been added to the lien law. For example, when a claim has been paid in full but the claimant has not discharged the lien and at least 13 months have passed since the date of the lien claim, the owner may discharge the lien by submitting a duly acknowledged discharge certificate and affidavit, provided that 90 days prior to the filing the owner has notified the lien claimant by certified mail of its

intention to discharge the lien. Alternatively, an owner (or any party in interest) may proceed in a summary manner by filing an order to show cause why the lien should not be discharged when the claim has been paid in full.

New Forms

New and revised forms were developed for a number of notices and filings such as the NUB, lien claim and amendment of lien claim.

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The specific references to the changes above include the following statutory citations:

- Changing the definition of "residential construction" to make clear that there is no distinction between single-family residences and larger residential developments, *see* N.*J.S.A.* § 2A:44A-2;
- Changing the definition of "filing" to clarify that a lien claim is filing when it is lodged for record and indexed by the county clerk, *N.J.S.A.* § 2A:44A-2;
- Providing that in the case of a supplier, a "contract" includes a delivery or order slip referring to the site or project to which materials have been delivered or used, which is signed by the party (or its agent) against whom the lien claim is asserted, *see N.J.S.A.* § 2A:44A-2;
- Requiring the county clerk to provide a copy of the lien claim form marked with a date and time received if requested at the time the form is lodged for record, *see N.J.S.A.* § 2A:44A-6;
- Requiring the use of the new lien claim form set forth in *N.J.S.A.* § 2A:44A-8, *see N.J.S.A.* § 2A:44A-6;
- Changing the time a lien must be filed on a residential construction project to 10 days after receiving the arbitrator's determination regarding the Notice of Unpaid Balance ("NUB") and within 120 days following the date the last work, services, material or equipment was provided for which payment is sought, *see N.J.S.A.* § 2A:44A-6;
- Permitting suppliers to suppliers to file lien claims, *see N.J.S.A.* § 2A:44A-2, *N.J.S.A.* § 2A:44A-9;
- Specifying how the lien fund is calculated, *see N.J.S.A.* § 2A:44A-9;
- Requiring that all arbitrations of NUBs relating to the same residential construction be determined by the same arbitrator, *see N.J.S.A.* § 2A:44A-21;
- Providing that a party may seek the discharge of a construction lien in a summary proceeding by filing an order to show cause in accordance with the New Jersey Rules of Court, *see N.J.S.A.* § 2A:44A-30;
- Providing that, where the lien claim has been paid in full and the claimant has not filed a discharge, after 13 months have elapsed since the date of the lien claim the owner may file a discharge certificate and affidavit to obtain the discharge of the lien, *see N.J.S.A.* § 2A:44A-30; and

- Providing for forms for an amended lien claim, *see N.J.S.A.* § 2A:44A-11, an affidavit of discharge, *see N.J.S.A.* § 2A:44A-30, and a bond discharging the construction lien, *see N.J.S.A.* § 2A:44A-31.

Contributor's note: Because the 2011 changes to the Construction Lien Law are so varied and include changes that impact a number of areas of the construction lien process, parties to construction projects in New Jersey, as well as practitioners, should familiarize themselves with all of the changes. A copy of the changes is available on the New Jersey Court's web-site.

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New Mexico

Case law:

1. In *Holguin v. Fulco Oil Services, LLC*, 2010-NMCA-91, 245 P.3d 42 (Ct. App. 2010), the Court finally addressed two issues left open under the New Mexico Anti-Indemnity Act. First, the Court held that, contrary to case law under the prior statute, an indemnity clause that violates the New Mexico Anti-Indemnity Act does not void the contract or the indemnity provision, but rather the indemnity provision is enforced only to the extent allowed by the Act. Second, the Court held that maintenance of an improvement to real property that is required to keep the improvement in a good state of repair and operating properly comes within the scope of the New Mexico Anti-Indemnity Act as construction services.

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New York

Case law:

1. In *Bechtel Do Brasil Construcoes Ltda. v. UEG Araucaria, Ltda.*, 638 F.3d 150 (2nd Cir. 2011), the issue of whether the court or the arbitrator decides if claims are barred by the applicable statute of limitations requires an examination of the specific construction contract. The case involved the construction of a 469-megawatt gas turbine near Curitiba, Brazil, which was engineered and constructed by various Bechtel entities for a Brazilian corporation, UEG Araucaria, Ltda. ("UEGA"). The project was completed on September 26, 2002. On January 18, 2008, the plant's steam-turbine generator failed. UEGA subsequently filed a request for arbitration with the ICC on September 29, 2008.

Bechtel responded to the arbitration request by seeking a permanent stay of arbitration since, in Bechtel's view, the claim was filed beyond the applicable statute of limitations, UEGA then filed a counter-application to compel arbitration claiming the timeliness of its claims was a matter that an arbitrator, and not a court, should decide.

Whether a court or arbitrator decides the statute of limitations issue requires an examination of the relevant contractual language. The conflicting clauses in the agreement make interpretation difficult. One portion of the contract states that "[a]ny dispute, controversy, or claim arising out of or relating to the Contract, or the breach, termination or validity thereof . . . shall be finally settled by arbitration . . . except as these rules may be modified herein" while additional sections stated that "the validity, effect, and interpretation of this agreement to

arbitrate shall be governed by the laws of the State of New York," and "[t]he law governing the procedure and administration of any arbitration instituted . . . is the law of the State of New York." These obviously contradictory provisions do not provide clarity as to *who* exactly should be deciding the issue.

The Second Circuit ultimately held that it is the arbitrator, and not the court – in this instance – who must decide whether UEGA filed its claim in a timely fashion. After a thorough analysis of the contractual provisions, the Court ultimately held that the language was not clear enough. Since ambiguity must be resolved in favor of arbitration, an arbitrator must ultimately decide whether the claim was timely. Without language demonstrating a clear intent to permit a court to decide timeliness issues, Bechtel's argument failed.

2. In *Plato General Const. Corp. v. Dormitory Auth. of N.Y.*, 932 N.Y.S.2d 504 (2nd Dep't 2011), the Second Department held that a no-damages-for-delay clause is valid when there is no intentional abandonment of a contract. The project in *Plato* involved the construction and renovation of the Brooklyn College Library. The plaintiff served as the project's prime general contractor and contracted with DASNY (the agent for the City University of New York) to perform its work for a total of $19,902,000. The contract contained a no-damages-for-delay clause.

The parties intended to complete the project by March 20, 2001. However, due to numerous delays the project was completed 526 days later than previously planned. The lower court ruled in favor of the plaintiff and awarded $10,285,698 in delay damages holding that DASNY waived the no-damages-for-delay clause because it failed to meet its contractual duties. The appellate court reversed.

The court held that a no-damages-for-delay clause exonerates a defendant for delays caused by inept planning, failure of performance in "ordinary, garden variety ways" or a failure of performance from ordinary negligence (as opposed to gross negligence). Since "[a]t worst, DASNY could be charged with poor planning and administration", the agreed upon contractual provision between the parties was deemed valid and binding.

3. In *Ippolito v. TJC Developments, LLC*, 83 N.Y.S.2d 108 (2nd Dep't 2011), the Court determined whether a homeowner can assert a Lien Law article 3-A cause of action against individual defendants. Plaintiffs hired a contractor, TJC Development, LLC, to perform substantial home improvements and renovations to their home. After TJC failed to complete the project with a reasonable time, Plaintiffs relieved TJC of its duties and hired a new contractor to complete the job. Plaintiff subsequently filed an action pursuant to Lien Law article 3-A against TJC and its two individual directors.

The Lien Law requires that "contractors who receive money in advance for construction of home improvements are required to place the money in a bank account and hold the money as the property of the owner until the money is paid for purposes of the home improvement." In a matter of first impression, the *Ippolito* court held that Plaintiffs may assert a Lien Law article 3-A claim against both the corporate entity and the individual directors.

4. In *Figueiredo Ferraz Engenharia de Projeto Ltda. v. The Republic of Peru*, 2011 U.S. App. LEXIS 24748 (2nd Cir. 2011), the Second Circuit dismissed an action seeking to confirm a Peruvian arbitration award. The case involved a breach of contract in connection with the preparation of certain engineering studies on water and sewage services in Peru. The

engineering firm contracted with a division of the Peruvian government. The contract required that any claim must be arbitrated in Peru.

After a fee dispute arose, the arbitration commenced and the engineering firm was awarded in excess of $21 million. Due to a statute that limits the amount of funds that a Peruvian agency may pay annually to satisfy a judgment (a maximum of 3% of its budget), the engineering firm was not receiving its payments on the arbitration award quickly enough. Therefore, the engineering firm filed a petition with the Southern District to confirm the arbitration award and obtain a judgment on the entire amount awarded at arbitration.

The Second Circuit dismissed the petition based upon the ground of *forum non conveniens*. The court focused on the Peruvian judgment statute and held that there is "a public interest in assuring respect for a sovereign nation's attempt to limit the rate at which its funds are spent to satisfy judgments." The Court also noted that given the fact that the claim arose from a contract executed in Peru, by a corporation claiming to be a Peruvian domiciliary, against a government agency of Peru, with respect to work performed in Peru, the public interest of permitting Peru to apply its funds statute "tips the balance" against the exercise of jurisdiction in an American court.

5. In *Mary Imogene Bassett Hospital v. Cannon Design, Inc.*, 923 N.YS.2d 751 (3rd Dep't 2011), the Court held than an expert's opinion that a design professional complied with the State Building Code is not sufficient to demonstrate that its services were performed in accordance with relevant professional standards.

The defendant, Cannon Design, Inc., entered into a contract with Plaintiff to design an upgrade to a hospital that improved the building's ability to withstand a seismic catastrophe. After the project was completed, Plaintiff filed the lawsuit against Cannon for professional negligence and breach of contract. Cannon subsequently filed a motion for summary judgment claiming, in part, that the professional negligence claim fails because it performed its design services according to the accepted standard of care in the industry. To support its motion, Cannon attached an affidavit of an expert who opined that the work complied with the New York State Building Code. The Court held that this affidavit, alone, was insufficient. Simply complying with the building code was not deemed determinative as "[r]elevant professional standards could be equal to, or much higher than, the minimum required under the Code."

Legislation:

1. Power NY Act of 2011. On August 4, 2011, Governor Andrew Cuomo signed the Power NY Act of 2011. The law streamlines the siting of power plants. The law 1) creates one multi-agency siting board that will make siting decisions, 2) provides for greater community participating in decision making process, 3) requires the siting board to decide if a proposed facility will create a disproportionate environmental impact and 4) allows homeowners and businesses to re-pay loans for energy efficiency upgrades using a surcharge on local utility bills.

2. Electronic filing. On September 23, 2011, Governor Andrew Cuomo signed into law a bill authorizing the e-recording of instruments affecting real property. County governments are now permitted (but not mandated) to accept and record real property instruments – deeds, mortgages and notes – via electronic means.

3. New York Works Infrastructure Fund Act. On December 9, 2011, Governor Andrew Cuomo signed into law the New York Works Infrastructure Fund Act, which will permit

the use of design-build on state infrastructure projects. Under the law—that creates a $1 Billion jobs program aimed at rehabilitating New York's roads and bridges—the Department of Transportation, Thruway Authority, Office of Parks, Recreation and Historic Preservation, Department of Environmental Conservation, and the Bridge Authority will all possess the general authority use design-build project delivery.

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North Carolina

Case law:

1. In *Wachovia Bank Nat'l Ass'n v. Superior Constr. Corp.,* No. COA10-1158, 2011 WL 2848234 (N.C. App. 2011), the North Carolina Court of Appeals reversed a North Carolina Business Court decision that held that a general contractor's interim lien waiver altered the lien priority for work performed after execution of the waiver. The contractor, Superior Construction, first furnished labor and materials to the construction project on April 22, 2005, several weeks before Wachovia recorded its deed of trust on the property. Later, though, Superior signed an interim lien waiver that released Superior's lien rights "on account of any labor performed or [materials furnished] up to and including" May 31, 2005. In 2007, Superior stopped work and filed a claim of lien when the owner failed to pay $1,286,000.00. The owner also failed to pay its obligations to Wachovia. In the ensuing litigation, Wachovia and Superior fought over who had the better claim to the property.

Wachovia filed a declaratory judgment action seeking a determination from the Business Court that its deed of trust had priority over Superior's lien. North Carolina's lien statutes explicitly grant contractors and subcontractors the right to have their lien priorities relate back to the date of first furnishing of labor or materials. Even though Superior's lien waiver contained no language addressing the priority of its lien for later-furnished labor or materials, the Business Court held that Superior's interim lien waiver released Superior's right to have its lien relate back to its first furnish date. Consequently, the Business Court held that Wachovia's deed of trust trumped Superior's lien rights. The contractor and the contractor's surety appealed. The American Subcontractors Association and ASA of the Carolinas filed an *amicus curiae* brief urging reversal of the trial court's decision.

The Court of Appeals reversed the Business Court's decision and held that the interim lien waiver at issue did not refer to or affect Superior's lien priority. The Court of Appeals recognized that Superior's waiver functioned merely as an acknowledgment that the owner had paid Superior for all labor and materials furnished through a certain date and that Superior could not file a lien for that labor and material.

The Court of Appeals' holding restored order to the process by correctly interpreting the scope of Superior's interim lien waiver. Although the Court of Appeals reached the correct decision, it left the door open for future interim lien waivers to change lien priorities by using more explicit language than that used in Superior's lien waiver.

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Legislation:

1. **N.C. General Statute § 6-21.6, An Act To Provide That Reciprocal Attorneys' Fees Provisions In Business Contracts Are Valid And Enforceable Under The Laws Of This State.** This statute becomes effective October 1, 2011, and applies to contracts entered into on or after that date. The statute significantly alters the ability of parties to business contracts, including construction contracts, to recover attorneys' fees.

As is indicated by the title, the Act applies only to business contracts and makes enforceable only "reciprocal" attorneys' fees provisions. A "business contract" is defined as a contract "entered into primarily for business or commercial purposes" and expressly excludes "consumer contracts" and "employment contracts." "Consumer contracts" are defined as contracts "entered into by one or more individuals primarily for personal, family, or household purposes." "Employment contracts" are defined as "a contract between an individual and another party to provide personal services by that individual to the other party, whether the relationship is in the nature of employee-employer or principal-independent contractor." A construction contract (other than perhaps a contract to build a home for a homeowner) would meet the definition of a "business contract."

A "reciprocal attorneys' fees provision" is one which is applicable to all parties to the contract and requires the parties to pay or reimburse the other parties for attorneys fees or expenses incurred in a suit, action, proceeding, or arbitration involving the business contract. In order for the reciprocal attorneys' fees provision to be enforceable, the business contract must be signed by hand by all parties to the contract.

This statute will allow parties to a construction contract to include in the contract an enforceable attorneys' fee provision. The contract may prescribe the terms and conditions under which fees may be awarded, so long as those terms and conditions are equally applicable to all parties to the contract. Thus, unlike under N.C. Gen. Stat. §6-21.2, a party paying for goods or services under the contract will be entitled to an award of attorneys' fees if the other party to the contract fails to perform.

The statute allows the court or arbitrator to award "reasonable" attorneys' fees and costs, and lists thirteen factors that may be considered in determining a "reasonable" fee. Unlike under N.C. Gen. Stat. §6-21.2, under the new statute, there is no presumption that a stated percentage is a "reasonable" fee and the court or arbitrator is not bound by a stated percentage contained in the contract. The only limitation is that the award of reasonable attorneys' fees and costs may not exceed the amount in controversy or the monetary damages awarded.

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North Dakota

Case law:

1. In *Leno v. K & L Homes, Inc.*, 803 N.W.2d 543 (N.D. 2011), the Supreme Court of North Dakota heard the appeal of a general contractor sued for breach of contract, breach of implied warranties of fitness and negligence. K & L Homes sold the Lenos a newly-constructed home. Shortly thereafter, the Lenos alleged various deficiencies with the home stemming from

improper construction such as cracks, unevenness and shifting. The Lenos claimed the contract included implied warranties that the residence would be built according to applicable code, engineering and workmanlike standards. K & L responded by asserting the Lenos were at fault for the home's damage and had waived implied warranties by accepting a Homeowner's Guide at closing. Prior to trial, the Lenos dropped their negligence claim. At trial, K & L requested a comparative fault instruction be read to the jury. The district court held that K & L failed to properly plead fault, and comparative fault was inapplicable to the remaining claims. In addition, the Homeowners' Guide provided to the Lenos failed to disclaim any implied warranties. The jury found K & L to have breached the construction contract or implied warranties of fitness.

On appeal, K & L argued the district court improperly erred in finding K & L failed to properly plead fault and its refusal to instruct the jury on comparative fault. The issue before the Supreme Court of North Dakota was whether fault and comparative fault were relevant to the Lenos' cause of action. In addition, K & L argued that implied warranties had been waived by the Homeowners' Guide.

The North Dakota Supreme Court recognized that implied warranties of fitness, in relation to construction contracts, were present if: (1) the contractor, impliedly or expressly, represents he is competent to undertake the contract, (2) the owner has no expertise in the field, (3) the owner does not provide the specifications or design, and (4) the owner indicates his reliance on the expertise of the contractor.

The court recognized that the statutory definition of fault included strict liability for breach of warranty and the modified comparative fault statute included language for breach of warranty for product defects. *See* N.D.C.C. §§ 32-03.2-01-02. The court held that actions in tort, as defined by fault and comparative fault, related to actions for products liability and did not apply to contract law. The general theory of liability under the U.C.C. was likewise inapplicable to the present dispute over allegedly faulty construction of a residence. The court held that fault and comparative fault principals are inapplicable to causes of actions arising from purely contractual claims.

The court also denied K & L's claim that the implied warranties had been waived by the Homeowners' Guide. By presenting the Homeowners' Guide at the closing, K & L's attempt to have the Lenos waive implied warranties was ineffectual due to the sequence of events. The contract was signed several weeks prior to the closing and the closing was merely a date to deliver possession of the residence. The bargain had been completed and any guide provided at the closing was not incorporated into the previously agreed to bargain.

2. In *Wahl v. Northern Improvement Company*, 800 N.W.2d 700 (N.D. 2011), the Supreme Court of North Dakota affirmed in part and remanded in part regarding the awarding of professional fees associated with injuries sustained by a motorist from negligently placed road signage in a construction area. The jury returned a verdict for the defendants. The trial court, as per statute, awarded defendants all expert fees for an emergency physician and an engineering expert. The Wahls alleged the defendants left an improper road grade between two lanes and negligently placed a road sign in a construction area. After the jury returned a verdict in favor of the defendants, a statement of costs was filed. The Wahls objected to the costs and a hearing was held. The lower court ordered the Wahls to pay all the defendants expert costs.

On appeal to the Supreme Court of North Dakota, the emergency room expert's fees were affirmed. The documentation submitted by the emergency room expert clearly demonstrated the claimed fees were in preparation for trial. The verdict in favor of the

emergency room expert's fees was affirmed. A second expert, an engineering expert, submitted far less defined fees. The necessary detail required in experts' billing records was a matter of first impression and the court analogized expert fees to the previously established analysis for attorney fees. The relevant factors the court found necessary for review include: 1) common law area of expertise; 2) education and training necessary; 3) prevailing rates in field; 4) nature, quality and complexity of discovery responses provided; 5) fee charged; 6) fees traditionally charged by the expert in similar matters; 7) any other factor that will assist the court in balancing interest.

The Supreme Court of North Dakota held it was an abuse of discretion to award expert engineering fees without an explanation as to the reasonableness of the fees and without an itemized bill. The court remanded for a further explanation of the engineering experts fees.

3. In *Peterson v. Sando*, ___ N.W.2d ___, 2011 WL 5009548 (N.D. 2011), the court affirmed in part and reversed in part the lower court's ruling relating to a State Engineer's determination of an unauthorized dam on landowner's property and requiring the landowner to construct a drainage dam. In 1973, Peterson, the landowner, was ordered by the United States Department of Interior, Fish and Wildlife Services ("USFWS") to insert a plug in the drainage ditch Peterson dug to drain a wetland and restore water to a certain level. In 2009, Peterson's neighbor filed a complaint with the state of North Dakota, alleging an unauthorized dam existed on Peterson's property and that Peterson had artificially raised the slough's natural overflow elevation, above the level required by USFWS in 1973. The neighbor alleged this work was performed without obtaining proper permits. After an investigation by the State Engineer, Peterson was found to have impounded water without proper permits as per North Dakota law and was ordered to lower the ditch plug. Peterson requested and was granted an administrative hearing. At that hearing, the Water Commission ordered Peterson to construct and maintain a drainage channel to lower the water level.

On appeal to the district court, the order was reversed, in part, as to requiring Peterson to dig a drainage ditch to maintain the slough at the desired level but affirmed that Peterson was required to maintain the dam at a certain level. In addition, the court awarded the State Engineer "costs as allowed by law."

After finding that Peterson's unauthorized dam impounded sufficient water to require permits, the Supreme Court of North Dakota held the State Engineer was authorized to order Peterson to construct a ditch to drain the water level. The Supreme Court of North Dakota reversed the district court and held that the State Engineer did have the authority to require Peterson to construct a ditch to drain the slough to a certain level. The court then declined the State Engineer's request to remand to adequately delineate its fees. The court found by failing to appropriately define and delineate the requested fees, the State Engineer had waived any costs it may have been entitled to.

Legislation:

1. **N.D. Code § 24-05-01 Contracts to be Advertised – Road Construction**

A new section has been added to the North Dakota Code to require the advertisement of construction contracts in excess of $100,000.00 for highway improvements. Contracts valued between $50,000.00 and $100,000.00 requires the county, when possible, to seek quotes from at least two contractors.

2. **N.D. Code § 48-01.2-02.1 Public Improvement Construction Threshold**

A new section has been added to the North Dakota Code to require the threshold for bidding construction contracts at $100,000.00. The threshold for procuring plans, drawings, and specifications from architects and engineers for a public improvement is also $100,000.00. This section does not significantly change North Dakota law but alters existing law in order to create one central statute for defining the "threshold" and then by reference change several statutes.

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Ohio

Case law:

1. In *Triton Services, Inc. v. Talawanda City School District Board of Education,* No. CA2010-05-112, 2011 Ohio 667, 2011 WL 497162 (Butler Ct. App. February 14, 2011), The Court upheld the decision of the Defendant Talawanda City School District Board of Education ("Talawanda School District") to reject as not responsible the bid of the Plaintiff Triton Services, Inc. ("Triton") for a heating, ventilation and air conditioning contract. After rejection of its bid, Triton sought and was denied injunctive relief by the trial court. The appellate court held:

> To prevail on a complaint seeking injunctive relief on the award of a public contract, the contractor must prove by clear and convincing evidence that the award constituted an abuse of discretion and resulted in some tangible harm to the public in general, or to the contractor individually. *Steingass Mechanical Contracting, Inc. v. Warrensville Heights Board of Education* (Cuyahoga 2003) 151 Ohio App.3d 321, 2003 Ohio 16.

Further relying on *Steingass,* the *Triton* court also noted that "responsible" is not limited to a bidder's financial condition, but includes other characteristics, such as a bidder's (1) ability and capacity to carry on the work, (2) equipment and facilities, (3) promptness, conduct and performance on previous contracts, (4) suitability to the particular task and (5) other qualities that would help determine whether or not it could execute the contract properly. The Court also noted that determining "responsibility" will necessarily differ for any given project under a fluid, abuse of discretion standard.

The Talawanda School District was concerned that Triton had failed to include external or field glycol, variously estimated at $50,000 to $75,000, in its bid. Triton indicated that the omission was due to confusion about whether the glycol was within Triton's scope of work. Notwithstanding Triton's promise to honor its bid, the Talawanda School rejected Triton's bid because previous litigation between the Talawanda School District and Triton had also involved a dispute about Triton's scope of work. The Court ultimately found that Triton had not met its burden to show that the Talawanda School District had abused its discretion and upheld rejection of Triton's bid.

2. In *Cleveland v. Vandra Brothers Construction, Inc.*, No. 94733, 2011 Ohio 821, 2011 WL 676108 (Cuyahoga Ct. App. February 24,2011), the Court held that an indemnification clause which provide for indemnification where the indemnitee's negligence was concurrent was void under Ohio's anti-indemnification statute, Section 2305.31 of the Ohio Revised Code.

The Plaintiff City of Cleveland ("Cleveland") entered into a street construction contract with the Defendant Vandra Brothers Construction, Inc. ("Vandra"). After a individual brought a negligence action against Cleveland and Vandra for damage occurring in the construction area, Cleveland sought declaratory relief holding that Vandra owed Cleveland indemnity under the contract between them and that Vandra's insurer owed Cleveland coverage as an individual insured. The contract between Cleveland and Vandra provided that Vandra was to provide indemnification "whether or not it shall be claimed that the injury was caused through a negligent act or omission of [Vandra]". Essentially, Section 2305.31 of the Ohio Revised Code states that a provision in a construction contract which requires that a contractor indemnify the contractee for the contractee's own negligence is void against public policy. Cleveland relied upon *Stickovich v. Cleveland* (Cuyahoga Ct. App. 2001) 143 Ohio App.3d 13, 2001 Ohio 4117 and argued that Section 2305.31 was inapplicable to political subdivisions. The Court found that the *Stickovich* case was narrowly decided on a claim of waiver, that any language more broadly holding that the statute was inapplicable to political subdivisions was dicta and held that "R.C. 2305.31 prohibited [Cleveland] from seeking indemnification from Vandra for damages resulting from [Cleveland's] negligence . . . regardless of whether such negligence is sole or concurrent." *Kendall v. U.S. Dismantling Co.* (1985) 20 Ohio St.3d 61. The Court also held that Vandra's insurer was not liable to Cleveland as an additional insured because the policy provided coverage only if Cleveland was not independently negligent.

3. In *Integrated Architecture, LLC v. New Heights Gymnastics, LLC*, No. 3:09 CV 1696, 2011 WL 1769006 (U.S. Dist. Ct. N.D. Ohio May 9, 2011), the Court held that an architect is not entitled to a lien under Ohio law simply for preparing plans and specifications for a building. Despite not having a contract, the Plaintiff Integrated Architecture, LLC ("Integrated") prepared and delivered design drawings and cost projections to Defendant New Heights Gymnastics, LLC ("New Heights"). When New Heights was unable to arrange financing, Integrated sought payment and filed a mechanics lien to secure the payment. Relying on *Kline v. Federal Insurance Co.* (Miami C.P. 1958) 80 Ohio L. Abs. 368, 6 O.O.2d 445 and *Robert V. Clapp Co. v. Fox* (1931) 124 Ohio St. 331, 341, the Court held that Integrated "did not supervise or in any way contribute to the physical improvements on New Heights' property" and, therefore, was not entitled to a mechanics lien.

4. In *State, ex rel. American Subcontractors Association, Inc. v. Ohio State University*, 129 Ohio St. 3d 111, 950 N.E.2d 535 (Oh. 2011), the Court held that (1) plaintiff subcontractors association lacked standing, (2) plaintiff surety association did not and (3) defendant university was under no duty to require construction manager at risk to furnish a payment and performance bond.

In December, 2009, the General Assembly passed Substitute House Bill No. 318 ("HB 318"). Included in HB 318 were provisions authorizing three Demonstration Projects to experiment with construction delivery systems different from the traditional multiple prime contractor system. For its Demonstration Project, Ohio State University ("OSU") selected Turner Construction Company ("Turner") by a Request for Proposal/Request for Qualifications process to build a $658 million project as a construction manager at risk.

OSU did <u>not</u> require Turner to provide a $658 million payment and performance bond. Instead, Turner provided a $20,000,000 letter of credit to provide some protection to OSU in the event of deficient performance. Turner also purchased insurance which provided Turner with protection from defaults by its subcontractors, but provided no payment protection to subcontractors and suppliers.

The American Subcontractors Association and the American Subcontractors Association of Ohio, Inc. (together, the "Subcontractors") and the Surety and Fidelity Association of America (the "Sureties") sought a writ of mandamus ordering OSU to require Turner to provide the payment and performance bond. The Court found that the Subcontractors failed to produce evidence that their members had been injured by the failure to provide the bond and dismissed them for a lack of standing. The Court, however, did find that some of the Sureties' members had lost a profit which would have been earned if the bond had been provided. As a result, the Court found that the Sureties had standing and proceeded to address the merits of their arguments.

Section 8(C)(2) of HB 318 stated that OSU was "not exempt" from "applicable" provisions of law concerning "bonding." The Sureties argued that, in accordance with general understanding of the construction industry, Section 153.54(C)(1) of the Ohio Revised Code ("RC") required that Turner provide a bond in the amount of the contract at the time Turner entered into the contract for the OSU Demonstration Project.

The Court, however, noted that RC 153.54(C)(1) actually requires that "If the bidder enters into the contract, the bidder, at the time the contract is entered into, shall file a bond for the amount of the contract . . ." The Court held that "bidding" as used in RC Chapter 153 involves the award of a contract to the lowest responsive and responsible bidder under RC 9.312. Because HB 318 did not require that Turner be selected by "bidding," RC 153.54(C)(1) was not "applicable" and, therefore, did not obligate Turner to provide a payment and performance bond.

Legislation:

1. Am. Sub. H.B. 153 ("Budget Bill"). Effective September 29, 2011, numerous provisions in the Ohio Revised Code ("RC") that affect public construction projects will be amended or enacted to address two broad topics: (A) construction reform and (B) prevailing wages.

A. Changes which relate to construction reform include:

1. Authorization for any public authority, except the Ohio Turnpike Commission, to use the construction manager at risk ("CM/R") or design-builder ("D/B") delivery system. RC 9.33(F); RC 153.65(A).

2. Department of Administrative Services ("DAS") is to adopt rules. RC 153.503

   a. Procedures and criteria for determining best value selection of CM/R or D/B.

   b. Standards for CM/R or D/B when establishing prequalification criteria.

   c. Form of contract documents for subcontracts by CM/R, D/B or general contractor ("GC").

   d. Form of contract documents from CM/R or D/B contract.

3. RC 9.33 - 9.334 and RC 153.65 - 153.72 supersede any conflicting provisions in RC Chapter 153. RC 9.335; RC 153.73.

4. Clarification that public authority may reject any and all proposals for a Construction Manager ("CM") contract, CM/R contract, design professional contract or D/B contract. RC 9.332(E); RC 9.334(I); RC 153.69(F); RC 153.693(F). RC 153.66 to 153.72 do not apply to design professional or D/B contracts with estimated fee under $50,000 (up from $25,000) under specified conditions. RC 153.71.

5. Authority of D/B. RC 153.72.

a. May perform design, construction, demolition, alteration, repair or reconstruction work.

b. May perform professional design services, even if not a professional design firm.

6. Electronic notice may be used in addition to newspaper notice for solicitation of an agency CM or a CM/R. RC 9.331(A).

7. Announcement for solicitation of design professional or D/B need not be sent to firms having qualifications on file with the public authority and may be sent to D/Bs, design professional associations and the news media, including electronic media, as the public authority considers appropriate. RC 153.67(D).

8. Bid bond requirements do not apply to CM/R or D/B contracts and references to bills of material are deleted when the requirements do apply. RC 153.54. CM/R or D/B to provide a surety bond in accordance with rules adopted by the director of DAS before construction begins. RC 9.333(B); RC 153.70(C).

9. Selection of CM/R or D/B.

a. Review of proposals or statements of qualifications received in response to notice or announcement and ranking of three most qualified proposers. RC 9.334(A); RC 153.693(A). Evaluation of D/B statements of qualifications, including qualifications of proposed architect or engineer of record are to be in consultation with a criteria architect or engineer. No longer any requirement to review statements of design professionals on file. RC 153.66(B); RC 153.69.

i. For CM/R "Qualified" is defined in RC 9.33(E).

ii. For D/B "Qualifications" are defined in RC 153.65(D) and include competence to perform required services as indicated by technical training, education and experience of personnel and key consultants and compliance with RC 4703.182, RC 4703.332 and RC 4733.16, including the use of a licensed design professional for all design services.

iii. Architect or engineer of record is the architect or engineer that serves as the final signatory on the project's plans and specifications. RC 153.65(H).

iv. Criteria architect or engineer is the architect or engineer retained by the public authority to prepare conceptual plans and specifications, assist with the establishment of design criteria and, if requested, serve as the representative of the public authority and provide design and construction administration services including confirming that the D/B's design reflects the original design intent. Public authority is to obtain services of a criteria architect or engineer by contracting in accordance with RC 153.65 - 153.70 or designating an architect or engineer employed by the public authority with the Department of Administrative Services ("DAS"). RC 153.65(I); RC 153.692.

v. Prohibition against criteria architect or engineer for a project providing any D/B services for that project. RC 153.694.

vi. Authorization for public authority to require that criteria architect or engineer and architect or engineer of record have professional liability insurance and to require that D/B have contractor's professional liability insurance and any other insurance the public authority considers appropriate. RC 153.73(A) & (B).

b. Provision of description of project to selected proposers. RC 9.334(B). Also, project delivery for D/B. RC 153.693(A)(2).

i. Statement of available design detail for CM/R and design criteria for D/B.

ii. Description of how the guaranteed maximum price ("GMP") shall be determined, including estimated level of design detail upon which the GMP will be based.

iii. Form of the CM/R or D/B contract.

iv. For D/B preliminary project schedule and description of any preconstruction services and proposed design services.

v. Request for a pricing proposal.

c. Elements of pricing proposal. RC 9.334(C); RC 153.693(A)(2)(h).

i. List of key personnel (and D/B consultants) for project.

ii. Statement of general conditions and contingency requirements.

iii. Fee proposal.
   A. Preconstruction (and D/B design services) fee.
   B. Construction or design-build services fee.
   C. Portion of construction fee to be at risk in GMP.

iv. For D/B design concepts adhering to the design criteria and preliminary project schedule.

d. Evaluation of pricing proposals and discussions with proposers about the scope and nature of proposed services and technical approaches. RC 9.334(D); RC 153.693(A)(3).

e. Ranking of the CM/Rs or D/Bs based upon evaluation of value, considering costs and qualifications. RC 9.334(E); RC 153.693(A)(4).

f. Negotiations with CM/R or D/B offering best value. RC 9.334(F); RC 153.693(A)(5) & (B).

i. Mutual understanding of essential requirements involved, including use of contingency funds and distribution of savings.

ii. Ensuring that the CM/R or D/B will be able to provide necessary personnel, equipment and facilities to perform within the time required.

iii. Procedure and schedule for determining the GMP that shall represent the total maximum price and shall include the costs of all the work, general conditions cost, contingency and fee. An open book pricing method shall be used in which the CM/R or D/B provides all books, records, documents, and other data in its possession pertaining to bidding, pricing, or performance to the public authority. RC 9.33(G); RC 153.65(J).

g. Termination of negotiations by public authority upon written notice and authorization of negotiation with next ranked firms and if those negotiations are unsuccessful selection of additional firms or a different delivery method. RC 9.334(G); RC 153.693(C) & (D).

h. Authorization to provide stipend for proposals received from D/Bs. RC 153.693(F).

i. If no GMP is agreed upon, CM/R may serve as a CM. RC. 9.334(H).

10. A public authority may authorize a CM/R or D/B to use a design-assist firm without transferring any design liability to the design-assist firm. RC 153.501(B). Design-assist firm is defined as a person capable of providing services for monitoring and assisting in the completion of plans and specifications. RC 153.50(A).

11. If a public authority permits a CM/R or D/B to self-perform a portion of the work and the CM/R or D/B intends to self-perform, the CM/R or D/B is to submit a sealed bid for the portion before accepting and opening any bids for the same work. RC 153.501(C).

12. CM/R or D/B to establish prequalification criteria for subcontractors. RC 153.502(A).

a. Subject to approval of public authority.
b. Consistent with rules adopted by DAS.

13. For each subcontract, CM/R or D/B to identify 3 prospective bidders, and public authority shall verify bidders are qualified or eliminate bidders found not qualified. RC 153.502(B).

14. CM/R or D/B shall solicit proposals from bidders and select subcontractor under an open book pricing method. RC 153.502(C).

15. CM/R or D/B is not required to award contract to low bidder. RC 153.502(D).

16. CM/R or D/B shall not award contract to subcontractor which is not in compliance with Bureau of Workers Compensation Drug-Free Workplace program. RC 153.03. CM/R and D/B are included in certain affirmative action requirements and bond reduction provisions. RC 153.581, RC 153.80. CM/R and D/B must comply with prompt payment requirements. RC 4113.61.

17. For state projects plans and specifications now required for projects estimated to cost $200,000 or more (up from $50,000), and bills showing exact quantities of materials are no longer required at all. RC 153.01(A). Threshold for competitive bidding of village contracts increased from $25,000 to $50,000. RC 731.14. RC 153.01(A) does not apply to a CM/R contract as described in RC 9.334 or a D/B contract as described in RC 153.693. RC 153.01(B). In 5 years, the $200,000 amount may be adjusted for inflation in accordance with rules adopted by the director of DAS. RC. 153.53. In calculating the threshold amount, a project shall not be subdivided, unless the resultant parts are conceptually separate and unrelated to each other or encompass independent or unrelated needs, and the following expenses shall be included. RC 153.55.

a. Professional fees and expenses for services associated with the reparation of plans.
b. Permit costs, testing costs and other fees associated with the work.
c. Construction costs.
d. Contingency reserve fund.

18. Multiple prime bids are still required, except for contracts made with a CM/R, D/B or GC. RC 153.50(B). GC is defined as a person capable of constructing and managing an entire project, including the plumbing, HVAC and electrical branches of work. RC 153.50(A). $5000 threshold for bidding a branch eliminated.

19. A public authority may accept a subcontract awarded by a CM/R, D/B or GC or may reject such a subcontract if the public authority determines that the bidder is not responsible. RC 153.501(A).

20. If multiple prime bids are required by RC 153.50, award may be made to separate bids or combined bid, but $5000 threshold for award of contract for separate branch eliminated. RC 153.51.

21. GC or multiple prime contracts shall be awarded to lowest responsive and responsible separate bidder or lowest and best separate bidder, as applicable, and to lowest responsive and responsible bidder by school districts, but $50,000 threshold is eliminated. RC 153.52.

22. Capital appropriations for state projects shall include a contingency reserve which shall be used to pay costs of unanticipated job conditions, compliance with building and

other code rulings, errors, omissions and other deficiencies in contract documents, changes in the scope of work, interest on late payments and settlements and judgments. Liquidated damages assessed are to be added to the contingency reserve, and any moneys remaining in the contingency reserve upon completion may be made available to the public authority for other purposes. RC 126.141.

23. Notices to be posted on state public notice website and newspaper website, if newspaper has one. RC 7.10. Abbreviated notice permitted in certain circumstances. RC 7.16. For state projects, electronic filing of bids and electronic broadcast of bid opening permitted. RC 153.08. Purchases under contracts with regional councils of government are exempt from competitive selection of bidding. RC 167.081.

24. DAS may debar contractors from Ohio School Facilities projects. RC 153.02.

B. Changes which relate to prevailing wages include:

1. New thresholds for application of prevailing wages to a public improvement. RC 4115.03.

   a. For new construction of a public improvement that involves roads, streets, alleys, sewers, ditches and other works connected to road or bridge construction: $78,258, adjusted biennially. RC 4115.03(B)(3)
   b. For new construction of other public improvements with no biennial adjustment. RC 4115.03(B)(1).
      i. $125,000 for year after effective date of HB 153.
      ii. $200,000 for the next year.
      iii. $250,000 thereafter.

   c. For reconstruction, enlargement, alteration, repair, remodeling, renovation, or painting of a public improvement that involves roads, streets, alleys, sewers, ditches and other works connected to road or bridge construction: $23,447, adjusted biennially. RC 4115.03(B)(4).

   d. For reconstruction, enlargement, alteration, repair, remodeling, renovation, or painting of other public improvements with no biennial adjustment. RC 4115.03(B)(2).

      i. $38,000 for year after effective day of HB 153.
      ii. $60,000 for the next year.
      iii. $75,000 thereafter

2. New exceptions from prevailing wages. RC 4115.04.

   a. Port authority projects. RC 4115.04(B)(6).

   b. Any portion of a project completed solely with labor donated by individuals performing the labor, by a labor organization and its members or by a contractor or subcontractor that donates all labor and materials for that portion. RC 4115.04(B)(7).

3. All exceptions in RC 4115.04(B) are mandatory. RC 4115.04(C).

4. Exception from apprenticeship requirements for a contractor, subcontractor or public authority that exceeds the permissible ratio by 2 or fewer apprentices for not more than 2 days in any 30-day period. RC 4115.05.

5. Labor organization required to file with the director of the Department of Commerce ("Commerce") and certify completeness of all relevant portions of any collective bargaining agreement to which it is a party within 90 days after the agreement is executed. RC 4115.05.

6. If upon receipt of the relevant portions of a collective bargaining agreement, the Commerce determines that the prevailing wage rate has changed where a project is ongoing, the change shall take effect 2 weeks after Commerce receives the relevant portions. RC 4115.05.

7. No contractor or subcontractor is responsible for payment of penalties provided in RC 4115.10(A) (25% to employee, 75% to Commerce) for a violation by its subcontractor if the contractor or subcontractor has made a good faith effort to ensure that its subcontractor complied with RC 4115.03 to 4115.16. RC 4115.10(G).

8. If a contractor's or subcontractor's underpayment of prevailing wages to an employee is less than $1000 and the contractor or subcontractor makes full restitution to the employee, the contractor or subcontractor is not subject to any further proceedings under RC 4115.03 to 4115.16. RC 4115.13(C).

9. An "interested party" is now defined with respect to a particular contract for construction of a public improvement. RC 4115.03(F).

   a. An interested party may file a complaint with Commerce alleging a specific violation by a specific contractor or subcontractor upon a form furnished by Commerce, and the complaint must include sufficient evidence. Commerce is not to investigate any nonconforming complaint. RC 4115.16(A).

   b. Commerce is to conclude an investigation of a complaint not later than 120 days after the complaint is filed, but may extend that period by up to 90 days by giving the parties to the complaint notice before the 120-day period expires. Commerce may also extend the time period for an investigation upon agreement of Commerce and all parties to the complaint. RC 4115.16(B).

10. Requirements to pay prevailing wages for projects financed by the Department of Development under RC 166.02, involving a community urban redevelopment corporation under RC 1728.07 or involving a port authority under RC 4582.12 have been repealed.

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Oklahoma

Case law:

No opinions of interest to the construction industry have been issued yet in 2011.

Legislation:

The Oklahoma Legislature had a busy session. The following laws potentially affecting the construction industry have been signed by the Governor and will take effect on Law Day (November 1, 2011), except where indicated:

1. 2011 Okla. Sess. Laws 14 (H.B. 2128): Part of the latest round of "tort reform" legislation, this law caps non-economic damages in all personal injury cases to $350,000 regardless of the number of defendants.

2. 2011 Okla. Sess. Laws 15 (S.B. 862): Also a "tort reform" measure, this law abolishes joint liability in Oklahoma in all actions "based on fault not sounding in contract". All defendants in such cases will have several liability based on percentages assigned by the trier of fact.

3. 2011 Okla. Sess. Laws 23 (S.B. 277): This law changes the pre-lien notice requirements as to residential projects in the mechanics' lien laws. The law repeals the statutes that currently require residential contractors working on owner-occupied dwellings to tender a "pre-contract" lien notice that explains to the owner that their property may be liened in the future if payments are not made. In its place, residential contractors and subcontractors, like other contactors, will now provide the "pre-lien" notice within 75 days of their last work or service in 42 O.S. §142.6. The law also raises the minimal threshold before a pre-lien notice is required to $10,000 (up from the current $2,500).

4. 2011 Okla. Sess. Laws 63 (H.B. 1060): Modifies the engineering standards required for county-built bridges, effective July 1, 2011.

5. 2011 Okla. Sess. Laws 99 (H.B. 1075): This law modifies the public contracting retainage requirements, such that the State can now collect only 5% retainage throughout the project. The ban on retainage in contracts with DOT or the Transportation (Turnpike) Authority remains.

6. 2011 Okla. Sess. Laws 156 (S.B. 789): Creates a new "Fair Practices of Equipment Manufacturers, Distributors, Wholesalers and Dealers Act" in Title 15 of the Oklahoma Statutes.

7. 2011 Okla. Sess. Laws 225 (S.B. 928): Modifies the new Roofing Contractor Registration Act by lowering the registration fee to $75 per year, but expanding the enforcement mechanisms.

8. 2011 Okla. Sess. Laws 318 (S.B. 878): A massive bill that overhauls the entire workers' compensation system. This was a cornerstone to the Republican-controlled Legislature's agenda and is generally presumed to be favorable to all employers, including constructors.

9. 2011 Okla. Sess. Laws 362 (S.B. 96): Raises the threshold under which the State may enter into negotiated contracts with qualified contractors to $5,000. Allows the Department of Central Services to award construction contracts on a "best value" competitive proposal basis.

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Oregon

Case law:

1. In *Abraham v. T. Henry Construction, 350 Or. 29, 249 P.3d 534 (2011),* the Oregon Supreme Court ruled that a claim for property damage arising from construction defects may lie in tort, as well as contract, where the builder and homeowner are in a contractual relationship. To bring a construction defect negligence claim concurrently with a contract claim, the contract must not limit the claim or supplant the standard of care, and the physical damage must be reasonably foreseeable as a result of the builder's conduct. Notably, the Court further held in a footnote that the statute of limitation for tort claims relating to the defective construction of a house is two years. The court's holding was *sua sponte*; neither party had briefed the statute of limitation issue. Moreover, it is a departure from ORS 12.080(3), regularly understood to apply a six-year statute of limitation to these claims.

Legislation:

(Contributor's note: All bills are from the 2011 Regular Legislative Session except as noted.)

1. Senate Bill 382 modifies the definition of "mortgagee" in ORS 87.005 by requiring that a person's name and address appear in the recorded instrument, and makes delivery of notices to mortgagees under the lien statutes compulsory only if the mortgagee's name and address are shown in the recorded mortgage, deed of trust or assignment of mortgage. These changes apply to original mortgages and trust deeds recorded after January 1, 2012. The changes apply to assignments of mortgages or trust deeds that are recorded after January 1, 2008.

2. Senate Bill 383 adds certified mail to the list of acceptable means of delivery or notices and secondary notices of defect and responses thereto under in ORS 701.570 and also removes the requirement that a notice of defect be sent when a defect claim is asserted in a small claims action, as counterclaim in a lawsuit or as response to an arbitration demand. The amendments took effect on January 1, 2012.

3. Senate Bill 384 modifies ORS 701.620 *et. seq.*, also known as the Private Prompt Pay Act. The intent of the legislation was to clean up some ambiguities and potential "gotchas" from the original legislation. For example, in the original law, any billing cycle that was not exactly "30 days" was technically in violation of the statute, subjecting the prime contractor to penalties for failing to provide notice of an alternate billing cycle. Now the requirement has been modified to a state that a billing cycle that is not "monthly" must comply with the notification requirements. The bill also clarifies the circumstances under which a party is entitled to claim attorney fees, in order to make the private act consistent with the public act.

4. Senate Bill 939. This bill was an omnibus budget bill, and made significant modifications to the Oregon Construction Contractors Board's (CCB) dispute resolution services. The requirements of the bill took effect on July 1, 2011. The CCB will no longer provide any arbitration or contested case hearings. All disputes, whether on residential or commercial construction projects, must now be either litigated in court or arbitrated via a contractual arbitration provision. The processing of a complaint at CCB will otherwise be unchanged – the complainant must still file the complaint within the statutory deadlines, and then return to the CCB if and when the complainant obtains a judgment or arbitration order in the complainant's favor. The CCB will continue to provide mediation services for parties in construction disputes. The changes have a sunset of July 1, 2017. This means that if Oregon's budget situation improves by that date, the prior dispute resolution scheme will automatically re-appear on that date.

5. Senate Bill 961. This bill, which contained an emergency clause and which became effective when the governor signed it into law on June 23, 2011, makes any provision in a construction agreement void if that provision requires a waiver of subrogation. There are two important exemptions: claims that are covered by the proceeds of property damage insurance, and claims arising out of projects that are subject to OCIP or CCIP insurance programs. The bill will likely be codified at ORS 30.141, and much of the language mirrors that of ORS 30.140, the so-called "anti-indemnity" statute.

SB 961 bill was introduced very late in the session and created significant dissention within the construction industry. The primary question was whether the bill would create additional risk and cost by undermining the decisions in *Walsh v. Mutual of Enumclaw*, 189 Or App 400 (2003) and 338 Or 1 (2005). In light of the existing language in ORS 30.140 and the *Walsh* case, there was also a significant question raised as to whether new language addressing subrogation waivers is even necessary. After a significant amount of work by various stakeholders, including input from our section, the bill was reduced in scope and the language removed from ORS 30.140, where it was originally proposed. The underlying issues - contradictions and gaps between the Employers Liability Act, Worker Compensation Act and comparative negligence statute – were not addressed with this new law. However, there has been significant discussion about creating an interim legislative work group to address the larger problems surrounding worker compensation and employer liability. That group has yet to hold its first meeting.

6. House Bill 2081, the Truck Idling bill, will limit the amount of time the engine of on-road commercial vehicles can idle to five minutes in any 60-minute period. However, all equipment required for powering work-related mechanical, safety, electrical or construction equipment was exempted.

7. House Bill 2186 (passed in 2009) authorized the Environmental Quality Commission to consider implementation of the nation's first low carbon fuel standard (LCFS). The rule would require emissions to be reduced by an average of 10% from 2010 levels by 2020. Compliance for meeting these standards would fall on petroleum manufacturers and distributers. Some economists estimate the standard could increase the cost of fuel 30-90% in the next five years and produce a significant economic disincentive unique to Oregon. Prior to the 2011 session, Oregon's Department of Environmental Quality (DEQ) intended to adopt rules in 2011 and implement the LCFS program in 2012. After business interests raised significant questions regarding potential impacts on Oregon's economy, the legislature directed DEQ to delay rulemaking at least two years. The 2011 legislature's direction means DEQ will now likely

need the funding approval from the 2013 legislature before implementing a low carbon fuel standard.

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Pennsylvania

Case law:

1. In *Brayman Constr. Corp. v. Pennsylvania,* 13 A.3d 925 (Pa. 2011), the Supreme Court of Pennsylvania upheld a temporary injunction that prevented the Pennsylvania Department of Transportation ("PennDOT") from future use of an innovative bid procedure in which PennDOT would only accept bids from design-build teams that were "short-listed" by PennDOT. In response to an advertisement published by PennDOT, design-build teams, including Brayman Construction Corporation ("Brayman") and its design professional partner, submitted statements of interest that detailed the teams' technical qualifications for a design-build bridge project. The statements of interest did not contain a monetary bid on the project. From the statements of interest, PennDOT short-listed three contractors that were allowed to submit bids on the project. Subsequently, PennDOT advertised that it was accepting design-build bids on the bridge project. PennDOT, however, would only consider bids from design-build teams that were previously short-listed. All other bids were rejected. Dissatisfied with the Commonwealth Court's failure to issue an injunction requiring PennDOT to re-bid the project, Brayman filed an interlocutory appeal to the Supreme Court of Pennsylvania. The Supreme Court ruled that Brayman was not required to follow PennDOT's administrative appeals process because the Procurement Code's appeal procedures only applied to prospective bidders. Brayman was not considered a "prospective" bidder, as PennDOT had divided the group of hopeful bidders into two groups, one group from which PennDOT was willing to consider bids and one group from which PennDOT was not willing to consider bids. As for the substantive challenge to the injunction, the court ruled that PennDOT was precluded from using the bidding procedures on future procurements because the method employed by PennDOT violated the Procurement Code due to its subjectivity. On public safety grounds, however, the court upheld the award of the bridge project Brayman had contested.

2. In *Progressive Pipeline Mgmt., LLC v. N. Abbonizo Contractors, Inc.*, No. 10-4551, 2011 U.S. Dist LEXIS 38513 (E.D. Pa. Apr. 7, 2011), the U.S. District Court for the Eastern District of Pennsylvania ruled that an arbitration provision in a subcontract that allowed a general contractor to elect arbitration if the principal contract provided for arbitration was enforceable. Additionally, the District Court ruled that a surety cannot force a principal to arbitrate based on an arbitration provision in the principal's contract with a subcontractor. Relying on the subcontract provision, the general contractor, N. Abbonizio Contractors, Inc. ("Abbonizo"), sought to force arbitration. The subcontractor, Progressive Pipeline Management, LLC ("Progressive"), argued that the arbitration agreement did not manifest a clear and unmistakable agreement to arbitrate. The court, however, held that the contract unambiguously incorporated the principal contract, which clearly provided for arbitration. Additionally, the arbitration agreement in the subcontract was neither procedurally nor substantively

unconscionable, rejecting Progressive's challenge to a provision that gave Abbonizio unilateral discretion in deciding whether to arbitrate. In fact, the record reflected that Progressive actively participated in contract negotiations. The District Court also ruled that the arbitration provision did not extend to Progressive's claims against the surety, Arch, because the payment bond did not expressly incorporate the subcontract (including its arbitration provisions) and Progressive did not separately agree to arbitrate such claims. Accordingly, Arch could not compel Progressive to arbitrate its claims against the surety. Finding that the arbitrator's decision against Abbonizio would bind Arch, the District Court granted Arch's request to stay the litigation between Progressive and Arch pending the outcome of the arbitration proceedings between Abbonizio and Progressive.

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South Carolina

Case law:

1. Notice of Arbitration Must Appear on First Page of Master Deed; *Richland Horizontal Prop. Regime Homeowners Ass'n, Inc. v. Sky Green Holdings, Inc.*, 392 S.C. 194, 708 S.E.2d 225 (Ct. App. 2011).

A developer of a condominium project sold twenty of twenty-four units under the terms of a recorded master deed, which included an arbitration provision. After the sale of the first twenty units, Developer created a supplemental master deed which also included an arbitration provision and added a new unit that did not previously exist. The supplemental master deed allotted the new unit a 4% ownership interest in the common areas, and reduced each of the original units' shares in the common elements accordingly. Purchasers of the first twenty units sought declaratory judgment against Developer, alleging that a sale of the newly created unit violated the terms of the original master deed and that the new unit should remain a part of the original common elements. Developer's motion to compel arbitration was denied because the arbitration clause did not comply with S.C. Code Ann. § 15–48–10(a), which required the clause to be on the first page of the master deed. Developer appealed, arguing that the trial court misconstrued the statutory meaning of "the first page of the contract" because the master deed contained a cover page, and the second page containing the arbitration provision was actually the first page of the document.

The South Carolina Court of Appeals declined to adopt Developer's interpretation, and maintained a strict reading of the statute. The cover page displayed a stamp by the Register of Deeds, prominently displayed the title of the master deed, and provided contact information for the attorney who prepared the deed; therefore, the cover page was the first page of the master deed. Applying this plain language of the statute, Developer's motion to compel arbitration was denied.

2. Enforceability of Administrative Burden Provision Upon Default; *ERIE Ins. Co. v. Winter Constr. Co.*, 2011 WL 2446854 (S.C. Ct. App. June 15, 2011).

Electrical subcontract on a school renovation project included a damages provision permitting an administrative fee to be assessed should Subcontractor default, stating: "[General Contractor] shall be entitled to charge all reasonable costs incurred in [a default] (including

attorney fees) plus an *allowance for administrative burden equal to fifteen percent (15%)* to the account of Subcontractor."

Subcontractor defaulted on the subcontract by failing to complete its work and by failing to pay its suppliers. Pursuant to the subcontract, Subcontractor automatically assigned all its rights under the subcontract to its Surety upon the default. General Contractor hired a Replacement Subcontractor, who timely completed the subcontract and was paid in full. Upon completion of the project, Surety demanded payment from General Contractor for all amounts owed under the subcontract, and General Contractor withheld certain funds citing the administrative fee provision in the subcontract. General Contractor contended that the withheld funds were compensation for General Contractor's administrative burden in overseeing the completion of the electrical subcontract. Surety filed an action for breach of contract against General Contractor, contending the administrative fee constituted an unenforceable penalty, rather than an enforceable liquidated damages provision. The trial court granted Surety's motion for summary judgment, and General Contractor appealed.

The Court of Appeals reversed, and found that the administrative burden provision was a reasonable and fair liquidated damages provision and was clear in its terms and application. The Court determined that General Contractor undertook a significant administrative burden in overseeing the completion of the subcontract. Moreover, it found that the provision was reasonably intended by the parties to serve as the predetermined measure of compensation for damages that would be difficult to ascertain during the contracting phase of the project. The provision was fair to the parties in that it operated on a "sliding scale," which accounted for the amount of work remaining at the time of the default. As a matter of contract interpretation and public policy, the Court of Appeals ruled the provision was a valid, enforceable measure of liquidated damages.

3. Inadequate License Classification Does Not Bar Recovery Under Contract; *C-Sculptures, LLC v. Brown*, 2011 WL 2535543 (S.C. Ct. App., Apr. 27, 2011).

Homeowners contracted with Contractor to build a home for over $800,000; however, Contractor's license classification was limited to projects not exceeding $100,000.00. After disputes arose between Homeowner and Contractor, Contractor filed a mechanics lien and foreclosure action alleging non-payment for performed work, which was referred to arbitration. The arbitrator found that, while S.C. Code Ann. § 40-11-370 precludes unlicensed contractors from enforcing construction contracts, it does not preclude recovery of a licensed contractor with an inadequate license classification. The arbitrator's award to the Contractor of actual damages, interest, and attorney's fees was confirmed by the Circuit Court and Homeowners appealed on the grounds that the arbitrator showed a manifest disregard for S.C. Code Ann. § 40-11-370.

The South Carolina Court of Appeals acknowledged the well-settled law that contractors operating without a valid license, with a license that differs in name from the name given in the contract, and contractors licensed in other states cannot bring an action to enforce a contract. However, the Court found no indication that the arbitrator's award disregarded the law because S.C. Code Ann. § 40-11-370 does not address classification requirements. In addition, no cases directly address this issue. Therefore, the circuit court's confirmation of the arbitration award was affirmed.

4. Formation of Contract, Waiver of Breach Claim by Participating in Bidding Process Without Objection; *Prysmian Power Cables and Systems USA, LLC v. THS Constructors, Inc.*, C/A No. 2008-CP-01-0145 (S.C. Ct. Com. Pls., Feb. 5, 2010).

Owner retained Contractor to develop a cost estimate for the construction of an upcoming Project. Contractor provided a cost estimate and a proposal to perform the work, and Contractor was paid for its estimation work. Owner and Contractor then conducted preliminary negotiations for construction of the Project, but no final written contract was ever executed by either party. As part of the negotiation process, Owner issued a Letter of Intent ("LOI") to Contractor to be used by Contractor for the sole purpose of securing steel prices from a fabricator. The LOI provided that Contractor was authorized by Owner to continue supporting work on the Project "as defined by preliminary specifications," and that "[t]he on-going determination of contract language and costs are still being negotiated and will be finalized [at a later date] . . . ." Negotiations continued after the issuance of the LOI. A few months thereafter, but before several essential elements of the contract had been agreed upon, Owner informed Contractor that it would be required to bid for the job against other contractors. Contractor participated in the bidding process without objection, but was not the successful bidder.

After Owner brought a declaratory judgment action against Contractor, Contractor answered and counterclaimed. In its counterclaims, Contractor alleged for the first time that Owner had breached a contract for construction of the Project, and sought lost profits for the entire job. The Circuit Court granted partial summary judgment to Owner on all of Contractor's counterclaims arising out of an alleged breach of contract on a number of grounds.

As an initial matter, the trial court found that there was no meeting of the minds as to a number of the essential elements of a construction contract. Contractor contended that the "preliminary specifications" referenced in the LOI referred to an unsigned contract for the construction of the facility. Owner contended that the word "preliminary" did not mean "final," and the word "specifications" was not analogous to "contract terms." In addition, the record indicated that negotiations regarding cost, scope of work, scheduling, and time and manner of payment continued after the issuance of the LOI and were never agreed upon by the parties. Thus, because these were essential elements of a construction contract, no contract was ever formed between the parties.

As a second and alternative basis for partial summary judgment, the trial court found that Contractor abandoned or waived any claim for breach of contract, to the extent such a claim existed, by participating in the bid process without objection. By its participating in the bidding, Contractor lulled Owner into a false assurance that strict compliance with any existing contractual duty would not be required. In other words, an abandonment of any binding contractual terms could be inferred by Contractor's participation in the bidding process.

5. Violation of Licensing Statute Must be Plead as Affirmative Defense; *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 703 S.E.2d 221 (2010).

Homeowner contracted with Landscaper to provide landscaping work on Homeowner's property. Landscaper did not have a contractor's license. After payment disputes arose, Landscaper filed a mechanics lien and foreclosure action based on non-payment for completed landscaping work. Homeowner filed a motion to dismiss for lack of subject matter jurisdiction and asserted that Landscaper could not assert a mechanics lien under Skiba v. Gessner, 374 S.C. 208, 648 S.E.d2d 605 (2007) (holding that, where plaintiff merely prepared land for landscaping and did no work relating to a building or structure, plaintiff could not assert a valid

mechanic's lien). The Circuit Court distinguished this case from Skiba, and held that Landscaper actually performed labor and supplied materials that became integrated into the property. Therefore, Landscaper could recover under the mechanic's lien statute or in quantum meruit. Homeowner did not raise the issue of Landscaper's license in its motion to dismiss or in its subsequent answer.

On appeal, the South Carolina Supreme Court held that, because Homeowner failed to raise the licensing statute both as an affirmative defense and as a grounds for dismissal, the licensing issue was not preserved for appeal. The Court also affirmed the circuit court's holding that Landscaper could proceed in quantum meruit. The Court declined to rule on the question of whether the mechanic's lien was valid since disposition of the prior issue of quantum meruit was dispositive.

6. Contractors Must Give Notice to Receive Prejudgment Interest under Prompt Payment Act; *EllisDon Constr., Inc. v. Clemson Univ.*, 391 S.C. 552, 707 S.E.2d 399 (2011).

University Owner retained Contractor to build a new science complex on its campus. The contract provided that interest would be paid in accordance with the South Carolina Prompt Payment Act, S.C. Code Ann. § 29-6-50 (2007). The statute provided that any payment delayed by more than 21 days would accrue interest at 1 % per month, but also provided that no interest would accrue unless the party being charged interest was notified of the provisions of the Act at the time the request for payment was made.

After completion of the Project, owner withheld partial payment and claimed Contractor failed to fully perform its contractual obligations. An administrative panel review of the dispute determined that Contractor failed to comply with the notice provisions of the Prompt Payment Act, but that it would be inequitable to hold that Contractor could not collect prejudgment interest. It awarded prejudgment interest to Contractor at the rate of 8.75 % per annum under South Carolina's general interest statute, S.C. Code Ann. § 34-31-20(A).

Upon review of the panel's decision, the circuit court agreed that the Contractor had failed to meet the notice requirements of the Prompt Payment Act, but also held that the general interest statute did not apply, either in equity or otherwise. The South Carolina Supreme Court affirmed, and found that the general interest statute only applies when an interest rate has not been agreed upon in a contract. Here, the parties' contract provided an interest rate by incorporating the Prompt Payment Act by reference. The Court also found that the administrative panel erroneously applied equitable principals in applying the general interest statute. The Court found that Contractor had a legal remedy for collecting interest – it needed only to meet the requirements of Prompt Payment Act to be entitled to interest. A party failing to fulfill the requirements of its legal remedy cannot later come to the courts complaining of hardship and seek an equitable remedy.

7. Sanctions for Conduct in Deposition Scheduling; *Fredrickson v. Reichert*, C/A No. 2009-CP-23-8523 (S.C. Ct. Com. Pl., May 26, 2011).

Plaintiff's Counsel was sanctioned by the Circuit Court after an agreement could not be reached regarding the sequence of depositions of the litigants. In November 2010, Defendant's counsel noticed Plaintiff's deposition for January 21st at 10:00 a.m. Plaintiff's counsel then requested the availability of Defendant for a deposition. Defendant's counsel responded with fourteen potential deposition dates between January 24th and February 25, 2011. One month

later, Plaintiff's counsel responded by noticing Defendant's deposition to begin on January 21st at 9:00 a.m., one hour before the scheduled deposition of Plaintiff.

Defendant's counsel unsuccessfully requested that Plaintiff's counsel withdraw the notice, then filed a Motion to Quash. Plaintiff's counsel responded by filing a Motion for Protective Order and Motion for Sanctions. In a further effort to resolve the dispute, counsel for the parties emailed the Chief Judge for Administrative Purposes and requested direction on the depositions. The judge responded by instructing as follows: "first noticed deposition will proceed. Reschedule the second."

Plaintiff's counsel interpreted this e-mail as a direction from the judge to proceed with deposition of the Defendant, since it was noticed to occur earlier in the day. A series of e-mails among counsel followed, which called this interpretation into question and indicated that defense counsel intended to take Plaintiff's deposition as noticed. Plaintiff's counsel sent a final e-mail accusing defense counsel of showing a lack of civility.

The Circuit Court determined that Plaintiff's counsel had engaged in improper discovery practices. Although the Judge stated the order of depositions rarely makes any difference, the tactics employed by the Plaintiff's Counsel were reprehensible and worthy of sanctions. The Court was also troubled with the "caustic" nature of e-mails sent by Plaintiff's counsel.

8. Prejudicial vs. Probative Effect of Evidence of Property Damage Insurance; *Wright v. Hiester Constr. Co.*, 389 S.C. 504, 698 S.E.2d 822 (Ct. App. 2010).

Homeowners executed a construction contract with Contractor to build a house, where Contractor assumed "full responsibility for acts, negligence or omissions of all his subcontractors and their employees . . . ." The contract also provided that both parties would waive "all claims against each other for fire damage" covered by the property damage insurance that Homeowners were to maintain on the construction site. After several days of work performed by Subcontractor, a fire destroyed the entire house. Homeowners filed a lawsuit alleging that the fire was a result of Subcontractor's negligence. Contractor and Subcontractor disputed the negligence claim, and asserted that any subrogation claim against them was waived by way of the allocation of risk to Homeowners and their insurance carrier by contract. At trial, Homeowners unsuccessfully moved *in limine* to exclude references to insurance by arguing that the availability of insurance was irrelevant for purposes of determining liability on their causes of action grounded in contract and negligence.

The South Carolina Court of Appeals found that the waiver of subrogation clause and requirement that Homeowners maintain property damage insurance on the premises during construction were relevant to the issue of liability. The court did not receive any explanation from Homeowners as to why evidence of insurance was more prejudicial than probative, given that the contractors' defenses were based on insurance provisions included in the contract.

9. Failure to State a Field That Requires an Expert Witness; *Hall's Custom Homes v. Vista Realty Partners*, No. 2011-UP-004 (S.C. Ct. App., Jan. 20, 2011).

Contractor and Owner contracted for the repair of decks at an apartment complex. The contract stated costs for the repairs, but added that "[p]ricing will vary depending on amount of rot found." When Contractor completed work and submitted its invoice, Owner felt the charges were excessive and refused to pay. Owner also contested the quality of Contractor's work. Contractor filed a mechanic's lien and foreclosure action. At trial, Owner sought to admit an

owner's representative as an expert witness. When asked the witness's area of expertise, defendant's attorney stated that the witness was offered "as the owner's representative." The trial court refused to admit the witness as an expert on the grounds that expert testimony was not needed for the area of expertise identified by defense counsel.

The South Carolina Court of Appeals held that the trial court did not abuse its discretion in refusing to admit the owner's representative as an expert witness due to defense counsel's failure to identify an area of testimony requiring expertise. Because he was not qualified as an expert, the witness was not permitted to provide expert testimony as to the costs that should have been allowed for the repairs, nor was he permitted to testify as to the quality of work performed. However, as a lay witness, owner's representative was permitted to testify as to his expectation of the amount he would be charged, and was further allowed to testify that a repair contractor was needed to complete Contractor's work.

10. Limitation of Actions; Statute of Repose Applies to Indemnity Actions; *Columbia/CSA-HS Greater Columbia Healthcare Sys., LP v. South Carolina Med. Malpractice Liability Joint Underwriting Ass'n*, 2011 WL 1466456 (S.C. Ct. App. April 13, 2011).

In 1997, Patient sought medical care at Hospital after experiencing chest pain. Doctor misdiagnosed Patient as having acid reflux and released Patient. Several days later, Patient went to a different hospital, where he was diagnosed as having had a heart attack. Two years later, Patient sued Doctor and Hospital based upon an apparent agency theory. Hospital sought indemnity from Doctor and Doctor's medical malpractice insurance carrier ("Insurer"). Insurer declined to defend or indemnify Hospital. Thereafter, in 2004, Hospital settled with Patient. Hospital brought this action in 2007 seeking equitable indemnification from Doctor and Insurer, who raised the three year statute of repose as an affirmative defense. The trial court granted summary judgment to defendants, holding that Hospital's claims were time-barred by the statute of repose.

Hospital appealed, and argued that the statute of repose did not apply because its cause of action did arise until it settled with Patient in 2004. The South Carolina Court of Appeals found that the statute of repose began to run at the time of Patient's treatment in 1997, and barred to any action that sought to recover damages from said treatment, including those that may have accrued later by way of settlement. Hospital's indemnity claim was predicated upon Doctor's liability to Patient in tort, which arose no later than 1997, if at all.

11. Statute of Repose and Limitations in Staged Development; *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 708 S.E.2d 787 (Ct. App. 2011).

Homeowners' Association ("HOA") brought suit against Developer after finding numerous construction defects involving the common areas of the development. The development had been built in several stages, with the oldest buildings (#1 - #8) having been constructed between 1978 and 1983, and the more recent buildings constructed in 1996 or later.

HOA brought its action in 2005. At that time, the statue of repose was thirteen years. S.C. Code Ann. § 15-3-640 (Supp. 2003). At trial, Developer sought a directed verdict on the grounds that HOA's action was barred by the statute of repose because the HOA asserted, *inter alia*, that defects had damaged the foundation of building #5, which was completed between 1978 and 1983. The Circuit Court denied Developer's motion and the South Carolina Court of Appeals affirmed. While HOA's claims would have been barred by the statute of repose if they

had related to the infrastructure of buildings #1 - #8, the alleged defects related primarily to general irrigation and design problems throughout the development. HOA contended that these defects ultimately led to the foundation problems in building #5. All other common elements claimed to be defective, including those related to the general irrigation of the Project, were constructed after 1996.

12. Improper Release of Construction Loan Funds Does Not Create Duty of Care in Tort; *Regions Bank v. College Ave. Dev., LLC*, 2010 WL 985298 (D.S.C. January 22, 2010).

Developer obtained construction loan from Lender, which was secured in part by personal guarantees from a number of Guarantors. Near the end of the project, Developer's general contractor abandoned the job and declared bankruptcy. Lender sought recovery of the disbursed loan funds from Developer and Guarantors, who in turn counterclaimed, alleging Lender had exacerbated the debt owed by: (1) making disbursements directly to Contractor in violation of the loan agreement; (2) making disbursements that were not proportionate to the amount of completed work; (3) making a final disbursement of funds after Lender's own inspector had recommended against such action; and (4) making disbursements when Lender knew Contractor was in jeopardy of bankruptcy.

Lender moved for summary judgment on all counterclaims (breach of contract, breach of contract accompanied by fraudulent act, negligence, breach of fiduciary duty, and violation of the S.C. Unfair and Deceptive Trade Practices Act). The United States District Court for the District of South Carolina denied Lender's motions as to breach of contract and breach of contract accompanied by fraudulent act, finding that questions of fact were present which related to Lender's supposed disbursement of funds directly to Contractor, contrary to Lender's inspector's instructions to cease distributions. Lender's remaining motions were granted. In granting summary judgment on the remaining counterclaims, the Court distinguished these facts from *Roundtree Villas Association, Inc. v. 4701 Kings Corp.*, 282 S.C. 415, 321 S.E.2d 46 (1984), which held that a construction lender owes a duty of care when lender assumes direct control over construction of a project. In *Roundtree*, the lender undertook construction repairs of a project and attempted to market the project after its completion. Here, lender exercised no control over the property beyond the possible alteration of the disbursement process. The Court found that, even if disbursements were improperly made, an extension of *Roundtree* would be improper. Lender and Contractor ultimately settled the dispute for approximately half of the loan's total value.

13. Determination of Number of Tortfeasors to Calculate Pro Rata Share of Contribution Liability; *McGonigal's Flamingo, Inc. v. RJG Constr. Co.*, No. 2011-UP-260 (S.C. Ct. App. 2011).

Developer brought a construction defect action against General Contractor for a hotel project. General Contractor subsequently brought third-party claims against several subcontractors, including Glass Subcontractor. General Contractor and several subcontractors settled with Developer, but Glass Subcontractor did not. After settling with Developer, General Contractor filed a contribution claim against Glass Subcontractor alleging Glass Subcontractor was a joint tortfeasor. The Circuit Court granted summary judgment to General Contractor, and properly used a *pro rata* calculation in determining the amount of judgment. The Circuit Court also awarded prejudgment interest.

Glass Subcontractor appealed, asserting that the Circuit Court erred by failing to include both the project's architect (for design defects) and the Developer itself (for deficient maintenance) from the number of joint tortfeasors in making its *pro rata* calculation. The South Carolina Court of Appeals disagreed, and noted that General Contractor's settlement agreement with Developer discounted Developer's alleged damages against General Contractor due to design defects. The Court further held that Developer could not be considered a joint tortfeasor for its own injuries. Glass Subcontractor prevailed in its appeal of the award of prejudgment interest, because General Contractor had failed to properly plead for the same.

14. Fraudulent Construction Seals; *United States v. Wynn*, C/A No. 8:10-CR-01026-GRA (D.S.C. Oct. 19, 2010).

A project engineer was convicted of mail and wire fraud after forging a set of S.C. Department of Health and Environmental Control seals on construction site plans to pass them off as possessing mandatory storm water permits. Construction commenced at Oconee Regional Airport to extend a runway, and resulted in significant run-off of sediment and mud onto private property and into Lake Hartwell. The project engineer was sentenced to 12 months and 1 day in prison and ordered to pay $118,000 to Oconee County.

15. Individual Owner's Right to Sue Developer for Damages to Common Areas; *Pulliam v. M.U.I. Carolina Corporation*, C/A No. 2008-CP-46-2148 (S.C. Ct. Com. Pl. April 1, 2011).

Plaintiffs, a group of individual condominium unit owners, brought an action against development's homeowner's association ("HOA") and Developer, asserting various causes of action arising out of damages to the development's common areas. Developer brought an action for summary judgment based on Plaintiffs' lack of standing, and asserted that claims against Developer must be brought by HOA. The trial court denied Developer's motion on the grounds that a complete record was needed, but noted that *Concerned Dunes West Residents, Inc. v. Georgia Pacific Corporation*, 349 S.C. 251, 562 S.E.2d 633 (2002) appeared to support Developer's position. *Concerned Dunes West* was not directly on point because defendants therein did not raise the issue of the incorporated plaintiffs' standing, but the decision seemed to confine the developer's duty to provide common areas that are in good repair such as to be owed solely to the homeowner's association.

Legislation:

1. CGL Coverage: Gov. Nikki Haley signed into law S. 431, legislation to address the S.C. Supreme Court ruling on Crossmann Communities vs. Harleysville Mutual.

2. Underground Damage Legislation: On June 7, Gov. Haley signed the Underground Damage Prevention legislation into law, less than three months after it was filed in the Senate. (S. 705)The legislation calls for:

Mandatory one-call center membership: South Carolina will now require all utilities to be members of the 811 "Call Before You Dig" service, on a three-phase in process, meaning one call is all professional excavators, homeowners and others need to make to notify utilities of proposed excavation.

Positive response: Utilities are required to respond and coordinate responses with those who give notice before digging. This closes the communication circle between the time a notice of intent to dig is submitted and affected utilities respond.

Tolerance zones: The actual tolerance zone for locating and safe digging in the vicinity of underground utilities is now 24 inches. This was reduced from 30 inches. South Carolina was one of only three states in the nation who had such a wide tolerance.

Modernization: Many new technologies and standards have been adopted since the law was originally enacted in 1978. Many smaller changes were made to integrate new standards, technologies and practices into state law.

811/One-Call Center governance: The membership for board seats for the state's One Call Center was increased, with specified seats being selected for various stakeholder groups. The construction industry will now have a stronger voice in the SC 811 call before you dig process.

Enforcement: All stakeholders will be held accountable for their fulfilling their responsibilities in the one call safety and damage prevention process. Violations will now be divided between the Attorney General's office and the state's General Fund.

Federal Intervention: The federal government has given states until 2013 to bring their underground utility safety and damage prevention laws up-to-date before they may intervene. This law brings South Carolina more in-line with federal government standards.

3. Tort Reform Legislation: H. 3375, the legislation clarifies the 2008 law that changed the statute of repose from 13 to 8 years. A building code violation cannot revert the statute of repose to 13 years from 8 years adopted three years ago. The legislation includes a cap on punitive damages modeled after Florida's cap, establishes an appeal bond cap, requires the attorney general to approve civil actions by circuit solicitors and requires disclosure of insurance policy limits for personal auto policies in accident cases. The legislation takes effect January 1, 2012 and applies to all actions that accrue on or after that date.

4. Unemployment Tax Relief: Gov. Haley signed into law enabling legislation to give employers some relief on the new and much higher unemployment taxes levied on employers since Jan. 30. The legislation, H. 3762, directs that the appropriations go toward state unemployment tax relief for businesses in tiers 2 through 20, which results in reductions up to 25% for 2011, makes state unemployment tax reductions retroactive to January 2011, states that seasonal employees may be ineligible for unemployment benefits which would result in a 3% reduction in state unemployment tax costs to businesses, companies that have a positive state unemployment tax balance will be in no class higher than class 12 for 2011 only, and reduction of benefits will be applied for the newly unemployed to 20 weeks from 26 weeks, resulting in an 8% reduction in overall state unemployment tax costs to businesses.

5. Immigration Legislation: S. 20, grants more power to police officers to check whether people are illegal immigrants. The legislation also made specific changes to how businesses must comply. The only option states currently have to verify someone's status is through e-verify; businesses will no longer be allowed to use a driver's license for verification. This change came about because of a recent federal lawsuit filed mandating all states use e-verify. The legislature also approved the length of time an employer violating the provisions of law would be posted on the agency website, changing it from one year to six months, adopted

an amendment that specifies a license revocation is not a tax revocation, provided for felony violations, the transportation of prisoners, and the promulgation of regulations.

6. Amendments to S.C. R. Civ. P. 26: S.C. R. Civ. P. 26 was amended in 2011 to provide rules for the discovery of electronically stored information. With the amendment, South Carolina's rules regarding electronic discovery are now substantially similar to the corresponding provisions in the Federal Rules of Civil Procedure. Rule 26 now provides that "[a] party need not provide discovery of electronically stored information from sources that the party identifies to the requesting party as not reasonably accessible because of undue burden or cost." S.C. R. Civ. P. 26(6)(A). If a motion to compel discovery is filed, the party from whom discovery is sought must show the undue burden or cost. In addition, the Court may limit the frequency or extent of discovery of electronically stored information if: (1) the discovery sought is unreasonably cumulative or duplicative; (2) the party seeking discovery has had ample opportunity to obtain the information sought; or (3) the burden or expense of the discovery outweighs its likely benefit. S.C. R. Civ. P. 26(6)(B).

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South Dakota

Case law:

1. In ***City of Rapid City v. Estes***, 2011 S.D. 75, ___ N.W.2d ___ (S.D. 2011), the South Dakota Supreme Court held that a municipality's acceptance of a surety, in lieu of a developer's completion of certain public improvements before acceptance of a final plat, did not serve to release the developer upon expiration of the surety.

Legislation:

1. **S.B. No. 94, Ch. 72**, amending **S.D.C.L. §11-10-7**, adopting the International Energy Conservation Code of 2009, published by the International Code Council, as the voluntary energy efficiency standard applying to the construction of new residential buildings in the state, and amending **S.D.C.L. §11-10-8**, a statute requiring disclosure of compliance with these energy efficiency standards under a Builder's Energy Disclosure Statement.

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Tennessee

Case Law:

1. In *Tri Am Construction, Inc., v. J & V Development, Inc.,* E2010-01952-COA-R9-CV (Tenn. Ct. App. Aug. 30, 2011), the Tennessee Court of Appeals held that the Trial Court did not err in liberally construing the revised mechanic's and materialmen's liens statutes to permit Tri Am to amend its complaint in order to cure procedural defects. The Court further found that the Trial Court did not err in holding that BB&T's rights would not be retroactively impaired by the liberal application of the revised mechanic's and materialmen's lien statutes.

2. In *Wise Constr., LLC v. Boyd*, E2009-01899-COA-R3CV, 2011 WL 864388 (Tenn. Ct. App. Mar. 14, 2011), appeal denied (July 14, 2011), the Tennessee Court of Appeals held that an individual who signed his own name in the signature block labeled "CONTRACTOR" on a construction contract signed the contract in a representative capacity on behalf of a limited liability company (LLC) contractor, and thus contractor and not individual was the party to the construction contract. The business name of contractor was "Wise Construction, LLC," and "Wise Construction" appeared on the contract in two places as the contractor. In his testimony, the owner indicated that he understood Wise Construction was a business name that the individual was using. He then stated that when he was sued by Wise Construction, LLC, he knew the individual was suing in the name of his business because he had made the progress payments to a business entity known as Wise Construction.

3. In *Bates v. Benedetti*, E2010-01379-COA-R3CV, 2011 WL 978195 (Tenn. Ct. App. Mar. 21, 2011), the Tennessee Court of Appeals held that an owner's failure to give contractor notice of dissatisfaction with contractor's work and an opportunity to cure the alleged construction defects before terminating the contract precluded the owner from maintaining an action against contractor based upon his failure to complete the construction project. Although required by common law to notify contractor of the alleged problems with its work and provide contractor with an opportunity to cure the defects, owner, upon discovering alleged defects with contractor's construction of a multi-story garage, advised contractor not to return to the job site and hired a third party to complete the project.

4. In *East Tennessee Grading, Inc. v. Bank of Am., N.A.*, 338 S.W.3d 506 (Tenn. Ct. App. 2010), appeal denied (Mar. 10, 2011), the Tennessee Court of Appeals held that an excavation contractor "abandoned" a construction project when it ceased work that was "leinable," despite remaining on the project. The Court held that the sixty-day (now ninety-day) period of cessation required by statute in order to establish "abandonment" ran concurrently with the ninety-day period in which contractor was required to record its lien so as to preserve priority over subsequent purchasers or encumbrancers. Tenn. Code Ann. § 66-11-112(a) provided, in pertinent part, that "[r]ecordation is required to be done no later than ninety (90) days *after the date the improvement is complete or is abandoned.*" Despite the statutory language "*after the date the improvement is complete or is abandoned,"* the Court determined that because Tenn. Code Ann. § 66-11-112(b) did not include the word "*after*" in defining what constituted abandonment, the abandonment was retroactively determined to be the day contractor ceased lienable work.

5. In *Kampert v. Valley Farmers Co-op.*, M200902360COAR10CV, 2010 WL 4117146 (Tenn. Ct. App. Oct. 19, 2010), appeal denied (Feb. 16, 2011), the Tennessee Court of Appeals addressed whether the proper venue for a case involving the breach of a construction contract is in the county named in the forum selection clause of the contract, or in the county where the realty is located upon which the construction took place. The Court held that the county named in the forum selection clause of a construction contract, not the county where the real property upon which the construction took place was located, was the proper venue, as it was a transitory action. The Court determined that the forum selection clause controlled the venue of the action because the underlying action was not fairly characterized as an action for injury to real property but a breach of contract action, which is a transitory action.

6. In *Hagan v. Phipps*, M201000002COAR3CV, 2010 WL 3852310 (Tenn. Ct. App. Sept. 28, 2010), the court held that genuine issue of material fact existed regarding whether a licensed contractor acted as the agent for the unlicensed contractor actually performing the work, precluding summary judgment regarding the owner's claims of breach of warranty,

negligence, violations of the Tennessee Consumer Protection Act (TCPA), and civil conspiracy against the contractor. The contractor denied supervising the contractor actually performing the work, and emphasized that it received no money in connection with the construction, and testified that it did not recall authorizing unlicensed contractor to use his license number. However, the contractor was the applicant on the building permit application, its license number appeared on the application, and though licensed contractor did not recall authorizing use of his license number, licensed contractor testified that he would not have had a problem with such an arrangement because the two contractors routinely handled projects jointly. Moreover, licensed contractor supplied the building inspector's office with an original copy of a workers' compensation affidavit of exemption, performed some grading work, and went to the lot at least once a week during construction.

Legislation:

1. Tenn. Code Ann. § 66-11-150. Residential Construction; Licensure Requirement. Tennessee's lien law was amended to prohibit an unlicensed contractor from placing a lien on residential real property. This law went into effect on July 1, 2010.

2. Tenn. Code Ann. § 66-34-104. Escrow of Retainage. The Tennessee Prompt Pay Act was amended to add a civil penalty that can be assessed against a contractor when contractor required to escrow retainage does not deposit the retained funds into a separate interest bearing escrow account as required by Tennessee law. This law went into effect on May 3, 2010.

3. Tenn. Code Ann. § 62-6-102. Definitions. Tennessee's Contractor's licensing law was amended to require certain masonry contractor's to hold a license even if acting as a subcontractor on a project where the total cost of the masonry portion of the construction project exceeds $100,000, materials and labor. This law went into effect on January 1, 2011.

4. Tenn. Code Ann. § 62-6-111. Licenses; Requirements; Transfer; Political Subdivisons. Tennessee law now requires any out of state licensed masonry contractor to take the licensing exam in Tennessee before contracting in the state. This law went into effect on January 1, 2011.

5. Tenn. Code Ann. § 62-6-118. Revocation or Suspension of License. Tennessee's licensing law added a new provision requiring that a contractor's license be revoked upon the notice of conviction for fraud under Tenn. Code Ann. § 39-14-154. This law went into effect on July 1, 2010.

6. Tenn. Code Ann. § 62-6-119. Notice of Requirements Given in Invitations to Bidders. Tennessee law now requires general contractors to list the geothermal heating and cooling subcontractor on bid documents where bid documents are required under this section, along with the geothermal contractor's Tennessee Department of Environment and Conservation License number, classification and expiration date. This law went into effect on March 24, 2011.

7. Tenn. Code Ann. § 62-6-307. Renewal and reinstatement of home inspector licenses. Tenn. Code Ann. § 62-6-307 relates to renewal and reinstatement of home inspector licenses. Tenn. Code Ann. § 62-6-307(a) was amended to remove the specific time limits for submitting an application for renewal and reinstatement.

8. Public Contracts, Tenn. Code Ann. § 12-4-101, *et seq.* There have been amendments to various government contracting statutes including, but not limited to, Tenn. Code Ann. §§ 12-4-109, 110, 112, 118, 119, 120 and 124. (Contributor's note: If your practice encompasses public contracting, it is important to remain current with the above statutes as there are some changes effective in 2011 and some in 2012. Some of the amendments are pursuant to legislation that has already been enacted, but the statutory amendments will not go into effect until April 2012.)

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Texas

Case law:

1. In *Sharyland Water Supply Corp., v. Alton*, NO. 09-0223, 2011 Tex. LEXIS 805, 55 Tex. Sup. J. 46 (Tex., October 21, 2011), the Texas Supreme Court held that the economic loss rule does not preclude recovery between contractual strangers in a case not involving a defective product. The Court stated unequivocally that the economic loss rule "cannot apply to parties without even remote contractual privity, merely because one of those parties had a construction contract with a third party, and when the contracting party causes a loss unrelated to its contract." The Court refused to answer whether purely economic losses can be recovered in negligence, but suggested that physical injury or property damage is not required to recover economic damages in tort.

The Supreme Court also considered a contractor's claims against a city and whether the city had waived governmental immunity. The Court found that the city had waived immunity, but that the contractor could not recover damages because the damages sought were money damages prohibited by the Tex. Loc Gov't Code. By its contract with the city, the contractor could recover only the "balance due and owed" or amounts owed for change orders or additional work. The Court also held that the contractor could not recover against the city, even though the city had filed a counterclaim, because the counterclaim was resolved on summary judgment and there were no pending claim for the contractor to offset.

2. In *Solar Applications Eng'g, Inc. v. T.A. Operating Corp.,* 327 S.W.3d 104 (Tex. 2010), the Texas Supreme Court held that without clear language indicating otherwise, a lien release provision should be interpreted as a covenant rather than a condition precedent. The provision at issue read, "[t]he final Application for Payment shall be accompanied … [by] complete and legally effective releases or waivers … of all Lien rights arising out of or Liens filed in connection with the Work." The Court stated that a condition precedent generally requires the use of conditional language such as "if," "provided that," "on condition that." If no conditional language is used and it is reasonable to do so, the provision should be treated as a covenant in order to prevent a forfeiture.

3. In *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.,* 341 S.W.3d 323 (Tex. 2011), a case involving the breach of a lease agreement, the Texas Supreme Court held that a disclaimer-of-representations was a standard merger clause and did not disclaim reliance so as to bar a claim for fraudulent inducement. The Court explained that there is a significant difference between making a statement of fact that no other representations were made and expressly disclaiming reliance, which requires the use of clear and unequivocal language.

The Court also found that the defendant breached the implied warranty of suitability despite contractual language modifying the implied warranty, and that the plaintiff did not waive it cause of action for breach of the warranty of suitability by ratification simply because it tried to remedy a problem before seeking rescission of its lease agreement with the defendant. The Court explained that policy requires a balance between attempting to remedy a premises defect while preserving the right to rescind an agreement when such attempts are unsuccessful.

Finally, the court held that by electing rescission as its remedy, the plaintiff was required to prove only the amount necessary to restore it to its original position—not that the defect caused the alleged damages.

4. In *Concept General Contracting, Inc. v. Asbestos Maintenance Servs., Inc.,* 346 S.W.3d 172 (Tex. App.—Amarillo 2011, pet. denied), the Amarillo Court of Appeals held that a subcontractor had properly asserted a claim for *quantum meruit* against a general contractor and that the general contractor's argument that only the owner of the benefitted property could be liable under a theory for *quantum meruit* was without merit. The court reasoned that the property owner was merely an incidental beneficiary of the subcontractor's services and that the general contractor—as the party for whom the subcontractor performed the work—was the proper party to assert the subcontractor's *quantum meruit* claim against.

5. In *Morrell Masonry Supply, Inc. v. Scott Griffin & Assoc*., No. 01-09-01147-CV, 2011 Tex. App. LEXIS 3827 (Tex. App.—Houston [1st Dist.] May 19, 2011, no pet.), the Houston Court of Appeals (First District) held that a supplier failed to prove that it was entitled to a lien because it could not show that the materials it supplied were actually used in the liened property. The court held that while delivery tickets and invoices indicating that materials were for a particular job site are some evidence to support a lien, such evidence is not conclusive in the face of contradicting evidence.

The court also affirmed an award of attorney's fees to the property owner under TEX. PROP. CODE § 53.156, even though only the supplier pled for attorney's fees under the Property Code and the property owner only pled for attorney's fees under the TEX. CIV. PRAC. & REM. CODE, under which the court expressly ruled the property owner was not entitled to recover.

6. In *Gartrell v. Wren,* No. 01-11-00586-CV, 2011 Tex. App. LEXIS 9650 (Tex. App.—Houston [1st Dist.] December 8, 2011), the Houston Court of Appeals, interpreting the 2009 amendments to the certificate of merit statute pertaining to design professionals (TEX. CIV. PRAC. & REM. CODE Chapter 150), held that it is not necessary to expressly state the applicable standard of care in a certificate of merit pertaining to a design professional, in contrast to the expert report requirements set forth in Chapter 74 pertaining to health care liability claims. *See also Elness Swenson Graham Architects, Inc. v. RLJ II-C Austin Air, LP*, No. 03-10-00805-CV, 2011 Tex. App. LEXIS 2011 (Tex. App.—Austin April 20, 2011, pet. denied)("By averring that the licensed or registered professional's conduct is 'negligent', the affiant is necessarily opining that the complained-of conduct did not meet the applicable standard of care.")

7. In *Hardy v. Matter*, 350 S.W.3d 329 (Tex. App.—San Antonio 2011, pet dism'd), the San Antonio Court of Appeals refused to adopt the Corpus Christi Court of Appeals' interpretation of the 2005 Certificate of Merit Statute, instead holding that 2005 statute does not require a certificate of merit affidavit to state on its face the qualifications of the affiant. TEX. CIV. PRAC. & REM CODE § 150.002(a) Act of May 18, 2005, 79th Leg. R.S. ch. 208 § 2, 2005 Tex. Gen. Laws 369, 370 (amended 2009)(current version at TEX. CIV. PRAC. & REM. CODE §

150.002(a),(b) (West 2011)) *See also Elness Swenson Graham Architects, Inc. v. RLJ II-C Austin Air, LP*, 2011 Tex. App. LEXIS 2011 (holding the same under the 2009 statute); *but see Landreth v. Las Brisas Council of Co-Owners, Inc.*, 285 S.W.3d 492, 500 (Tex. App.—Corpus Christi 2009, no pet.)(Holding that the certificate of merit affidavit does require a recitation of the affiant's qualifications under the 2005 statute.)

8. In *Durivage v. La Alhambra Condominium Ass'n*, No. 13-11-00324-CV, 2011 Tex. App. LEXIS 10030 (Tex. App.—Corpus Christi 2011, December 21, 2011, no pet. h.), the Corpus Christi Court of Appeals held that the 2009 certificate of merit statute requires the certificate of merit to set forth the factual basis for *each* theory of recovery. *See* TEX. CIV. PRAC. & REM. CODE § 150.001 *et seq*. Consequently, although the plaintiff's certificate of merit affidavit provided a sufficient factual basis to support plaintiff's negligence claim, it failed to state a factual basis for plaintiff's gross negligence and breach of contract claims and the lower court was required to dismiss those claims.

9. In *In re: Olshan Foundation Repair Co., LLC,* 328 S.W.3d 883 (Tex. 2010), the Texas Supreme Court held that an arbitration provision requiring arbitration "pursuant to the Texas General Arbitration Act," invoked the Texas Arbitration Act ("TAA") to the exclusion of the Federal Arbitration Act ("FAA"). *See* TEX. CIV. PRAC. & REM CODE § 171.001 *et seq*. Consequently, the arbitration provision was rendered unenforceable under § 171.002(a)(2), which requires a written agreement signed by each party and each party's attorney for certain transactions by individuals of not more than $50,000, because the agreement was not signed by each party's attorney.

Conversely, the Court held that an arbitration provision requiring arbitration "pursuant to the arbitration laws in your state…" did not preclude the FAA in favor of the TAA. Consequently, the FAA preempted section 171.002(a)(2) of the TAA and the arbitration provision was enforceable.

10. In *NAFTA Traders, Inc. v. Quinn,* 339 S.W.3d 84 (Tex. 2011), the Texas Supreme Court held that the Texas General Arbitration Act ("TAA") does render unenforceable a contractual agreement for judicial review of an arbitration award for reversible error and that the Federal Arbitration Act ("FAA") does not preempt the TAA so as to preclude such a review. *See* TEX. CIV. PRAC. & REM. CODE § 171.001 et seq. and 9 U.S.C. § 1 – 16. The parties in *NAFTA* expressly agreed that an arbitrator would not have the authority "to render a decision which contains a reversible error of state or federal law." The Texas Supreme Court analyzed the United States Supreme Court's holding in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, which held that the FAA's grounds for vacatur were exclusive and could not be altered by contract, but refused to apply the *Hall* Court's reasoning to the TAA. *See Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578, 128 S. Ct. 1396 (2008). The Texas Supreme Court stated, "the TAA contains no policy against parties' agreeing to limit the authority of an arbitrator to that of a judge, but rather, an express provision requiring vacatur when 'arbitrators have exceeded their powers.'" The key point in *NAFTA* is that the parties agreed to expanded review. The Court expressly noted that restricted review is the only course permitted by the FAA, and the default under the TAA without an agreement otherwise.

12. In *Gilbane Building Co. v. Admiral Ins. Co.*, No. 10-20817, 2011 U.S. App. LEXIS 24867 (5th Cir., December 12, 2011), the Fifth Circuit, interpreting an additional insured provision, held that a general contractor qualified as an additional insured under its subcontractor's policy where the policy stated that a party is an additional insured if coverage "is required by written contract or written agreement that is an 'insured contract.'" The insurer

argued that there was no "insured contract" because the indemnity provision in the contract at issue was unenforceable under the express negligence doctrine. The court held, however, that whether the general contractor qualified as an additional insured turned not on whether the indemnity provision was enforceable, but on whether the subcontractor agreed to assume the tort liability of the general contractor. Because the subcontractor agreed to assume tort liability and provide additional insurance coverage, the contract was an "insured contract" and the general contractor qualified as an additional insured.

Nevertheless, the court, following the "eight-corners rule" held that the policy imposed no duty to defend because the plaintiff failed to explicitly allege the liability of an insured party in his pleadings. However, the court did find that the general contractor was entitled to indemnity because Texas law allows an examination of facts outside those alleged in the petition to determine a duty to indemnify.

13. In *Maryland Casualty Co. v. Acceptance Indemnity Ins. Co.,* 639 F.3d 701 (5th Cir. 2011), the Fifth Circuit distinguished the present case from the Texas Supreme Court case *Mid-Continent Ins. Co. v. Liberty Mutual Ins. Co*., 236 S.W.3d 765 (Tex. 2007), holding that *Mid-Continent* does not bar Maryland's recovery for settlement costs where Acceptance "absolutely refused" to defend and indemnify, Maryland's policy created a right of contractual subrogation, and the settlement preserved Maryland's right to seek reimbursement from Acceptance. Maryland and Acceptance were both insurers for a contractor during successive policy periods. Acceptance refused to defend and indemnify and Maryland eventually settled the lawsuit. Maryland then sued Acceptance for contribution and subrogation. The lower court dismissed Maryland's claim for contribution, but allowed the subrogation claim to proceed to a jury trial. The jury found that Acceptance was liable to pay a pro rata share of the settlement. The Fifth Circuit also considered when damage occurs for the purpose of interpreting the "ongoing damages" exclusion and held that actual physical damage during the policy period was sufficient to trigger coverage regardless of whether alleged negligence that later resulted in the actual property damage occurred outside the policy period.

14. In *Weingarten Realty Management Co. v. Liberty Mutual Fire Ins. Co*., 343 S.W.3d 859 (Tex. App.—Houston [14th Dist.] 2011, pet. denied), the Houston Court of Appeals (Fourteenth District) recognized a "very narrow exception" the eight-corners rule where "an insurer established by extrinsic evidence that a party seeking a defense is a stranger to the policy and could not be entitled to a defense under any set of facts." The extrinsic evidence considered under this exception must go strictly to the issue of coverage and cannot any allegation material to the merits of a claim.

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15. In *Allen Keller Company v. Foreman, 343 S.W.3d 420 (Tex. 2011),*the Texas Supreme Court held that a contractor had no duty to warn prospective motorists of the danger posed by a construction project completed in strict compliance with specifications. Gillespie County contracted with Keller to work on a number of road construction projects. The contract required strict compliance with project specifications. The designs for one of the projects required Keller to excavate an embankment, which widened a gap in the guard railing between the embankment and an adjacent bridge. However, the designs did not provide for extending the guardrail. Following completion, a motorist drowned after passing through the gap in the railing and plunging into the adjacent river during a storm. Keller was sued for wrongful death under a premises defect theory of liability, and the trial court granted summary judgment in favor

of Keller. The court of appeals reversed, holding that Keller was not entitled to summary judgment because Keller's motion failed to address whether it created a dangerous condition, and the decedent motorist's plight was foreseeable. The Texas Supreme Court addressed only whether Keller owed a duty of care to prospective motorists under the circumstances, specifically considering the duties to rectify and to warn. Because Keller's contract with the county required absolute compliance with the specifications, Keller had no duty to alter the gap in the guardrail. Nor did Keller have a duty to warn the public or the county of the gap. Keller did not own the property, he was not in a position to erect any devices to warn the public of the gap, and he had vacated the construction site more than four months before the accident. Moreover, under Texas law contractors do not have a duty to warn an owner of a danger on the owner's property.

16. In *Black + Vernooy Architects v. Smith, 346 S.W.3d 877 (Tex. App.—Austin 2011),* the Austin Court of Appeals withdrew its earlier opinion affirming a judgment holding an architecture firm liable for a percentage of personal injury damages following the collapse of a balcony designed by the firm. The AIA form agreement required the firm to visit, familiarize, determine, inform, and endeavor to guard the homeowner from construction defects. However, the contract provisions also provided that the firm would not be liable for construction not conforming to the firm's designs. Notwithstanding multiple site visits by a firm intern and a firm architect's review of construction photographs, several material defects went unnoticed in the construction of the balcony. After completion of construction, two guests of the homeowners were severely injured when the balcony collapsed. The jury found the firm liable for a percentage of the damages based on the obviousness of the defects in the photographs reviewed by the firm architect. On appeal, the firm contended that it owed no duty to the injured guests. The court initially affirmed the jury's finding of a duty, holding that the firm could be held liable for a breach of its contractual duty as a "provider of information." The court extended this duty to third-party guests, but limited its holding to the facts of the case. Rehearing *en banc*, the court held that the firm had no contractual or common-law duty of care to the third-party houseguests. The contract contemplated no third-party beneficiaries and expressly denied any intent to confer any benefit for third parties. In declining to impose a new common law duty on the architects, the court noted that the firm had no actual control over the construction of the balcony to warrant a duty of care. Moreover, the firm expressly denied any role as guarantor under the contract, which would have been the practical effect of the duty sought.

17. In *Wortham Bros. Inc. v. Haffner, 347 S.W.3d 356 (Tex. App.—Eastland 2011),* the Eastland Court of Appeals considered whether property owners' testimony regarding repairs in support of damages constituted competent. Homeowners contracted with Wortham Bros. to replace roofs on two properties. The homeowners were dissatisfied with the work performed on the first roof and withheld payment for the second, ultimately hiring a separate roofer to replace the roofs on both properties. The homeowner sued Wortham Bros. under the Texas Deceptive Trade Practices Act and predicated their damage claims on the recovery of their repair and replacement costs. The only testimony offered in support of damages was the homeowners' own testimony about the condition of their property and the repair and replacement costs incurred. The trial court found that the roofer knowingly engaged in false, misleading, or deceptive trade practices, trebling the court's actual damages calculation. Wortham Bros. appealed, arguing there was insufficient evidence to support the damages award because it was not supported by expert testimony. The appellate court agreed, holding that expert testimony was required to establish the necessity and reasonableness of subsequent residential roof replacements. Under Texas law, parties seeking to recover damages predicated on repair cost must present competent evidence justifying that the repair costs are reasonable and fair. The court determined that the necessity and reasonable cost of remedial roof replacements

performed immediately after allegedly defective work are matters of "a specialized and technical nature," which accordingly require expert testimony as competent evidence. Although the court acknowledged that, under the Texas "Property Owners Rule", property owners are generally qualified to testify as to the value of their property, it concluded that the trial court erred in extending this presumption to the costs of repair when repairs are of a technical or specialized nature.

18. In *Hernandez v. Hammond Homes, Ltd., 345 S.W.3d 150 (Tex. App.—Dallas 2011)*, the Dallas Court of Appeals examined the limitations of common-law duties owed by landowners to employees of independent contractors. Hernandez was injured after falling from a ladder while working as a roofer for an independent roofing contractor as part of a Hammond Homes construction project. Hernandez sued Hammond Homes for premises liability and negligence, and the trial court granted summary judgment in favor of Hammond Homes on three grounds: (1) the home building company owed no duty to employees of an independent contractor such as Hernandez, (2) Hammond Homes did not exercise any control over the roofing activities related to Hernandez's injury, and (3) Hammond Homes was statutorily relieved of liability by the Texas Civil Practice & Remedies Code. Under Texas law an employer of an independent contractor generally does not owe a duty to ensure the safe performance of the contractor's work unless the employer retains a right to control the manner in which the work is performed. Parties can prove a right to control by evidence of a contractual agreement or by evidence that the employer actually exercised control over the manner in which the independent contractor performed its work. The contract between Hammond Homes and the roofing contractor specified no right to control, and the court further concluded that Hammond Homes did not exercise control over the roofer's use of fall protection. Although agents of Hammond Homes testified to knowing that roofing had an inherent risk of falling and that Hammond Homes did not require its contractors to use fall-protection equipment, the court determined that the possibility of control is not evidence of a right to control actually retained or exercised. The court likewise concluded that Hammond Homes owed Hernandez no duty under premises liability, as landowners are only liable to the employees of independent contractors for claims arising from concealed, pre-existing defects, and a danger of falling and the lack of fall protection was an open and obvious defect, not a concealed one. The court affirmed the trial court's grant of summary judgment on common-law grounds, and therefore did not address whether the trial court erred in granting summary judgment on statutory grounds.

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19. In *Ewing Const. Co., Inc. v. Amerisure Ins. Co.*, C-10-256, 2011 WL 1627047 (S.D. Tex. Apr. 28, 2011), the United States District Court for the Southern District of Texas issued the first decision to apply recent Supreme Court of Texas holdings in *Gilbert Texas Const., L.P. v. Underwriters at Lloyd's London,* 327 S.W.3d 118, 124 (Tex.2010). The case facts involved a construction company suing its insurer to obtain indemnity under its commercial general liability coverage for defense of claims arising from defective construction of tennis courts. The insurer denied coverage, and the Court dismissed the case, granting the insurer's motion for summary judgment on the grounds that the policy excluded claims arising from the insured's contractual obligations. *Ewing* is important because it carries forward the proposition that where the only alleged damage is to the property that was the subject matter of the insured contractor's contract, the policy's contractual liability exclusion applies even where there are negligence claims in addition to breach of contract claims. The court held that it could only review the pleadings and the policy to determine whether the claim was excluded, and closely examined the negligence claims against the contractor to determine that they were actually

seeking damages for breach of contract. To be clear, the Court did not hold that *all* negligence claims against an insured contractor made in conjunction with a breach of contract claim will be defeated by the standard commercial general liability policy exclusion. Nevertheless, practitioners should be wary when drafting negligence pleadings that their cause of action does not sound in contract; otherwise, they may limit the resources with which a defendant can pay their damages.

20. In *Gen. Agents Ins. Co. of Am., Inc. v. El Naggar*, 340 S.W.3d 552 (Tex. App.—Hous. [14th Dist.] 2011, no pet.), the Houston Court of Appeals for the Fourteenth District held that a policy buy-back agreement between a contractor and an insurer was not void as against public policy. El Naggar contracted with Traxel Construction, Inc. for the construction of a building and concrete slab. General Agents Insurance Company of America issued a commercial general liability policy to Traxel. Problems arose, and El Naggar filed suit against Traxel. After an initial mistrial, General Agents and Traxel entered into a buy-back agreement wherein General Agents repurchased Traxel's policy and Traxel released General Agents from any and all claims arising out of the policy. A second trial resulted in judgment against Traxel. El Naggar then brought suit against General Agents, and sought a declaratory judgment that the agreement between General Agents and Traxel was void as against public policy. The trial court granted El Naggar's motion for summary judgment, declared the agreement void, and the policy unaffected. On appeal, the Court distinguished the case of *Ranger Ins. Co. v. Ward*, 107 S.W.3d 820, 823 (Tex. App.—Texarkana 2003, pet. denied), that held a similar agreement *was* against public policy on the grounds that the buy-back agreement in that case involved a statutorily required insurance policy and a release that functioned retroactively. Because the release in this case was prospective, and there were no common law or statutory requirements to maintain the insurance, the Court held there were no public policy grounds to support El Naggar's claim.

21. In *Gulf Liquids New River Project, LLC v. Gulsby Eng'g, Inc.*, 01-08-00311-CV, 2011 WL 662672 (Tex. App.—Hous. [1st Dist.] Feb. 17, 2011, no pet.), the Houston Court of Appeals for the First District waded through a lengthy and complicated series of facts to reach several noteworthy conclusions. The case involved resolving disputes between Gulf Liquids (the project owner), Gulsby Engineering (the contractor) and National American Insurance Company (the surety). Importantly, the Court held that Gulf could not rely on two contingent payment clauses that required evidence of payment for materials as a condition precedent to any obligation of Gulf Liquid's to pay Gulsby, because the mandatory clauses conflicted with an additional permissive clause that stated Gulf Liquids, "may at its option withhold payment." Additionally of note, the Court held that a termination for convenience clause in the contract between Gulf Liquids and Gulsby enabled Gulf to terminate the contract without committing breach, and that damages for the termination were limited to those specified in the termination for convenience clause. The Court further held a merger clause in the agreement between Gulf Liquids and Gulsby precluded any reliance as a requisite element of Gulsby's fraudulent inducement claim, upholding the lower court's judgment notwithstanding the verdict against a jury award of over $100 million. Finally, the Court held NAIC had no independent tort claim against Gulf Liquids for amounts improperly paid on its bond, and could only look to its principal, Gulsby. NAICO's claims of fraud and misrepresentation could only operate as defenses to a bond claim.

22. In *Howe-Baker Engineers, Ltd. v. Enter. Products Operating, LLC*, 01-09-01087-CV, 2011 WL 1660715 (Tex. App.—Hous. [1st Dist.] Apr. 29, 2011, no pet.) (mem. op.), the Houston Court of Appeals for the First District grappled with yet another dispute involving Chapter 150 of the Texas Civil Practice and Remedies Code, which, in its present form, requires

a plaintiff to provide an affidavit called a certificate of merit with the first filed petition for any claim arising out of the provision of professional services by a licensed or registered professional. One issue in the case is noteworthy for adding to the jurisprudence on the issue. The plaintiff, Enterprise Products Operating, filed the certificate as required when bringing its claim against Howe-Baker Engineers. In an amended petition, the plaintiff added allegations against CB&I as a vicariously liable additional defendant. The defendants moved for dismissal on the grounds that Enterprise failed to file a certificate as to CB&I when it amended its petition. Upholding the lower court's denial, the Court held that Chapter 150, "[does] not require the plaintiff's supporting affidavit to set forth a negligent act, error, or omission attributed to a defendant whose alleged liability for a claim covered by the statute is entirely vicarious of the alleged liability of another defendant as to which the affidavit did satisfy the statue."

23. In *ICI Const., Inc. v. Orangefield Indep. Sch. Dist.*, 339 S.W.3d 235 (Tex. App.—Beaumont 2011, no pet.), the Beaumont Court of Appeals affirmed a judgment that there was no contract stating the terms of an agreement between a school district and a general contractor as necessary to waive the school district's immunity from suit. ICI Construction, Inc. had performed repairs for the Orangefield Independent School District to repair damages resulting from Hurricane Rita. ICI brought suit for amounts it claimed were still owed. ICI claimed OISD waived its governmental immunity by entering into a written contract pursuant to Texas Local Government Code Section 271.152. To establish a waiver, Section 271.152 requires a written contract "stating the essential terms of the agreement" for the provision of goods or services to a local government entity. When OISD contended there was no written contract sufficient to establish such a waiver, ICI produced sixteen separate documents it argued constituted a written agreement between the parties. The Court noted none of the documents ICI produced revealed the basis of OISD's agreement to pay for the repairs, such as whether OISD was to pay for the repairs on a time and materials basis, a cost-plus basis, or some other basis. Further, the documents did not define the properties OISD agreed to have repaired, or whether OISD agreed to pay the entire invoiced amount. ICI had no recourse against OISD as a result.

24. In *LTTS Charter School, Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73 (Tex. 2011), the Supreme Court of Texas held that an open-enrollment charter school is a governmental unit under the Section 51.014(a) of the Texas Civil Practice and Remedies Code, giving the court of appeals jurisdiction to hear school's interlocutory appeal from an order denying its plea to the jurisdiction. LTTS had retained C2 Construction to build facilities at a leased site. C2 filed a breach of contract claim, and LTTS filed a plea to the jurisdiction claiming immunity. When LTTS' plea was denied, it filed an interlocutory appeal that the court of appeals dismissed, agreeing with C2 that LTTS was not a "governmental unit" as required by the Texas Tort Claims Act for LTTS to enjoy immunity from suit. The Supreme Court held the court of appeals improperly dismissed the interlocutory appeal. It looked to the Tort Claims Act's definition of governmental unit as inclusive of, "'any other institution, agency or organ of government' derived from state law," and further noted various provisions of the Texas Education Code referring to open-enrollment charter schools as part of the public school system created in accordance with the laws of the state. The Supreme Court reversed the court of appeals' judgment dismissing the appeal, and remanded the case to resolve the issue of whether LTTS was, in fact, immune. There, the Dallas Court of Appeals held in *LTTS Charter Sch., Inc. v. C2 Constr., Inc.*, 05-07-01469-CV, 2011 WL 5119438 (Tex. App.—Dallas Oct. 28, 2011, no pet.) that LTTS was indeed immune from suit, relying on the same reasoning the Supreme Court applied in determining whether LTTS was a "governmental unit." The Court additionally held that, because there was no written contract, let alone one that memorialized the essential terms of the agreement, LTTS did not waive immunity under the Local Government Code Section 251.152. The Court did

deny LTTS' plea to the jurisdiction on a Section 1983 claim and the remaining claims of C2 construction that would have offset any recovery by LTTS that were defensive of LTTS' claims.

25. In *Nova Cas. Co. v. Turner Const. Co.*, 335 S.W.3d 698 (Tex. App.—Hous. [14th Dist.] 2011, no pet.), the Houston Court of Appeals for the Fourteenth District held that a general contractor was not required to terminate its subcontractor in order to trigger the surety's performance obligations. The City of Houston hired Turner Construction Company to build a cargo facility at the city's intercontinental airport. Turner subcontracted with Box or Container Automation, Inc. to install a baggage handling system. The subcontract required BOCA to reimburse and indemnify Turner against any liability for delay. Further, any failure by BOCA to satisfy any of its contractual obligations constituted a default. BOCA obtained a required performance bond from Nova Casualty Company. The bond incorporated the terms of the subcontract between Turner and BOCA. Turner made initial payments to BOCA, however, as BOCA continued to fail to meet its performance deadlines, eventually abandoning the project, Turner declared BOCA in default of the subcontract. Per the terms of the subcontract, Turner elected to supplement the labor and materials needed to complete BOCA's scope of work. Five weeks passed before Turner notified Nova that it considered BOCA to be in default. After a lengthy investigation, Nova notified Turner that it could not elect its remedies under the bond until BOCA was terminated from the project. More time passed, and after determining that Turner's claim was more than double the penal sum of the performance bond, Nova notified Turner that a condition precedent to any claim on the bond was a declaration that BOCA was in default, which Nova claimed was not timely done. Tuner sued Nova and BOCA, obtaining an interlocutory default judgment against BOCA, and a summary judgment against Nova. On appeal, the Court looked at the subcontract and the bond, noting that neither required BOCA's termination. The Court further determined, based on stipulations by the parties, that Turner had notified BOCA and Nova of the default. In addition, the Court held Nova violated the terms of the bond by conducting a lengthy investigation of the claim instead of promptly remedying the default. Finally, the Court upheld Turner's award of prejudgment interest on its attorney's fees incurred prior to the trial court's entry of judgment.

26. In *Pakal Enterprises, Inc. v. Lesak Enterprises LLC*, 01-09-01038-CV, 2011 WL 1598778 (Tex. App.—Hous. [1st Dist.] Apr. 28, 2011, pet. filed), the Houston Court of Appeals for the First District considered whether a petition improperly naming the defendant was the initial petition for the purposes of Chapter 150 of the Texas Civil Practices and Remedies Code, which requires plaintiffs to file a certificate of merit with the first filed complaint for claims of negligence against a licensed or registered professional. The Court applied a previous iteration of the statute, which has since been amended to apply to any claims arising out of the provision of professional services by a licensed or registered professional. The plaintiffs, René Dominquez and her general contractor, Pakal Enterprises, brought a negligence claim against a professional land surveyor, Toby Couchman, and his employer, Lesak Enterprises. The plaintiffs did not file a certificate with their initial petition, but instead, after learning they improperly named Lesak as "Pro-Surv, Inc." in their original petition, they amended their petition and concurrently filed a certificate at that time. The Court granted Lesak and Couchman's motion to dismiss, and Plaintiffs appealed the dismissal of the case against Lesak. Pakal argued that it did not file suit against Lesak until it filed its amended petition, properly naming the defendant. The Court held that the original petition was a suit against a professional land surveyor, Couchman, and his employer. The Court noted that Pro-Surv was the name under which Lesak was doing business, and under Texas Rule of Civil Procedure 28, was a name under which Lesak could be sued. Because a certificate was not filed with the original petition, dismissal was proper. The Court also addressed an argument by Pakal that the statute permits an extension of time to file a certificate for "good cause." The Court did not rule on whether the

statue provides for such an extension, instead upholding the dismissal on procedural grounds. Nonetheless, the Court observed that in cases where such an extension has been granted, the delinquent plaintiffs were unaware they were suing licensed or registered professionals.

27. In *S & P Consulting Engineers, PLLC v. Baker*, 334 S.W.3d 390 (Tex. App.—Austin 2011, no pet.), the Austin Court of Appeals overruled a previous decision that the 2005 amended version of Texas Civil Practice and Remedies Code Section 150.002 only applied to claims of negligence against licensed and registered professionals. The present case involved claims of deceptive trade practices and fraud against S & P Consulting Engineers. S&P moved for a dismissal on the grounds that the Plaintiff had failed to file a certificate of merit. The Plaintiff countered that the 2005 amended statute only required a certificate of merit to be filed with claims of negligence. The Court undertook a long and deliberate analysis of Section 150.002. As amended, that statute required the certificate to "set forth specifically at least one negligent act, error, or omission claimed to exist and the factual basis for such claim." The Court overruled its holding in a previous case that the adjective, "negative" modified each verb listed afterwards, and instead looked at the plain language of the entire statute, the history of the statute, and the intent of the drafter of the statute's 2009 amendments to determine that it applied to claims arising out of the provision of professional services. The Court took it's discussion a step further, noting its disagreement with specific decisions by other courts throughout the state. The Court concluded that the Plaintiff was required to file a certificate of merit with its first filed petition against S & P, as its allegations of misrepresentation and fraud arose from the provision of professional services. In 2009, Section 150.002 was again amended, and now explicitly states that a certificate is required in any action for damages arising out of the provision of professional services of a licensed or registered professional.

28. In *Sabine Syngas, Ltd. v. Port of Port Arthur Nav. Dist. of Jefferson County, Tex.*, 09-09-00331-CV, 2011 WL 192756 (Tex. App.—Beaumont Jan. 13, 2011, no pet.), the Beaumont Court of Appeals held a non-signatory defendant could compel a plaintiff to arbitrate when the plaintiff's claims arose out of a contract containing an arbitration provision. The Port of Port Arthur Navigation District of Jefferson County entered into a development agreement with Sabine Syngas to develop, construct and operate a gasification and electric generation facility. That agreement contained a valid arbitration clause. The Port sued Sabine, alleging it breached the agreement, and Sabine counterclaimed, alleging the Port breached the development agreement by entering into a subsequent agreement with another energy company. Additionally, Sabine added third-party claims against the power company and additional parties it alleged tortuously interfered with the development agreement. The Port and the added third-party defendants successfully moved to arbitrate based on the development agreement between the Port and Sabine. The arbitrator held in the Port's favor and in full settlement of all claims. The third-party defendants thereafter filed a joint motion for entry of judgment, asking that Sabine take nothing on its third-party claims. Sabine opposed, alleging those claims were not arbitrated. The trial court rejected Sabine's argument, Sabine appealed. On appeal, Sabine argued the trial court erred in compelling arbitration with the third-party defendants because those claims were outside the scope of the development agreement. The Court examined equitable estoppel and the direct benefits doctrine to hold that Sabine could not sue for breach of a contract resulting form tortious interference and avoid its own agreement to arbitrate in that same contract.

29. In *Sanders v. Wood*, 348 S.W.3d 254 (Tex. App.—Texarkana 2011, no pet.), the Texarkana Court of Appeals split form the Austin Court of Appeals' *S & P* decision, (discussed above), holding that the pre-2009 certificate of merit statute found in Texas Civil Practice & Remedies Code Section 150.002 only required a certificate for negligence claims against

licensed and registered professionals. The instant case involved a counter-claim by a client of the plaintiff, a professional engineer, for breach of contract. The engineer moved to dismiss the counter-claim on the ground that the client did not file a certificate of merit under the 2007 amended statute. The trial court granted in part and denied in part the motion to dismiss, and limited the client's counterclaim to an offset of any award to the engineer. The Court commented that it found the Austin Court of Appeals' reasoning unpersuasive, that the *S & P* court relied on the legislative history of future amendments to the statue, and that it too quickly disregarded rules of grammar and construction. Ignoring the claims as phrased by the parties, the Court examined the pleadings of the parties and the damages sought, holding they indicated the suit to be for a breach of contract, meaning no certificate was required. The Court reversed the trial court's limitation on the counterclaim and remanded for further proceedings.

30. In *TDIndustries, Inc. v. Rivera*, 339 S.W.3d 749, 753 (Tex. App.--Hous. [1st Dist.] 2011, no pet.), the Houston Court of Appeals for the First District upheld a lower court decision that the plaintiff, Rivera's, claims were not governed by Chapter 150 of the Texas Civil Practice and Remedies Code, which would have required Rivera to file a certificate of merit with its first filed petition if its claims arose form the provision of professional services by a licensed professional. TDI argued that Rivera's claims as pled in its original petition, as opposed to subsequent amendments, fell within the ambit of the statute. Because Rivera did not file a certificate, TDI argued the case should have been dismissed. The Court observed that a determination of whether the statue applies requires the Court look to the parties' pleadings. However, despite the statutory requirement that the certificate be filed with the original petition, the Court held it was required by precedent to examine the live pleadings in making its determination. Based on the live pleadings, the Court determined Rivera's claims did not arise from the provision of professional services by TDI. Whether plaintiffs may look to *TDI* and artfully amend their pleadings in an effort to evade their own failure to provide a certificate of merit with their original petition remains to be seen.

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Legislation:

1. **HB 1456 82(R) – Lien Waivers**: HB 1456 creates statutorily required forms for the waiver or release of a lien or payment bond claim for monthly progress payments and final payments. Only conditional and unconditional release forms are allowed for non-residential projects. When payments have not been received, only conditional release forms are allowed, and are enforceable only with proof of payment.

HB 1456 applies to lien claims arising from a contract that was entered into on or before January 1, 2012 and amends Tex. Prop. Code §§ 52.021(d), 53.085(c) and adds Subchapter (L) §§ 53.281-287.

2. **HB 2093 82(R) – Indemnity:** HB 2093 renders unenforceable an indemnity provision in a construction contract that requires the indemnitor to indemnify the indemnitee against the indemnitee's own negligence or the negligence of a third party under the control of the indemnitee, except for claims of bodily injury or death to an employee of the indemnitor or its subcontractor. Likewise, a contractual provision that requires an additional insured endorsement is unenforceable to the extent it requires coverage which is prohibited as described above. This provision cannot be waived by contract.

HB 2093 also requires that all consolidated insurance program (CIP) policies include completed operations coverage for three years.

HB 2093 applies where the original contract is signed and the construction project begins on or after January 1, 2012 and adds Chapter 151 to the Texas Insurance Code.

3. **HB 1390 82(R) – Retainage:** To be entitled to perfect mechanics lien rights for retainage, first and second tier subcontractors and suppliers must notify owners if there is a retainage clause in their subcontracts and purchase orders. HB 1390 82(R) amends the Texas Property Code so that the retainage notice letter may be sent within 30 days after either the claimant's agreement is completed or the original contract is terminated or abandoned, rather than at the beginning of the project. HB 1390 also amends Tex. Prop. Code § 53.057 to require the owner to send notice to claimants in order to trigger the deadline to file a lien affidavit for retainage earlier than the statutory deadline to file a lien for progress payments.

This amendment applies to lien claims arising from an original contract that was entered into on or before September 1, 2011. Tex. Prop. Code §§ 53.053(e), 53.057, 53.107, 53.105(a), 53.106(a) and (d), 53.107(b) and (d), 53.109, 53.160(b) are affected by this amendment.

4. **SB 539 82(R) – Attorney's Fees**: SB 539 amends the Texas Property Code so that in any proceeding to foreclose a lien or enforce a bond claim or to declare that a lien or bond claim is invalid or unenforceable, a court *shall* award costs and attorney's fees except in cases involving residential construction. SB 539 applies to proceedings commenced after September 1, 2011 and amends Tex. Prop. Code § 53.156.

5. **H.B. 628 82(R) and SB 1048 82 (R) - Procurement Statutes**: H.B. 628 consolidates government procurement statutes previously codified in the Education Code, the Local Government Code and the Government Code into Chapter 2267 of the Government Code. HB 628 also places restrictions on the use of funds recovered in construction defect cases. SB 1048 82 (R) also pertains to Tex. Gov't Code § 2267 and also amends § 2268 to set forth guidelines for the implementation and financing of public-private projects. HB 628 applies to contracts or construction projects for which requests for bids were first advertised or requested before September 1, 2011. SB 1048 takes effect September 1, 2011.

6. **Tex. Civ. Prac. & Rem. Code § 33.004 – Responsible Third Parties:** HB 274 82(R) § 5 repealed the subsection (e) of TEX. CIV. PRAC. & REM CODE § 33.004, which allowed a claimant to join a person named as a responsible third party to a lawsuit even if limitations had expired, and added a new subsection (d) stating that a defendant may not designate a responsible third party after limitations has expired with respect to the third party if the defendant fails to timely disclose that the third party may be designated as a responsible third party. HB 274 applies to actions commenced on or after September 1, 2011.

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7. **TEX. INS. CODE 1811.001 et seq. (S.B. 425, Certificates of Insurance).** Chapter 1811 is added to the Texas Insurance Code regulating certificates of insurance and promulgating forms for such certificates. It prohibits an insurance agent form issuing a certificate that alters, amends or extends the policy coverage (for example, by naming an additional insured on a certificate but not on the policy). A certificate issued in conformance with this chapter constitutes a confirmation that the referenced policy has been issued. But, no

private cause of action is given for issuing a certificate in violation of this chapter, instead there are regulatory penalties.

8. **TEX. GOVT. CODE Chapters 2267 and 2268 (S.B. 1048, Public/Private Partnerships).** Authorizes and creates a structure for public/private partnerships for infrastructure and government construction projects. Also creates a Partnership Advisory Commission to advise governmental entities regarding public/private partnerships and provides a framework for the operation of the commission. Addresses both solicited and unsolicited proposals from private entities.

9. **TEX. LOCAL GOVT. CODE § 271.153(a) (H.B. 345, Interest Accrued Against Government).** Clarification that plaintiffs can recover interest against a local governmental entity in a breach of contract action.

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10. **H.B. 346, Attorney's Fees for Liens.** House Bill 346 amends Texas Property Code Section 53.156 to make the award of attorney's fees in a proceeding to foreclose a lien or enforce a claim against a bond mandatory, where they were previously permissive. The bill accomplishes this by changing the language that a court "may" award fees to stating that the court "shall" award fees.

11. **H.B. 628, Alternative Delivery Systems**. This bill consolidates at least five separate laws relating to alternative delivery systems for construction projects by most governmental entities. Procurement methods under the new Chapter 2267 of the Texas Government Code include competitive sealed proposals, construction manager-agent, design build, and job order contracts. The bill prohibits reverse auctions for a public works contract for which a performance or payment bond is required, and mandates that a contract with an original price of $1 million or more may not be increased by more than 25 percent. Further, public bodies can approve certain projects up to $75 thousand without taking formal bids. Finally, the bid reforms procedural requirements for school construction defect cases, requiring notice to be sent to the Commissioner of Education, allowing the Commissioner to intervene, and requiring that any state recovered funds be used for the repairs of the project or returned to the state, as opposed to used as a funding source for operational costs.

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Utah

Case law:

1. In *Meadow Valley Contractors, Inc. v. Utah Dep't of Transportation*, the Utah Supreme Court held the contractual provisions requiring written notification of a change order claim will be strictly enforced, even if the affected party has actual notice of the alleged changes. The Court determined that a contractor was not entitled to recover additional compensation after the owner directed it to alter its means and methods because the contractor failed to provide the owner the contractually required notice that it contended the change constituted a change to the contract. The Court held that this failure amounted to a waiver of its claim, even though the record was clear that the owner had actually knowledge that the contractor believed the direction to be a change that would cost additional amounts.

2. In *Olsen v. Chase*, the Utah Court of Appeals created ambiguity regarding the future enforcement of mechanic's lien subordination agreements. The case at bar dealt with a subordination agreement that was entered prior to the recent statute (enacted in 2007). The Court's language suggests that it may consider subordination agreements under the current statute unenforceable. Contractors should treat Utah law on enforceability of mechanic's lien subordination agreements as unsettled. Until a court directly address this question, it remains unclear whether Utah Code section 38-1-39 renders subordination agreements enforceable or merely allows lien holders to waive their rights in return for final payment of their claims

Legislation:

1. **H.B. 260, Priority of Mechanic's Liens.** This bill gives lenders super-priority on non-governmental construction projects and provides a mechanism to tie information in the Utah State Construction Registry to the real property record itself. The bill provides that the lender's rights take priority over contractors' mechanic's lien right if the contractor accepts payment and the contractor withdraws its pre-lien from the SCR. The pre-lien must contain property tax-id numbers and building permit numbers. The lender is now required to file a Notice of Construction Loan with the SCR. If the contractor removes its pre-lien after payment from the lender, the contractor is required to re-record its preliminary notice within 20 days after the lender records it notice. The lender now must file a Notice of Default with the SCR if it believes that the owner is in default of its financing agreement with the Owner.

2. **H.B. 115, Pre-Construction Liens.** The bill creates a mechanic's lien right for "pre-construction liens that provides that contractors who provide pre-construction services are entitled to a mechanic's lien that has priority over the start of visible construction on the site, if certain strict notice requirements are complied with.

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Virginia

Case law:

1. *In Royal Indemnity Co. v. Tyco Fire Prods., LP, 281 Va. 157 (2011)*, the Virginia Supreme Court addressed whether sprinkler heads installed in a construction project constitute "equipment" or ordinary building materials for purposes of Virginia's five-year statute of repose for construction projects. The case involved a suit against the manufacturer and installer of sprinkler heads that allegedly failed to activate during a fire, resulting in substantial property damage. Virginia's statute of repose provides:

> No action to recover for any injury to property . . . arising out of the defective and unsafe condition of an improvement to real property . . . shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction, or construction of such improvement to real property more than five years after the performance or furnishing of such services and construction.

> The limitation prescribed in this section shall not apply to the manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property . . . .

Id. at 163 (emphasis added).

After reviewing Virginia case law regarding what constitutes "equipment" under the statute, the Supreme Court held that sprinkler heads were "equipment." Consequently, the plaintiff's negligence causes of action against the manufacturer and installer of the sprinkler heads were not barred by the statute of repose.

Legislation:

1. H.B. 1951, concerning Virginia Public Procurement Act; bid, performance, and payment bonds. This change to Virginia's Little Miller Act raises from $100,000 to $500,000 the minimum contract amount for which bid bonds, performance bonds, and payment bonds will be required on all non-transportation construction projects. In addition, if the contract is between $100,000 and $500,000, and the bid bond requirement has been waived, prospective contractors must be prequalified.

2. S.B. 1424, concerning Virginia Public Procurement Act; shortened notice timeframe for second-tier subcontractors and vendors to provide payment bond notice. This change shortens the timeframe within which claimants with contracts with subcontractors, but with no contractual relationship with the contractor (i.e., second-tier subcontractors and vendors) must provide written notice of a payment bond claim on public projects. The time for such notice is reduced from 180 days after last providing materials or labor to 90 days after last providing materials or labor.

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Washington

Case law:

1. *Williams v. Athletic Field, Inc.*, 172 Wn.2d 683 (2011). A mechanic's lien claim that used the sample form set forth in RCW 60.04.091 is valid even in the absence of certificates of acknowledgement. In addition, while RCW 60.04.081 requires the court to award reasonable attorneys' fees, this case holds that a court "may take action as required by the merits of the case and the interests of justice."

2. *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 163 Wn.App. 436 (2011). The "independent duty doctrine" (formerly known as the "economic loss doctrine" or "economic loss rule") does not bar a property owners' negligence claims against an engineering firm because the engineering firm owes the owners an extra-contractual duty to exercise reasonable skill and judgment.

3. *Brotherton v. Kralman Steel Structures, Inc.*, 2011 Wn.App. LEXIS 2873 (2011). Damages for construction defects may be based on the cost to remedy the construction defects, even if such amount results in a recovery "somewhat in excess of the loss in value."

4. *Blue Diamond Group, Inc. v. KB Seattle 1, Inc.*, 163 Wn.App. 449 (2011). Providing construction management services does not constitute an improvement to the property. There is nothing to show any "labor" was performed at the site (as defined by RCW 60.04.021), so the lien filed by construction management service was frivolous.

5. *Optimer Int'l, Inc. v. RP Bellevue, LLC*, 170 Wn.2d 768 (2011). Parties cannot "waive" their rights to appeal an arbitration award by including a clause in the arbitration provision that such rights are waived. Please note that while this case was decided under the Washington Arbitration Act (WAA) – the law in effect at the time – the WAA has been replaced by the Revised Uniform Arbitration Act (RUAA).

6. *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587 (2011). The Industrial Insurance Act (RCW 51.24.035) only provides immunity to design professionals performing professional services on a construction project. Whether or not the area where the act of negligence occurred is a construction site is a question of fact.

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West Virginia

Case law:

1. In *J.A. Street & Associates v. Thundering Herd Development, LLC*, ___ S.E.2d ___, 2011 WL 5827617 (W.Va. Nov. 18, 2011), the Supreme Court of Appeals of West Virginia addressed whether the statute of limitations barred a cross-claim brought by a general contractor against a geotechnical engineer when the basis of the cross-claim involved damages to a different section of a shopping development than was the basis of the original suit. Specifically, the original suit involved claims that improper fill caused the failure of a slope located near a Target store in the shopping complex, whereas the cross-claim, filed more than five years after the commencement of the original suit, alleged damage to shops at the other end of the complex due to setting as a result of groundwater in the fill beneath those shops. At trial, the geotechnical engineer was granted summary judgment based on a finding that the claim alleging groundwater in the fill under the shops was a separate, unrelated cause of action, and therefore barred by the statute of limitations. The Supreme Court reversed this decision and remanded the case, holding that the trial court did not properly analyze whether the initial claims regarding the Target store tolled the statute of limitations because the trial court did not analyze whether the two claims both arose out of the same transaction or occurrence, as required by W.Va. R. Civ. P. 13(g). The court further held, in the alternative, that the trial court also erred in granting summary judgment because there were genuine issues of fact regarding whether the discovery rule applied to bar the claim based on the fact that the engineer may have known about the groundwater in the fill as early as 2003.

2. In *State ex rel. American Homes of West Virginia, Inc. v. Sanders*, ___ S.E.2d ___, 2011 WL 5903509 (W. Va. Nov. 21, 2011), the Supreme Court of Appeals of West Virginia affirmed the trial court's refusal to enforce arbitration clauses in contracts between a builder of new homes and the purchasers of several of those homes. The case arose after forty plaintiffs came forward, filing eleven separate actions all alleging that the builder failed to properly install radon mitigation systems in newly constructed homes that were either purchased or occupied by the plaintiffs. The Supreme Court of Appeals found that the arbitration clause in the contracts was procedurally unconscionable because it was non-negotiable and because the

purchasers lacked the requisite sophistication to fully comprehend its meaning. The Court also found that the arbitration provision was substantively unconscionable because it either implicitly or explicitly limited the ability of purchasers to fairly pursue remedies for their injuries. Finally, the concluded that the arbitration provision was ambiguous because it suggested in at least five places that a plaintiff retains the right to bring a civil action. Thus, the Court concluded that the provision should be construed against the builder, as drafter of the contract and did not prohibit the plaintiffs from bringing their respective suits.

3. In *Maxum Indem. Co. v. Westfield Ins. Co.*, 2:10-CV-00428, 2011 WL 289270 (S.D.W. Va. Jan. 25, 2011), an individual was killed while working for a general contractor on a construction project in West Virginia and asserted a "deliberate intent" claim under W.Va. Code §23-4-2(d)(2)(ii) against the general contractor and subcontractor. The subcontractor's insurance company, Maxum, indemnified the subcontractor and general contractor against claims brought by the decedent's estate and settled the case. Maxum then sought equitable contribution from the general contractor's insurance carrier. The indemnity clause in the subcontract provided that the subcontractor would indemnify the general contractor from any claim arising out of bodily injury or death caused, in whole or in part, by the subcontractor's negligence. The District Court observed that there was no West Virginia case directly on point as to the right to indemnification for deliberate intent claims, and predicted, based on Supreme Court of Appeals of West Virginia precedent, that requiring a party to indemnify another for a deliberate intent claim similar to those made by the decedent's estate does not offend the public policy of West Virginia. Thus, the court denied Maxum's request for equitable contribution.

4. In *Great Am. Ins. Co. v. Hinkle Contracting Corp.*, ___ F.Supp.2d ___, 2011 WL 6029966 (S.D.W. Va. Dec. 5, 2011), the Southern District of West Virginia considered whether an arbitration clause in a subcontract between a general contractor and a subcontractor applies to a dispute between that subcontractor and the surety company that issued it a Subcontract Performance Bond which incorporated the terms of the subcontract by reference. The court observed that resolution of the issue is a fact specific inquiry and set out to interpret the language of the subcontract. The court determined that because the language of the subcontract was based on the assumption that the surety would be asserting defenses available to the subcontractor, and because the subcontract allows both the contractor and subcontractor to appoint arbitrators, the parties to the subcontract intended the arbitration clause to apply only to claims where contractor's interests were adverse to those of the contractor. Therefore, the court held that the arbitration clause in the subcontract did not apply to disputes between the subcontractor and the surety company.

5. In *Gateway Towne Ctr., LLC v. First United Bank & Trust*, 2011 WL 3877010 (N.D.W. Va. Sept. 2, 2011), the Northern District of West Virginia refused to enforce a liquidated damages provision in a contract to grade and utilities on a site so to make it ready for construction. The provision in question provided that the owner of the site would be paid $15,000 for every month past the scheduled delivery of the graded site until delivery. Although the project was delivered ten months late, the court refused to enforce the liquidated damages provision because the site owner did not break ground to begin building on the site until nearly two years after the graded site was delivered by the contractor to the owner. Therefore, the court concluded that the site owner failed to establish that it suffered any actual harm, and as a result, the liquidated damages provision was actually an unenforceable penalty rather than a valid vehicle for recovering actual damages.

6. In *Multiplex, Inc. v. Raleigh County Bd. of Educ.*, 709 S.E.2d 561 (W.Va. 2011), Multiplex entered into a contract with the Board of Education to build an extension to the Independence High School in Raleigh County, West Virginia. While the project was ongoing, the Board of Education instructed Multiplex to suspend all construction until the utility lines could be relocated. Multiplex abided by the request, and as a result, no construction took place for over six months. Consequently, Multiplex filed a claim against the Board of Education to recover the costs it incurred while its equipment and laborers sat idle. The matter eventually settled, and Multiplex entered into a release with the Board of Education that released the Board from all past, present, and future claims "for or arising out of those certain alleged wrongful acts alleged in the Complaint . . . ." Although construction resumed, there was another considerable delay, and as a result, Multiplex filed a second claim against the Board of Education for delay damages. The trial court determined that Multiplex's second claim was barred by the language releasing all future claims contained the release signed by Multiplex. On appeal, however, the Supreme Court of Appeals of West Virginia determined that because the release plainly states that it only releases claims arising out of the events described in the first complaint, and because the events giving rise to the second delay claim were wholly unrelated to those described in the first complaint, the release did not bar Multiplex's second delay claim.

Legislation:

1. **W.Va. Code § 7-20-7a, Impact Fees for Affordable Housing.** Effective June 10, 2011, this statute provides that there is a lack of affordable housing in certain counties which affect the ability of communities to develop and maintain strong and stable economies. As a result, it is encouraged that counties that have imposed impact fees to fairly assess and discount impact fees. On or before July 1, 2012, counties which have imposed impact fees shall enact an affordable housing component with a discount impact fees schedule.

2. **W.Va. Code § 64-10-1, et seq., Authorization for Bureau of Commerce to Promulgate Legislative Rules.** Effective March 9, 2011, this statute authorizes Workforce West Virginia, the Division of Natural Resources and the Division of Labor to promulgate legislative rules and to modify certain existing ones.

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Wisconsin

Legislation:

1. **Administrative Rule DHS Code § 163, Certification for the Identification, Removal and Reduction of Lead-Based Paint Hazards** (effective 4-22-2010). Wisconsin's Lead-Safe Renovation Rule went into effect on April 22, 2010. This rule is consistent with U.S. EPA's Lead Renovation, Repair, and Painting Rule 40 C.F.R. Part 745 under authority of section 402(c)(3) of the Toxic Substances and Control Act. This new Wisconsin rule enforces the federal rule established by the Environmental Protection Agency in 2008 that was enacted to protect young children from being exposed to lead-based paint hazards that can be created during renovation activities. The rule affects target housing and child-occupied facilities built before 1978, consisting of: (1) single-family and multi-family housing built before 1978 (regardless if a child lives in the property); and (2) any child-occupied facilities in buildings built before 1978.

According to §163, any company or contractor conducting target housing or facility renovation work in Wisconsin must be certified under the terms of the DHS Code. A renovation contractor now must be certified as a Lead-Safe Renovator or must have a Certified Lead-Safe Renovator in charge of the work site. Currently, under § 163.32(2-6), rule violations can result in denial of accreditation, suspension or forfeiture of certification, or daily civil forfeiture of up to $1000 per violation with each day of continued violation constituting a separate offense.

2. **2011-2013 Biennial Budget Bill (2011 Wisconsin Act 32) (effective 7-1-2011).** The 2011-2013 Wisconsin Biennial Budget Bill has made significant changes to Wisconsin's prevailing wage laws (wage law provisions effective 1-1-2012) as follows:

- **Exemption for Residential Projects**

State or local public works projects involving the erection, construction, repair, remodeling, or demolition of a residential property containing two dwelling units or less are not subject to prevailing wage laws.

- **Exemption for Residential Development**

Any residential development, which consists of 90 percent of approved lots containing one or two dwelling units, will become exempt from municipal prevailing wage and hour scales as of July 1, 2011. This exemption applies to any work paid for by a developer and then dedicated over to a municipality, including work performed on a road, street, bridge, sanitary sewer or water main.

- **Night Shift Differential and Holiday Pay**

On highway projects, Wisconsin Department of Workforce Development ("DWD") must now require payment of Sunday, holiday, and shift differential pay (except height pay, pay for work with particular products, and supervisory pay) in addition to current prevailing wage rates, where provided for in a collective bargaining agreement or a successor agreement.

- **Prevailing Wage Survey**

Governmental units will be exempt from filing a prevailing wage survey if the governmental unit performs any construction work.

- **Reporting Requirements**

Monthly wage reporting requirements for contractors, contractor's agents, subcontractors, or subcontractor's agents enacted in 2009 Act 28 are no longer required.

- **Inspection of Records**

DWD no longer needs to inspect contractor payroll records when requested by individuals.

- **Statewide Concern; Uniformity**

Statutory prevailing wage laws will be construed as an enactment due to statewide concern for the purpose of providing uniform prevailing wage law requirements throughout the state.

- **Work Performed Without Compensation**

Eliminates the current law exemption from state and municipal prevailing wage laws for public works projects where certain specified types of voluntary project labor is used. Instead, the new law specifies that state and municipal prevailing wage laws do not apply to projects where the contracting governmental unit is not required to compensate any contractor, subcontractor, agent or individual performing the work.

- **Project Thresholds**

Increases to the threshold cost for state and municipal public works projects for which prevailing wage laws apply. Increases are as follows:

  - $48,000 for single-trade construction projects (single-trade project is defined as a project where a single trade accounts for 85 percent or more of total labor cost);

  - $234,000 for multiple-trade construction projects conducted by townships or by cities and villages with populations of less than 2,500, provided that the work is contracted with a private contractor (multiple-trade project is defined as a project where no single trade accounts for more than 85 percent or more of the total labor cost);

  - $100,000 for all other multiple-trade state and municipal public works projects.

- **Publicly Funded Private Construction Projects**

Prevailing wage statutes regarding “publicly funded private construction projects”, which were adopted in 2009 Act 28, are repealed. A "publicly funded private construction project" means a construction project where the developer, investor, or project owner receives direct financial assistance from a local governmental unit for the erection, construction, repair, remodeling, or demolition, including any alteration, painting, decorating, or grading, of a private facility, including land, a building, or other infrastructure.

- **Publicly Funded Private Construction Projects**

Under current law, the prevailing wage provisions do not apply to a laborer, worker, mechanic, or truck driver who is regularly employed to process, manufacture, pick up or deliver materials or products from a commercial establishment that has a fixed place of business from which the establishment regularly supplies processed or manufactured materials or products unless either of the following applies:

  - The individual is employed to go to the source of mineral aggregate that is to be immediately incorporated into the work, and is not stockpiled or further transported by truck, by depositing the material substantially in place, directly; or

  - The individual is employed to go to the site of a covered project, pick up excavated material or spoil from the project site, and transport that excavated material or spoil away from the project site.

The new requirements modify the above provisions by providing that:

- the individual would not have to be regularly employed in the activities above to be exempt from coverage;

- it does not apply to an individual delivering products from a facility that is not dedicated to a project; and

- in order to be covered, the individual would have to be employed to go to the source of the mineral aggregate and deliver that mineral aggregate to a covered project site by depositing the materials directly in final place, from the transporting vehicle or through spreaders from the transporting vehicle.

- **Exemption for Chip/Slurry Seal**

Existing prevailing wage law exemption for chip and slurry work with a projected life span of less than five years is augmented to include an exemption for all chip and slurry work by towns, except for work funded through the Town Road Improvement Program under the Local Roads Improvement Program.

3. **Administrative Rule Order CR 10-103**. As of July 2011, Administrative Rule Order CR 10-103 has been filed with the Legislative Reference Bureau and is in the process of being published. Administrative Rule Order CR 10-103 Revises Chapters Comm. 2, 5, 14, 20, and 61-66, relating to the Wisconsin Commercial Building Code. These changes are currently scheduled to be effective 9-1-2011 in part, 1-1-2012 in part, and 7-1-2014 in part. Note that it is possible these publication dates for these Code changes may be modified such that adoption dates will be later than currently scheduled.

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Wyoming

Case law:

1. In *Winter v. Pleasant,* 222 P.3d 828 (Wyo. 2010), the Supreme Court of Wyoming invalidated a contractor' lien statement on grounds that that it did not satisfy the statutory requirement of Wyoming Statute § 29-1-301(a). The court found the contractor failed to assure the factual accuracy of the lien statement itself. The court held that sworn statements of a lien claimant's identity and or authority alone are insufficient to create a valid lien under Section 29-1-301(a).

2. In *Vision 2007, LLC v. Lexstar Dev. & Constr. Co., LLC*, 255 P.3d 914 (Wyo. 2011), the Wyoming Supreme Court interpreted Wyoming Statute § 29-1-311(b), which allows a property owner to petition to strike a lien on grounds the lien was forged, "knowingly groundless," or contains a material misstatement or false claim. The Court held that a contractor's original lien statement could not be invalidated due to a typographical error regarding the contractor's last date of work. Invalidating a lien statement requires a finding that the "lien claimant knew at the time of filing that the lien was groundless."

3. In *Strong Construction, Inc. v. City of Torrington,* 255 P.3d 903 (Wyo. 2011), the City of Torrington ("City") entered into a prime contract with Strong Construction, Inc. ("Contractor") to supply and install three submersible water pumps and motors in a municipal well field. Prior to commencement of this work, the Contractor obtained approval for the equipment's installation following approval of submittals by the City's engineer. Before installation could be achieved, the manufacturer/supplier issued revised operational guidelines indicating the equipment would not conform to the contract's plans and specifications. The equipment failed after installation and the City brought a breach of contract action against the Contractor for its replacement costs.

At trial, the court found that the Subcontractor was 60 percent at fault, for which the Contractor was vicariously liable; the City's engineer was 30 percent at fault; and the remaining ten (10) percent was apportioned to the project's electrician. Judgment was entered in favor of the City and the Contractor appealed. The Wyoming Supreme Court affirmed and held that , no legal basis existed to extend apportionment of damages to breach of contract actions. The Court explained that under Wyoming common law and Wyoming's comparative fault tort statute (Wyoming Statute §1-1-109(a)(iv)), contract damages are to be generally awarded on an "an all or nothing basis."

Legislation:

1. 2010 Wyoming Session Law Ch. 92, Changes to Wyoming Lien Law. In 2010, the Wyoming Legislature passed amendments to Wyoming lien law. These amendments took effect July 1, 2011 and include the following:

- Wyoming Statute § 29-1-201 now defines "materialman" as "a person other than a contractor who furnishes material to, but does not perform work for, an owner, a contractor or subcontractor under contract;"

- § 2-2-112 now requires contractors to send written "preliminary notice" of the right to assert a lien to the owner "prior to receiving any payment from the owner, including advances." Subcontractors and materialmen must now give written preliminary notice to contractors within thirty (30) days after first providing services or materials to the project. All such preliminary notices must substantially conform to the form required by § 29-10-101. Failure to send the required notice within the specified time bars the right of a contractor, subcontractor or material man to assert a lien under the revised statutes.

- § 29-2-106 changed the timeframe for a contractor to file a lien from one hundred and twenty (120) days to one hundred and fifty (150) days from the date of substantial completion of the project, or the last date work was completed; all other persons asserting a lien must file within one hundred and twenty days (120) days;

- § 29-10-105 establishes a statutory form and procedure by which owners may opt to file a "notice of substantial completion." This notice creates a rebuttable presumption as to the date for substantial completion by which a lien must be filed; and

- Under § 29-2-107, a lien claimant now must give twenty days written notice of intention to file lien (changed from ten) prior to the filing of the lien.

2. Wyoming Statute §§ 16-6-101 *et seq.*, New Legislation Provides Increased Preference to Resident Contractors. In 2011, the Wyoming Legislature passed two bills designed to provide increased preferences for in-state contractors, subcontractors and suppliers on public works projects. Enrolled Act No. 41 (H.B. 111) became effective on July 1, 2011 and amended several sections of Wyoming Statutes Title 16, Chapter 6 (Public Works and Contracts). Pertinent changes and additions include:

- Wyoming Statute §16-6-101 tightened restriction on eligibility for certification as a "resident" contractor on public works projects. Prior to bidding on public contracts, Wyoming contractors must demonstrate they have maintained both their principal offices and place of business within the state for at least one (1) year. Foreign contractors must demonstrate they have employed at least (15) "full time Wyoming resident employees within the state for one (1) year or more, and must be current with all Wyoming worker compensation requirements. In addition, foreign contractors must show they have been in business for a minimum of two (2) years;

- §16-6-102 requires the state to investigate all applications for certification of residence status and expressly places the burden of proof "on the person whose residency is in question;"

- §16-6-104 was amended to expressly provide a preference for "Wyoming materials and products of equal quality and desirability" over all products or materials produced outside the state;

- §16-6-120 directs the state to promulgate new rules and regulations for enforcement purposes and established increased penalties for intentional falsification of a contractor's residential status, including: (1) $750 per day fine for each violation; and 2) barring violators from bidding on any state contract or submitting any request for a proposal on any state project for one year from the date the violation is corrected. Furthermore, contractors that violate administrative orders must now be referred to the appropriate district or county attorney for enforcement purposes;

- Amendments to §16-6-206 further increases fines for willful or intentional failure to employ the requisite number of Wyoming laborers on public works projects and makes those guilty of second offenses ineligible to bid on state project for one (1) year from the date the violation is corrected.

3. **The second new preference law, Enrolled Act No. 67 (S.F. 144) ("the Act")**, establishes temporary benefits for Wyoming contractors and suppliers on "alternative design and construction projects" through June 30, 2012. This statute is focused on new school construction and requires the "construction manager at risk or design builder" to award not less than seventy percent (70%) of the value of all subcontract work to Wyoming resident contractors. The Act also provides Wyoming resident suppliers a five percent (5%) bid preference for all furniture, fixture and equipment associated with a project, regardless of construction delivery method. Lastly, the Act directs the Joint Appropriations Committee to

study the impacts of the temporary procurement statute and to propose permanent changes to Wyoming's resident preference laws.

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FEDERAL

Legislation:

In 2011, Congress considered a multitude of bills which directly affected the construction industry. A few of these bills were signed into law. What follows is a brief summary of some of the legislation which became law in 2011 and continues to affect the construction industry today.

1. **H.R. 4, The Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011**. In March 2010, H.R. 3590, the Patient Protection and Affordable Care Act ("PPACA") expanded the 1099 reporting requirements so that starting on January 1, 2012, all businesses (other than tax exempt corporations) would have to submit Form 1099s to the IRS and to any business with which they purchased $600 or more in goods or services in the year. Similarly, H.R. 5297, the Small Business Jobs Act of 2010 ("SBJA") required that individuals who receive rental income issue Form 1099s to all service providers for payments of $600 or more. The 1099 reporting requirements of both the Patient Protection and Affordable Care Act and the Small Business Jobs Act, as enacted, created a tremendous amount of paperwork and a compliance burden for businesses of all sizes.

Fortunately, in April 2011, President Obama signed H.R. 4, the Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011 into law which repealed the expanded Form 1099 reporting requirements mandated by both the PPACA and the SBJA.

2. **H.R. 674, Repeal of the 3 Percent Withholding Rule Established in IRS Code Section 3402(t)**. Congress enacted Section 3402(t) to the IRS Code (26 CFR Part 31) in 2006. Section 3402(t) requires that certain governmental entities withhold from payment to vendors on public projects 3% of the total contract price that they are due to guard against possible business tax evasion. Under the most recent amendment of the statute, Section 3402(t) was set to become effective January 1, 2013. If Section 3402(t) was allowed to go into effect, it is estimated that the result would have been approximately $11 billion in new tax compliance costs for employers who engage in public contracting.

On November 21, 2011, President Obama signed into law H.R. 674. H.R. 674 repeals the requirement set forth in Section 3402(t) that governmental entities withhold 3% of the total contract price from payment to contractors on public projects.

H.R. 674 also includes the VOW to Hire Heroes Act of 2011 ("VOW") which creates new benefits for unemployed veterans. VOW includes a Veterans Retraining Assistance Program (VRAP) for unemployed veterans. The VRAP is expected to start on July 1, 2012 and offers twelve (12) months of training and assistance to unemployed veterans. The VA may offer

incentive payments to encourage employers to hire and train program participants. To qualify, a veteran must:

(1) Be at least 35 but no more than 60 years old;
(2) Be unemployed (as determined by the Department of Labor);
(3) Have an other than dishonorable discharge;
(4) Not be eligible for any other VA education benefit program;
(5) Not be in receipt of VA compensation due to unemployability (IU);
(6) Not be enrolled in a federal or state job training program; and
(7) Enroll in a VA approved program of education offered by a community college or technical school.

The program is limited to 45,000 participants from July 1, 2012 through September 30, 2012, and 54,000 participants from October 1, 2012 through March 31, 2014. Veterans who previously completed a VA vocational rehabilitation program and have used the initial 26 weeks of unemployment benefits may qualify for an additional 12 months of VA vocational rehabilitation benefits.

3. **Changes to the Small Business Administration's 8(a) Business Development Program Regulations**. On February 11, 2011, the United States Small Business Administration ("SBA") published revisions to the regulations governing the 8(a) Business Development (BD) program. The regulations governing the 8(a) BD program are located at Title 13 of the Code of Federal Regulations, Subpart A, Section 124 (13 CFR § 124). Except for changes related to reporting requirements for firms owned by Tribes, Alaska Native Corporations, Native Hawaiian Organizations and Community Development Corporations, the changes are effective March 14, 2011 and are summarized as follows:

Economic Disadvantage: Objective criteria was added to determine economic disadvantage based on personal income and total assets. Applicants to the program must now demonstrate economic disadvantage based upon: (1) **adjusted net worth** which must not exceed $250,000 for initial eligibility or $750,000 for continuing eligibility; (2) **personal income** which must not exceed $250,000 (averaged over three years) for initial eligibility or $350,000 for continuing eligibility; and (3) **total assets** which must not exceed $4 million for initial eligibility and $6 million for continued eligibility (allows for growth during the 9 year term). IRA accounts are excluded from net worth and total asset determinations. The new rule also clarifies the SBA's treatment of Subchapter S corporations when determining economic disadvantage. The rule adds the same treatment for LLCs and Partnerships.

Joint Ventures: The requirements for joint ventures have been restricted.

Technical Requirements: The JV agreement may be informal or formal (separate business structure) but must be in writing. The JV may not be awarded more than three contracts over a two year period without a finding of general affiliation. The same two entities may form additional JVs and each may be awarded three contracts over two years. The 8(a) partner to the JV must perform at least 40% of the work performed by the JV.

Project Manager: For the unpopulated JV (JV populated only with administrative personnel) an employee of the 8(a) managing venture must be the project manager. For the JV populated with individuals intended to perform contracts, the JV must demonstrate how performance of the contract is controlled by the 8(a) managing venture.

Performance of the Work: For the unpopulated JV the amount of work done by all the partners will be aggregated and the 8(a) partner must perform at least 40% of all of the work done by the JV (includes all work done by the non-8(a) partner and any of its affiliates at any subcontracting tier). For the JV populated with individuals intended to perform contracts, the non-8(a) JV partner, or any of its affiliates, may not subcontract to the JV or any subcontractor of the JV.

Reporting Requirements: As part of the annual review the Participant must demonstrate how it is meeting the performance of work requirements for each 8(a) contract that it is performing as a JV. At the conclusion of every 8(a) contract awarded to a JV, the Participant must explain how Performance of Work Requirements were met.

Mentor/Protégé Program: A Mentor can have up to three protégés at one time. A Protégé can have a second Mentor, corresponding to an unrelated secondary NAICS code. However, a firm cannot be both a Mentor and a Protégé at the same time. Non-Profit Mentors are permitted.

Assistance: The assistance to be provided by the Mentor must be tied to the Protégé's SBA-approved business plan. The Mentor/Protégé Agreement must be approved by the SBA before the firms can submit a joint venture offer on a procurement as a small business. In order to receive an exclusion from affiliation on 8(a) contracts, the agreement must comply with the 8(a) JV requirements (other than SBA approval). Mentor/Protégé JV are permitted to be small for federal subcontracts.

Benefits: The benefits that flow from the Mentor/Protégé relationship end once the protégé leaves the 8(a) BD program – exclusion from affiliation ends. The SBA may not approve a new Mentor/Protégé relationship within six months of the end of an 8(a) Participant's program term. A specific reconsideration process is allowed when a Mentor/Protégé Agreement is declined.

Consequences for Failure to Provide Assistance: If the Mentor fails to provide the agreed-upon assistance the SBA may terminate the Mentor/Protégé Agreement. The Mentor is ineligible to participate in the program for two years. The SBA may recommend a stop work order for each contract the Mentor and Protégé are performing as a JV and where they have received the exclusion from affiliation. If a stop work order is authorized where the protégé can independently complete performance, the SBA may authorize the substitution of the Protégé firm for the JV. A Mentor's Failure to provide the agreed assistance may constitute grounds for Government-wide suspension or debarment.

Tribally-Owned Firms, Alaska Native Corporations, Native Hawaiian Organizations or Community Development Corporations:

Sole Source Awards: A Participant owned by a Tribe, ANC, NHO or CDC may not receive a sole source 8(a) contract that is a follow-on contract to an 8(a) contract immediately performed by another Participant (or former Participant) owned by the same Tribe/ANC/NHO/CDC in the secondary NAICS code.

Reporting Requirements: Firms owned by Tribes, ANC, NHO or CDC are required to report benefits flowing back to native/disadvantaged communities.

NHOs and Economic Disadvantage: The majority of an NHO's members must establish that they individually qualify as economically disadvantaged. For the first firm the same thresholds apply as the individually-owned firms for initial eligibility. For the second firm and any other firm thereafter, the individuals must qualify under the thresholds for continued eligibility. The NHO must control the board of directors of the applicant or Participant and the individual responsible for day-to-day management of a NHO-owned firm need not establish personal, social and economic disadvantage.

Business Size for Primary Industry: The SBA may graduate a Participant from the 8(a) BD program where the firm exceeds the size standard corresponding to its primary NAICS code, as adjusted, for three successive program years. If the firm can demonstrate that through its growth and development the NAICS code is changing to a secondary NAICS code in its adjusted business plan, the SBA will not graduate the firm early.

Excessive Withdrawals: The SBA has amended its definition of withdrawal and the amounts the SBA will consider excessive and a possible basis for termination or early graduation from the program. The new definition for withdrawal excludes officers' salaries, but the SBA will count those salaries if it believes the firm is attempting to circumvent the regulation through the payment of salaries. The withdrawal amounts are as follows:

Firms with sales up to $1M, $250,000;
Firms with sales between 1M and 2M, $300,000
Firms with sales exceeding $2M, $400,000

These limits do not apply to tribes, ANC, NHO and CDCs where withdrawal is made for the benefit of the tribe/ANC/NHO/CDC or the native or shareholder community; however, it does apply to withdrawals that do not benefit the relevant entity or community.

4. **H.R. 2647, The National Defense Authorization Act for Fiscal Year 2010**.

On March 16, 2011, the Federal Acquisition Regulations Counsel issued an interim rule adopting Section 811 of H.R. 2647, the National Defense Authorization Act for Fiscal Year 2010, thereby amending the FAR to require Federal Agencies to provide written justification prior to awarding a sole-source contract in excess of $20M under the 8(a) program. Written justification must include a description of the agency's needs, a determination that the contract is in the government's best interest and verification that its costs will be fair and reasonable. It must be approved by the appropriate official and, after award, made public.

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