
# Construction Law Update:

## Case Law & Legislation Affecting the Construction Industry (2013-2014)

**Presented by**

## Division 10 – Legislation and Environment

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# INTRODUCTION

Division 10 is proud to present the Eighth Edition of the annual publication, ***Construction Law Update: Case Law & Legislation Affecting the Construction Industry (2013-2014).***

This is the fifth year that the **Construction Law Update** will be distributed exclusively in an electronic format along with the materials for the 2014 Annual Meeting in New Orleans, Louisiana. The **Construction Law Update** has become a hot item, requested by many construction practitioners throughout the country. Along with this year's update, you can get access to the archive of previous updates (2006-2013) on the Forum's *eLibrary* site.

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. I would also like to recognize Amber Floyd, Wyatt Tarrant & Combs LLP, for her remarkable contribution in bringing this update to the finish line. 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 and Jackie Dusek of Stites & Harbison, PLLC, for their countless hours of administrative help this year.

The submissions in this publication are made throughout the 2013-2014 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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**Editor**

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# CONSTRUCTION LAW UPDATE

## Alabama

### Case law:

1. In *Ex parte BASF Construction Chemicals, LLC* 2013 WL 6850015 (Ala. December 30, 2013), the Alabama Supreme Court considered whether a manufacturer of polyurethane coating had assumed duties to give advice to a subcontractor concerning product application. In the underlying action, the Plaintiff fell and sustained injuries in a hospital parking deck. The trial court initially dismissed on summary judgment the Plaintiff's action against the manufacturer based on the lack of duty, rejecting the Plaintiff's arguments that the manufacturer voluntarily assumed a duty to inspect the subcontractor's work. The Alabama Supreme Court held that where the facts upon which the existence of a duty depends are disputed, the factual dispute related to the question of duty is to be resolved by the jury. However, the Court recognized that there was no fact in dispute suggesting that the duty of the manufacturer was to guarantee the proper installation of the product. On the contrary, the manufacturer's assumed duty was limited to visiting the site to consult with the subcontractor on issues concerning preparatory work and product installation. The Court rejected the notion that the manufacturer assumed a more general duty for the success of the product installation, and therefore found in favor of the manufacturer, upholding the summary judgment dismissing claims against the manufacturer.

2. In *Hardy Corporation v. Rayco Industrial, Inc.* 2013 WL 6516391 (Ala. December 13, 2013), the Alabama Supreme Court reviewed cross-appeals concerning the enforcement of a subcontract for certain welding work associated with a kidney dialysis filter manufacturing facility. Among other issues, the Court concluded that the subcontractor was entitled to deduct from the sub-subcontractor's damages award the amount of the premium it paid to purchase a bond to "bond off" the subcontractor's lien. The Supreme Court also held that the trial court exceeded the scope of its discretion in refusing to consider the subcontractor's request for attorneys' fees. The subcontractor had requested an award for attorneys' fees in its counterclaim. The trial court did not address the request for attorneys' fees in its judgment, and later denied the subcontractor's post-judgment motion for attorneys' fees with a specific statement that the issue of attorneys' fees was moot because no evidence regarding the propriety of the fees had been presented at trial and that a post-trial affidavit as to attorneys' fees was not properly before the Court. The Supreme Court noted that counsel for the subcontractor had properly notified the Court that he would defer presentation of evidence on attorneys' fees until after the trial court had reached the determination as to whether a contract providing for an award of attorneys' fees had in fact been breached. In its review of the record, the Supreme Court concluded that the trial court had assented to this request for an opportunity to produce evidence as to attorneys' fees after a determination had been made on breach.

3. In *Bella Investments, Inc. v. Multifamily Services, Inc.* 2013 WL 6150819 (Ala. Civ. App. November 22, 2013), the Alabama Court of Civil Appeals reviewed a Jefferson County Circuit Court decision granting a defendant general contractor judgment as a matter of law. The Court of Civil Appeals found that the owner of a hotel property, who brought an action against a general contractor alleging negligent construction and fraudulent suppression, had failed to present evidence of the fair market value of the hotel either before or after the alleged damage. The Court found that the property owner's reliance on evidence of repair costs alone was not

sufficient to support a damages award. Likewise, reliance on the contract price for the construction of the hotel in 2003 could not support the claim as the issue in question was the fair market value of the hotel upon completion in 2006. The Court of Civil Appeals also upheld the dismissal of the fraudulent suppression claim as there was no evidence in the record to indicate that the general contractor was aware that certain construction applications would cause damages at the time of the installation. The Court of Civil Appeals rejected the property owner's argument that the general contractor should have both known and disclosed certain construction defects solely because the defendant was the general contractor on the project and because construction deficiencies were later found through destructive testing.

4. In *O'Neal v. Bama Exterminating Co., Inc.*, ---So.3d---, 2013 WL 3336989 (Ala., July 3, 2013), the Alabama Supreme Court considered whether a defendant had waived its right to compel arbitration by participating in the lawsuit first. The Court found that the Defendant did not "substantially invoke the litigation process" waiving its right to compel arbitration by attending depositions, filing a motion for judgment on the pleadings, or filing a joint motion seeking a continuance.

5. In *Industrial Project Solutions, Inc. v. Frac Tech Services, Ltd.,* 2013 WL 444350 (N. D. Ala. January 31, 2013), the District Court enforced a forum selection cause contained in a Master Services Agreement to transfer a case from Alabama to Texas, finding that the Master Services Agreement took precedence over conflicting venue selection clauses contained in the terms and conditions of other contracts between the parties.

6. In *ThyssenKrupp Steel USA, LLC v. United Forming, Inc.*, 926 F. Supp. 2d 1286 (S. D. Ala. 2013), the Owner obtained summary judgment against claims by a general contractor based on lien waivers executed by the general contractor through a certain date. The Court also considered whether work performed by an unlicensed subcontractor on behalf of the general contractor called into question the enforceability of the general contractor's entire agreement with the owner under *White-Spunner Construction, Inc. v. Construction Completion Company, LLC*, 103 So.3d 781 (Ala. 2012) and the Alabama General Contractor's Practice Act, but the Court found disputed questions of fact and refused to grant summary judgment on that basis.

7. In *Hosea O. Weaver and Sons, Inc. v. Balch*, ---So.3d---, 2013 WL 5299290 (Ala., Seot, 20, 2013), a judgment for the plaintiffs in a wrongful death action against a road construction company was reversed and rendered, with the Alabama Supreme Court holding, on application for rehearing, that the road construction company did not owe a car driver and passengers involved in a fatal automobile accident on a road that had been resurfaced by the road construction company a duty of care after the Department of Transportation accepted the resurfacing work and assumed responsibility for its maintenance. The Court reasoned that the road construction company's duty of care arose pursuant to its contract with the Department of Transportation, and that duty was discharged when the Department of Transportation accepted the work. Applying the "accepted-work doctrine", the Supreme Court found that the road construction company was not liable for injuries occurring to a third person for work that was completed, turned over, and accepted by the Owner.

8. In *Tull Brothers, Inc. v. Peerless Products, Inc.*, 953 F. Supp. 2d 1245 (S. D. Ala. 2013), a Subcontractor who installed aluminum windows on a project at the University of South Alabama filed suit against the window manufacturer for negligence, breach of express warranty,

indemnity, and breach of contract. The window manufacturer moved for summary judgment, and the District Court granted summary judgment on the express warranty claim because the written warranty did not provide a warranty against negligent or defective design. The District Court also granted summary judgment on the indemnity claim, reasoning that the indemnity provision had not been triggered because the subcontractor had not been held liable for anything by the general contractor yet. The third-party beneficiary breach of contract claim also failed as a matter of law because the subcontractor was merely an incidental, rather than an intended beneficiary of the University's contract with the window manufacturer to provide the windows. Nonetheless, the District Judge denied summary judgment on the negligence claim reasoning that, based on *Berkel and Co. Contractors, Inc. v. Providence Hospital,* 454 So.2d 496 (Ala. 1984), the subcontractor could recover in negligence against the window manufacturer if the window manufacturer negligently designed the windows with knowledge that others, including the subcontractor, were relying on proper performance such that the resulting harm was reasonably foreseeable.

9. In *Owens v. Georgia-Pacific, LLC*, 2013 WL 1628716 (S. D. Ala. April 16, 2013), an injured employee of a subcontractor filed suit against the Prime Contract alleging negligence. The District Court granted summary judgment to the prime contractor because there was insufficient evidence that the general contractor controlled the job site in a manner giving rise to a duty of care to subcontractor employees.

10. In *Blackmon v. Powell*, ---So.3d---, 2013 WL 2451339 (Ala., June 7, 2013), homeowners sued a plumber who installed a water supply line that ruptured causing flooding and other water damage in a house. Summary judgment in favor of the plumber was affirmed by the Alabama Supreme Court. The Court explained that a breach of contract claim in a home construction defect case is effectively the same as a breach of implied warranty of workmanship claim, and a plaintiff may recover only where there is evidence indicating that the contractor failed to use reasonable skill in fulfilling its contractual obligations. The Court agreed with the trial court's finding of insufficient evidence in this case. The Court also rejected an implied warranty of merchantability claim, reasoning that the allegedly defective water line was not provided or sold by the plumber, but rather had been purchased by the Owner to be installed by the plumber. The plumber could not liable under the Uniform Commercial Code for the allegedly defective water supply line because it did not sell it.

11. In *Employers Mutual Casualty Company v. Smith Construction & Development, LLC,* 949 F. Supp. 2d 1159 (M. D. Ala. 2013): An Insurer filed an action for declaratory judgment that it owed no insurance coverage under a general liability policy when the insured contractor allegedly abandoned a home construction project and left the incomplete structure exposed to the elements. The Court held that a 10-week delay in providing notice of the claim was not unreasonable as a matter of law, reasoning that the carrier must show there are no disputed questions of fact regarding delayed notice and no justification on the part of the insured for an unreasonable, protracted delay in providing notice. Then, the Court held that negligence claims against the contractor by the homeowners did not meet the policy's definition of "occurrence." Likewise, though the Court acknowledged that it was a more ambiguous question, the Court concluded that the homeowners underlying breach of contract claim also did not qualify as an "occurrence" under the CGL policy. The Court also held that the homeowners' underlying claims for misrepresentation were not covered because the policy expressly excluded such claims. The Court did not grant summary judgment concerning coverage for the underlying deceptive trade practices claim, and did not reach the question of whether the

insured owed a duty to indemnify because the underlying action was still pending. The Court indicated that certain bodily injury claims asserted by the homeowners, including hypertension and stress attributed to the construction problems, might be covered.

12. In *Hanover Ins. Co. v. Hudak & Dawson Constr.,* 946 F. Supp. 2d 1208 (N. D. Ala. 2013), the District Court reaffirmed the surety's right of reimbursement from its principal for losses incurred on bonded obligations, and this right may be established by common law, contract, or statute. The surety cannot rely on a common law theory of indemnification where the surety and principal have entered into a written indemnity agreement. The surety is entitled to recover payments, interest, expenses, and attorney's fees. The only exceptions arise when the surety makes payments through fraud or lack of good faith.

**Legislation:**

1. **10A-2-15.01-15.02 (Repealed effective January 1, 2014)** Section 3 of Acts 2012-304 worked to repeal these sections, removing the former bar on foreign corporations transacting business in this state until they register with the Secretary of State. This represents a major change to the Alabama "door closing statute." The legislature approved amendments to the Alabama Constitution which formerly provided authority for these sections and state voters ratified this change. The end result is that a foreign corporation that fails to obtain a certificate of authority or pay the business privilege tax before entering into a contract in Alabama will no longer be definitively barred from bringing an action on that contract.

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## Alaska

**Case law:**

1. In *Bachner Co., Inc. v. Weed, 315 P.3d 1184 (Alaska 2013)*, an unsuccessful bidder on a public construction contract sued four individuals who sat on the procurement committee under a theory of intentional interference with prospective economic opportunity. After the initial scoring, Bachner filed a bid protest alleging that the bid scoring process suffered from a number of irregularities. *Id.* at 1187. The committee chairman denied the protests and refused to stay the proceedings. Bachner then appealed; a hearing officer found "grave deficiencies" in four of the evaluations. *Id*. On appeal, the Supreme Court of Alaska upheld the hearing officer's decision. *Id.*

Following the protest appeal, Bachner filed this lawsuit, suing the individual members whose evaluations had been found deficient. In ruling against Bachner, the supreme court determined (a) that the prior litigation was not dispositive against the committee members as they were not in privity with the state for the purpose of collateral estoppels, (b) that the committee members were protected by qualified immunity, as Bachner could not produce evidence that the members acted in bad faith or with an evil motive. *Id.* at 1192-93. The court also held that the committee members were protected by Alaska's exclusive remedy statute, AS 36.30.690, finding that the committee members were acting within the scope of their duties and therefore were acting as the agency. *Id*. at 1194.

2. In *North Pacific Erectors, Inc. v. State of Alaska, Dept. of Administration, __ P.3d __ (Alaska 2013),* North Pacific Erectors appealed an administrative decision denying its claims for additional costs associated with what it alleged to be differing site conditions. NPE's claim was initially denied at the project level; NPE then appealed to a hearing officer. The hearing officer found for NPE, declining to strictly enforce contractual requirements finding that both parties had failed to meet those requirements and because the State of Alaska had failed to disclose superior knowledge. *Id*. at 3-4. The hearing officer's recommended decision was not accepted by the Commissioner of Administration (who acted in lieu of the Commissioner of Transportation after the Transportation Commissioner recused himself and delegated his authority to the Commissioner of Administration). The Commissioner of Administration issued the Agency's final decision, finding that NPE had failed to meet its burden to support its claim for additional compensation. NPE then appealed to the superior court, which held a limited trial de novo on NPE's procedural claims. *Id*. at 7-8. The superior court found against NPE, holding that the Dept had a reasonable basis for its decision, that the state had not deprived NPE of a hearing or otherwise violated its procedural requirements. *Id*.

The Supreme Court also held against NPE, finding (a) that the state was not obligated to disclose its superior knowledge regarding the site condition as NPE could have otherwise discovered that condition, (b) NPE failed to comply with the requirement to keep contractual records and to track actual costs. *Id*. at 13 – 14.

**Legislation:**

1. No legislation relevant to the construction industry was amended or enacted in Alaska in 2013.

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## Arizona

**Case law:**

1. In *Sullivan v. Pulte Home Corp*., 306 P.3d 1 (Ariz. 2013), the Arizona Supreme Court confirmed that a subsequent purchaser/homeowner not in contractual privity with the builder could maintain negligence-based construction defect claims discovered nine years after the house was built.

Pulte had built and sold a home in 2000. The original buyer re-sold the home to the Sullivans in 2003, but they did not discover defects in the retaining wall until 2009. They filed suit against Pulte in 2010, within the two-year statute of limitations for negligence claims (under the discovery rule). The trial court dismissed all claims.

While upholding the dismissal of other claims, including the Sullivans' breach of implied warranty claim (which was time-barred under Arizona's eight-year statute of repose applicable to actions based in contract), the Supreme Court held that a subsequent homeowner could maintain a tort claim against the builder, notwithstanding the economic loss doctrine. The Supreme Court thus confirmed that the economic loss doctrine will only bar parties in contractual privity from pursuing to tort-based remedies for purely economic loss.

2. In *Thomas v. Montelucia Villas, LLC*, 302 P.3d 617 (Ariz. 2013), the Arizona Supreme Court held that a builder must prove that it was ready, willing and able to complete construction despite the fact that a prospective homeowner anticipatorily breached the parties' construction contract.

In this case, the Thomases (prospective home purchasers) had made three installment "earnest money deposits" to Montelucia totaling $659,000 previously before they sent a letter stating they would not close on the luxury home for various reasons, thus anticipatorily breaching the parties' agreement. Montelucia responded by attempting to obtain a certificate of occupancy (in order to fulfill a contract requirement) but otherwise did not respond. The Thomases then sued to recover their deposit. The trial court ruled that the Thomases were entitled to their refund and held that Montelucia breached the agreement by, among other things, not completing certain resort amenities, access points and infrastructure and failing to timely provide a certificate of occupancy. The Court of Appeals reversed, holding that the Thomases anticipatorily breached the agreement by sending the letter backing out of the deal.

The Supreme Court reversed and remanded, clarifying that an anticipatory breach does not by itself entitle the non-breaching party to recover damages. Rather, "in addition to proving repudiation, the non-breaching party need . . . show that he would have been ready and willing to have performed the contract, if the repudiation had not occurred." The Supreme Court therefore reversed the lower court's holding that a defendant seeking to *retain* damages need not make that affirmative showing. The Supreme Court also rejected Montelucia's argument that the installment payments could be retained as "earnest money" (which is how the parties' agreement characterized those payments) because the deposits were more accurately characterized as progress payments. The Supreme Court also held that Montelucia was not excused from the "ready, willing and able" requirement because those payments were also characterized as liquidated damages under the contract. The Court therefore remanded the case for a determination of whether Montelucia was, in fact, ready, willing and able to perform its obligations to complete construction.

3. In *Engler v. Gulf Interstate Eng'g, Inc.,* 230 Ariz. 55, 280 P.3d 599 (Ariz. 2012), the Arizona Supreme Court limited the extent to which a contractor/employer may be liable for an after-work accident caused by an employee who was on an extended away-from-home project.

In this case, the victim of a car accident sued the employer of the driver who hit him, Gulf Interstate Engineering, alleging that Gulf was vicariously liable for its employee's actions. The driver/employee lived in Houston but traveled each week to Yuma, Arizona for work. He stayed in a Yuma hotel and commuted to a jobsite in Mexico. Gulf reimbursed his business expenses, including the cost of the hotel, rental car and meals. However, Gulf did not supervise the employee or control his activities after work hours.

On the day of the accident, the employee returned to his hotel after a day of work and later went to a restaurant with a coworker. Leaving the restaurant in his rental car, the employee hit Engler and caused serious injuries.

The Arizona Supreme Court found that Gulf was not vicariously liable because the employee was not subject to the control of Gulf at the time of the accident and therefore was not acting within the scope of his employment. Specifically, the Court held that an employee who

maintains the right to choose where, when, and how to travel, and by what route, is not held to be subject to contractor/employer control. Mere reimbursement of travel expenses or payment of a travel allowance alone cannot create employer liability under these circumstances.

4. In *RSP Architects, Ltd. v. Five Star Dev. Resort Communities*, 306 P.3d 93 (Ariz. Ct. App. 2013), the Arizona Court of Appeals held that architects (and, by implication, other design professionals) are not covered by Arizona's Prompt Payment Act, A.R.S. §§ 32-1129 *et seq*., and therefore may not invoke that statute when locked in a payment dispute.

In this case, RSP and Five Star vehemently disagreed about who owed who what. For its part, Five Star argued that RSP overbilled it and submitted improper invoices that were not in accordance with the contract. RSP responded that, according to the Prompt Payment Act, its invoices could not be disputed by Five Star this late in the game. However, Five Star convinced the trial court that the statute had no applicability to architects in the first place.

The Court of Appeals agreed with Five Star based on how construction and architect-engineer agreements are treated differently under various Arizona statutes. For example, not only does the anti-indemnity statute (A.R.S. § 32-1159) differentiate between "construction contracts" and "architect-engineer professional service contracts," but contractors and architects are regulated under entirely different chapters in Title 32 (professions and occupations). The court therefore held that the legislature could not have intended to include architect agreements within the statute's definition of a "construction contract," despite the fact RSP's scope of work under its AIA B151 agreement included "construction administration" duties. (The court held that such duties were within the norm of what architects routinely perform.) Without the Prompt Payment Act as its trump card, RSP not only lost its $591,554.67 breach of contract claim, but had to pay Five Star over $300,000, the vast majority of which accounted for attorneys' fees.

5. In *Summers Group, Inc. v. Tempe Mechanical, LLC*, 299 P.3d 743 (Ariz. Ct. App. 2013), the Arizona Court of Appeals held that all unsuccessful lien claimants named as defendants are liable for paying the successful lien claimant's attorneys' fees, even though those claimants did not initiate the lawsuit and were only named for notice purposes.

In this case, an electrical supply company, Rexel Phoenix Electric, recorded a mechanics' lien on a property for which it supplied materials but was never paid. In accordance with Arizona law, Rexel named all the other mechanics' lienholders as defendants in its suit to foreclose on its lien. The trial court found that one of the lienholders, ML Manager, had lien priority over all others, and thus was a "successful party" entitled to its attorneys' fees under A.R.S. 33-998(B). Rexel, as the party who initiated the suit, was ordered to pay all of ML Manager's fees. Rexel appealed, arguing that all the other unsuccessful lien claimants should have to pay a portion of ML Manager's attorneys' fees award in proportion to their respective lien claims.

The Court of Appeals agreed, reasoning that "[a]ll lien claimant parties are treated on equal footing in the sharing of the income collected after a mechanics' lien foreclosure sale and should also share in the potential expenditures"—which includes the successful claimant's attorneys' fees.

**Legislation:**

1. **SB 1231 – Amendment to Public Anti-Indemnity Statutes.** SB 1231 amended Arizona's public anti-indemnity statutes in A.R.S. § 34-226 (public buildings and improvements) and A.R.S. § 41-2586 (state procurement code) by clarifying and expanding the situations under which state and local governments cannot require contractors, subcontractors and design professionals to indemnify the government for the negligence of others. The bill therefore reflects the principle that contractors and design professionals should be held accountable for their *own* negligence but should not be responsible to defend or indemnify a government body for losses beyond their control.

Thus, on one hand, SB 1231 clarifies that a government body may require indemnification for negligence, recklessness or intentional wrongful conduct committed by a contractor, subcontractor or design professional or any persons "employed or used" by them. Subcontracts or design consultant agreements may be similarly structured. Furthermore, nothing prohibits a requirement that one be named as an additional insured under a general liability insurance policy or a designated insured under an automobile liability policy.

Outside these specified exceptions, however, a government body may not otherwise require a contractor, subcontractor or design professional to indemnify, defend or insure against losses caused by others. Thus, SB 1231 not only incorporates the existing prohibition against defending or indemnifying the government for *its* own negligence, the new law expands this concept to include a prohibition against defending or indemnifying any *others* on the project who are not in contractual privity with the contractor, subcontractor or design professional.

Importantly, SB 1231 also addresses the perception that some local governments in Arizona had undermined this anti-indemnification policy in recent years. The law therefore declares that "the regulation and use of indemnity agreements ... are of statewide concern" and prohibits any further regulation by counties, cities, towns or other political subdivisions. This preemption provision will no doubt affect a handful of Arizona cities and counties that incorporate broad indemnity provisions in their standard contracts.

2. **HB 2111 - Transaction Privilege Tax Reform**. The goal of HB 2111 was to simplify how transaction privilege taxes (TPT) are administered in Arizona.

For example, in order to mitigate the burdens of multijurisdictional compliance, the new law allows businesses to acquire a TPT license, file monthly TPT returns and pay all state and local TPT taxes through a single online portal operated by the Arizona Department of Revenue. The bill also streamlines TPT auditing procedures by having the Department of Revenue conduct all audits of taxpayers who conduct business in multiple jurisdictions.

The prime contracting provisions of the bill represented the biggest sticking point during negotiations with stakeholders; namely, contractors that stood to gain from simplification versus cities and towns that potentially stood to lose revenue. Under the existing system, TPT is <u>not</u> imposed at the point of sale when a contractor purchases materials to be used in construction projects, but rather the prime contractor is taxed at 65% of the contract price with the owner. This creates considerable complexity in determining whether an activity is taxable in a given jurisdiction and calculating the correct amount of tax based on the type of activity, location of the project, and value of any deductions. Although transitioning to a materials-based or point-of-

sale TPT would represent an obvious fix for contractors who operate across different jurisdictions, this would have potentially caused a revenue shift from those cities and counties where construction was occurring to those areas where contracting suppliers are located.

HB 2111 therefore made only modest reforms with respect to the prime contracting tax classification. Namely, beginning January 1, 2015, only service contractors who work directly for a property owner to maintain, repair or replace (as opposed to "modify") existing property will be exempted from the prime contracting TPT and permitted to pay retail TPT on project materials at the point of sale. Furthermore, the bill provides that each contract is to be treated independently of another contract, which allows a contractor who normally performs non-taxable service contracting to work on a taxable contracting project (independently or as a subcontractor for a larger job) without tainting the revenues from the non-taxable activities. Outside the context of service contractors, however, most contractors involved in new construction remain subject to the previously existing prime contracting TPT classification.

HB 2111 also liberalized the existing prime contracting exemption for design phase and professional services. Current law requires these pre-construction services to be outlined in a separate contract from the construction services in order to avoid prime contracting TPT on the pre-construction services. Under the new law, no separate contract is needed in order to avoid the tax on pre-construction services if the terms, conditions and pricing for these services are stated separately (in the same contract) from the construction services.

The bill will go into effect on January 1, 2015.

3. **HB 2535 – Installation of Tax-Exempt Machinery and Equipment.** Purchases of machinery, equipment and related items used in a wide range of activities (such as electricity generation and manufacturing) have long been exempt from taxation. However, whether tax applied to the revenues received by a contractor for installing these tax exempt items depended on a complicated analysis of whether the tax-exempt items were "permanently attached" to the real property, a standard that proved uncertain at best.

HB 2535, which applies retroactively to July 1, 1997, abandons the unworkable "permanent attachment" test in favor of an "independent functional utility" rule for determining whether the installation proceeds are tax-exempt. This new standard essentially means that an activity is tax-exempt if the item can perform its function without attachment to real property, other than attachment related to assembling the item, connecting the item to another item, connecting the item to any utility, or stabilizing or protecting the item during operation. This test may provide some additional certainty to taxpayers, not to mention administrative simplicity for tax authorities.

4. **HB 2599 – Amendment to Arizona Procurement Code**. Among other changes, HB 2599 streamlines state procurement by eliminating the need for procurement officers to obtain written approval from the Director of the Arizona Department of Administration (ADOA) in order to: (1) utilize a multistep bidding method; (2) enter into a contract by use of competitive sealed proposals; or (3) allow for cost-reimbursable contracts. A.R.S. §§ 41-2533(H), 2534(A), and 2544. Furthermore, the bill requires the ADOA Director to render a decision on any appeal of a contract claim within forty-two days, or otherwise ADOA must refer the matter to an administrative law judge. A.R.S. § 41-2611(B). Finally, the Director must adopt administrative rules governing vendor performance and evaluation of past performance. A.R.S.

§ 41-2612. Other changes involve expanding the Director's authority, making it unlawful (for a period of one year) for a public employee to accept employment with any entity who responded to a solicitation, and expands the statutory definition of lobbying to include persons attempting to influence a procurement.

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## California

### Case law:

1. In *Liberty Mutual v. Brookfield Crystal Cove LLC*, 219 Cal.App.4th 98 (Cal. Ct. of App. 2013), the California Court of Appeals addressed the time limits under the Right to Repair Act (SB 800) and held that the Act does not provide the exclusive remedy for construction defects involving *actual* property damage.

In that case, Eric Hart, an individual, bought a new from Brookfield Crystal Cove LLC. A sprinkler pipe in the home burst, causing significant damage. Brookfield acknowledged liability for, and repaired the damage. Hart's homeowners insurer, Liberty Mutual Insurance Company, paid for Hart's relocation expenses incurred while Hart was out of his home during the repair period. Liberty Mutual then filed a complaint in subrogation against Brookfield to recover the relocation expenses it incurred on Hart's behalf. The court sustained Brookfield's demurrer, and Liberty Mutual appealed.

The Court of Appeals reversed the judgment, holding that SB 800 does not provide the "exclusive remedy" in cases where actual damage has occurred because of construction defects. Specifically, it held that in enacting SB 800, the Legislature did not eliminate the common law actions for actual damages for construction defects, because it did not repeal those existing statutes of limitations applicable to construction defect cases found in California Code of Civil Procedure Sections 337.1 (providing a four-year statute of limitations for patent defects) and 337.15 (providing a ten-year statute of limitations for patent defects). The Court of Appeals concluded that SB 800 was intended only to apply in cases where no damage had yet to occur and was not intended to be the exclusive remedy available to homeowners.

One of the reasons SB 800 was enacted was to abrogate the California Supreme Court's decision in *Aas v. Superior Court*, 24 Cal.4th 627 (2000), which held that in the absence of *actual* property damage, homeowners could not file suit for construction defects in their residential properties. SB 800 changed the law to specifically provide homeowners a cause of action even where the damages are only "economic" damages.

Since SB 800's passage, many builders and insurance companies have interpreted SB 800 as the exclusive means for homeowners seeking recovery of damages for residential construction defects. This interpretation was understandably advantageous for several reasons, including: (i) limiting claims for defects to the building standards enumerated in SB 800; (ii) requiring homeowners to give notice and follow pre-litigation procedures before filing suit, including giving the builder the chance to inspect the alleged violation, and either fix it or hire another contractor to fix it; and (iii) reducing the statutes of limitations for several of the

enumerated defects (traditionally, they would be subject to the four-year state of limitations for patent defects, the ten-year statute of limitations for latent defects, but in the case of plumbing and electrical work under SB 800, the statute of limitations is four years, regardless of whether the defects were patent or latent).

After the *Liberty Mutual* decision, plaintiffs may circumvent the SB 800 "Right to Repair" process altogether, on the basis that property damage claims do not fall within the Act's alternative resolution process. Parties may also engage in disputes over the definition of "damage," and there may be an increase in cubrogation claims against homebuilders by homeowner's insurance companies that pay for water leaks and damage claims.

In *Liberty Mutual*, the Court of Appeals made it clear that while SB 800 was intended to allow homeowners to file suit to recover economic damages, "nothing in the Act supports a conclusion it rewrote the law on common law claims arising from actual damages sustained as a result of construction defects…those statutes remain and evidence a legislative intent and understanding that the limitations periods they contain could and would be used in litigation other than cases under the Act."

2. In *KB Home Greater Los Angeles, Inc. v. The Superior Court of Los Angeles County*, 14 C.D.O.S. 1890 (Cal. Ct. of App. 2014), the California Court of Appeals held that the Right to Repair Act (SB 800) requires that notice be given to a builder before repairs are made to a home, even if the repairs are to remedy damage resulting from an alleged defect.

Dipak Roy, in individual, purchased a home from KB Home in 2004. The right to repair addendum to the purchase agreement advised of the prelitigation procedures of SB 800 and listed KB Home's corporate address in Los Angeles, where notice of defect claims were to be sent

In March 2010, Roy's property manager discovered a water leak in the home (the home was vacant at the time). The property manager called Roy, and Roy called his insurer, Allstate (the real party in interest). Allstate fired a mitigation company to remove water, damaged dry wall, and carpet. Allstate completed repairs in June 2010, and in July 2010, Allstate sent KB Home a notice of its intent to pursue its subrogation right to recover payment for loss at the property. The notice was sent to KB Home's address in Irvine, not its corporate address as indicated in the purchase agreement. KB Home did not respond. In November 2010, Allstate sent a demand for settlement of the loss to KB Home's corporate address in Los Angeles. Again, KB Home did not respond.

In March 2011, Allstate filed a complaint in subrogation against KB Home, asserting causes of action for negligence, breach of implied warranty, and strict liability. KB Home demurred, on the grounds that Allstate did not allege compliance with the prelitigation procedures of SB 800. In July 2011, the trial court sustained KB Home's demurrer with leave to amend.

Allstate then filed two amended complaints, and its second amended complaint, filed March 2012, advanced a claim for property damage in subrogation, and combined the causes of action for negligence, breach of implied warranty, and strict liability, and violation of SB 800. The court sustained KB Home's demurrer as to Allstate's common law causes of action (negligence and strict liability), and overruled KB Home's demurrer as to Allstate's SB 800 cause of action.

Thereafter, KB Home filed a motion for summary judgment, based on failure to give KB Home timely notice to allow it to repair the defect, which was asserted as an affirmative defense against Allstate's claim in subrogation. Allstate filed a summary judgment motion in turn, arguing that KB Home had violated the building standards of SB 800 and was statutorily liable for damages, that SB 800 did not require notice to the builder before repairs, and that there was compliance with the notice requirements.

In January 2013, the court denied KB Home's motion for summary judgment, finding that Allstate's July and November 2010 letters to KB Home substantially complied with the notice requirements of SB 800, and that KB Home lost its right to repair when it failed to respond. The court granted Allstate's motion for summary judgment, finding KB Home breached the building standards of SB 800. KB Home appealed.

Since the trial court had sustained KB Home's demurrer to Allstate's common law tort claims, and the summary judgment motions were based only on Allstate's SB 800 cause of action, the California Court of Appeals limited its analysis to determining whether SB 800 requires notice be given to a builder before repairs were made. This issue had not been addressed in *Liberty Mutual*. The court found that KB Home was not given notice or adequate opportunity to inspect and repair the defect before the damage was repaired, and that failure to give timely notice to KB Home was fatal to Allstate's cause of action under SB 800.

3. In *Brisbane Lodging, L.P. v. Webcor Builders, Inc.*, 216 Cal.App.4th 1249 (Cal. Ct. of App. 2013), the California Court of Appeals held that a standard clause in a 1997 AIA A201 contract shortening the statute of limitations for a latent defect claim to four years from the date of substantial completion was enforceable.

A property owner entered into a construction contract with a design-builder for an eight-story hotel. They signed a 1997 AIA A201 contract, which included a standard clause that for any claims arising from events prior to substantial completion (such as a construction defect or design error), the applicable statute of limitations would commence to run, and any cause of action would be deemed to have accrued, no later than the date of substantial completion.

This clause effectively abrogated the "delayed discovery rule" applicable to latent defects. The delayed discovery rule provides that the statutory limitation period will not begin to run until the owner discovers or should have discovered the injury and its cause. The reason for the rule is that an owner's rights may be extinguished before the owner is even aware that it has sustained an injury.

The delayed discovery rule naturally poses a problem to contractors and design professionals, as their exposure to liability may continue for a much longer time period – their exposure to liability continues four years after the latent defect is discovered, or ten years after the date of substantial completion, whichever comes first.

Ultimately, the Court of Appeals held the clause enforceable on commercial projects, in cases where it is freely entered into by parties represented by counsel. The Court of Appeals was reluctant to impinge on parties' freedom of contract, and also found the clause created certainty for the parties, as they could, by agreement, establish a date certain for bringing claims, and avoid protracted litigation over when the owner discovered or "should have discovered" the defect. Specifically, the Court of Appeals held:

> "Sophisticated parties should be allowed to strike their own bargains and knowingly and voluntarily contract in a manner in which certain risks are eliminated and, concomitantly, rights are relinquished."

**Legislation:**

1. **AB 2237 Modifies Cal. B&P Code Section 7026.1(b)(2)** – The California Legislature modified the existing basic contractor's licensing statute by expanding the definition of a "consultant". California B&P Code Section 7026.1(a)(2)(A) defines who must have a General Contractor's "B" license as follows:

> (2)(A) "*Any person, consultant to an owner-builder, firm, association, organization, partnership, business trust, corporation or company, who or which undertakes, offers to undertake, purports to undertake, purports to have the capacity to undertake, or submits a bid to construct any building or home improvement project, or part thereof."*

AB 2237 added the following subsection (2)(B):

> (2)(B) *A consultant is a person who meets either of the following:*
>
> (i) Provides or oversees a bid for a construction project.
>
> (ii) Arranges for and sets up work schedules for contractors and subcontractors and maintains oversight of a construction project.

The notes from the April 17 hearing before the Assembly Committee on Business, Professions and Consumer Protection said the purpose of the bill was to "define[] the term "consultant" for purposes of the definition of a contractor to include a person, other than a public agency or an owner of privately owned real property to be improved, who meets either of the following criteria as it relates to work performed **pursuant to a home improvement contract**, as specified: a) provides or oversees a bid for a construction project; or, b) arranges for and sets up work schedules for contractors and subcontractors and maintains oversight of a construction project." (bold added)

The Hearing Notes went on to say that "the intent of this proposal is not to license consultants or construction managers but to protect the public from persons presenting themselves as 'consultants' but acting in the capacity of a contractor by scheduling subcontractors and exercising responsibility for the construction project."

The inherent difficulty with this statement is that "consultants" and "construction managers" schedule subcontractors and often exercise a great deal of responsibility for the construction project, and yet they do not undertake to do any of the building, either themselves or through others. Nevertheless, based on the committee's statement above, they arguably are acting in the capacity of a "contractor," and should be licensed. However, when it reorganized the language of the amendment and placed it under subdivision (b) instead of subdivision (f), it deliberately added the requirement that a "consultant" needed to undertake or provide a bid for

a construction project in addition to merely managing it before it would be considered a "contractor."

One of the major reasons why the legislature structured the amendment in this way was to "protect the public from persons presenting themselves as 'consultants' but acting in the capacity of contractor." The legislature was concerned about cases where an unlicensed person provided laborers or contracted directly with subcontractors to perform work on a construction project, and consequently failed to carry proper insurance or performance bonds. He was able to circumvent the licensure requirement by calling himself a "consultant." If any workers were injured on the job, the owner would be liable; if the consultant was unable to complete the work, the owner could not rely on any performance bond to ensure that the work would be completed.

This scenario typically arises only in the case of residential construction, which is why the legislature further limited the scope of the amendment to apply only to "home improvement contracts." Its intent was to protect individual homeowners who are generally less sophisticated than other property owners and likely aren't aware of the state's licensure requirements for contractors, or the liability they may be exposed to if they work with an unlicensed contractor. According to the CSLB, "unlicensed contractors lack accountability and have a high rate of involvement in construction scams. They also compete unfairly with licensed contractors who operate with bonds, insurance and other responsible business practices."

The CSLB has established SWIFT (Statewide Investigative Fraud Team) to target unlicensed contractors. SWIFT conducts jobsite sting operations to uncover violations of state contracting laws, including illegal payrolls, workers compensation and workers safety violations. These types of violations arise typically where the unlicensed person is actually providing laborers for a project, or directly contracting with others to perform the work. A person who is only acting as a construction manager (ie., managing a construction project or coordinating work schedules) would not be held liable for illegal payrolls, nor would he have to provide workers compensation insurance for the laborers actually performing the work, since he did not hire them, or directly contract with them to perform the work.

2. **SB 822 Amends Cal. B&P Section 7026.1 and clarifies AB 2237** – The Governor of California signed SB 822, which clarifies AB 2237 and confirms the legislative intent that Community Managers are not required to have a contractor's license in the course of the regular duties. SB 822 amends California B&P Code Section 7026.1 to add the following section (b):

> (b) The term "contractor" or "consultant" does not include a common interest development manager, as defined in Section 11501, and a common interest development manager is not required to have a contractor's license when performing management services, as defined in subdivision (d) of Section 11500.

3. **SB 189 Amends Cal. Civ. Code Section 8456** whereby priority is given to optional advances made up to the limit of the original construction loan – As long as the total amount of optional advances do not exceed the original amount of the construction loan, optional advances will relate back to the date of the recordation of the construction deed of trust and will have priority to mechanics liens. This was accomplished by adding the following subsection (b):

(b) An optional advance of funds by the construction lender that is used for construction costs has the same priority as a mandatory advance of funds by the construction lender, provided that the total of all advances does not exceed the amount of the original construction loan.

This change will benefit construction lenders, as they can wait until the last minute to advance funds to a construction borrower who is in default under the loan agreement, because they will have security that their trust deed will remain senior to mechanics liens.

4. **SB 822 Amends Cal. Civ. Code Sections 8034 and 8200(c)(2)** requiring a "Direct Contractor" to give a Preliminary Notice to the construction lender or reputed construction lender, if any – although traditionally, claimants with a direct contractual relationship with an owner do not need to provide preliminary notice to the owner, they must provide preliminary notice to the construction lender or reputed construction lender under these new revisions. This puts the burden on the claimant to determine the identity (or identities) of the lender and serve them with proper notice.

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## Colorado

### Case law:

1. On February 4, 2013, the Supreme Court decided a case involving the Colorado Construction Trust Fund Statute, §37-22-127, C.R.S. 2012. *Donald A. Yale v AC Excavating, Inc.,* 295 P.3d 470 (Colo. 2013). In this case, an LLC had been formed to develop and operate a residential golf course community. The LLC obtained several construction loans, but subsequently suffered severe financial issues. *Yale*, 295 P.3d at 472.

The LLC had an oral agreement with AC Excavating, Inc. (AC). On June 30, 2006, Yale, a member of the LLC, became the LLC's sole manager. *Id.* at 473. Yale loaned the LLC money and used these funds to pay a number of subcontractors, including AC. However, AC was not paid in full. In late 2006, Yale left the LLC and thereafter AC sued the LLC and Yale personally.

The trial court determined that the money Yale contributed was "not disbursed on a construction project", but was a "survival loan" for the LLC. The court of appeals reversed the trial court, stating that Yale's loans were subject to the statute because the statute applies regardless of intent. *Id.*, relying on *Flooring Design Associates, Inc. v Novick*, 923 P.2d 216, 220 (Colo.App. 1995). The appeals court also determined that the trial court erred in its decision regarding the theft statute. In particular, not considering section (1)(b) as to whether Yale "knowingly used" the funds so as to "deprive AC Excavating permanently". *Id.*

The Supreme Court noted that although §38-22-127(1), C.R.S. contains provisions regarding assurances of payment, the primary purpose was to protect owners from "unscrupulous contractors". *Id.* at 475, citing *In Re Regan*, 252 P3d 1281, 1286 (Colo. 2007). The court determined that the money was "disbursed" and "the LLC stood in the position of a contractor". *Id.* at 476, referencing *Webster's Third New International Dictionary* 644 (2002). The court determined that Yale's deposits were a survival loan for the LLC. Regarding the theft

claim, since the court determined that the deposits in question were not subject to the statute. *Id.* at 479. As such, the court of appeals was reversed. *Id.* at 480.

2. On January 17, 2013, the court decided an appeal of a summary judgment regarding the economic loss rule. *Stan Clausson Assoc., Inc. v Coleman Bros. Construction, LLC*, 297 P.3d 1042 (Colo. App. Div. 5 2013). Stan Clausson Associates, Inc. (SCA) signed a letter agreement to provide land planning and development services to Coleman Brothers Construction, LLC (Coleman). Subsequently, the parties agreed orally for SCA to provide development analysis regarding another property. SCA sued Coleman for breach of the oral agreement. Coleman counterclaimed stating that SCA negligently prepared the development sketch plan, because that plan was denied by the county. SCA fiiled a motion for summary judgment claiming that the economic loss rule bars Coleman's negligence claim, which the district court granted. *Id.* at 1044.

The purpose of the economic loss rule is to prevent negligence claims for contractual breaches. The court must review the claim to determine if the alleged tort duty constitutes a material breach of the contract. If so, the claim is barred pursuant to that rule. *Id.* at 1048, citing *Town of Alma v AZCO Constr. Inc.*, 10 P.3d 1256, 1264 (Colo. 2000) and *Jardel Enterprises, Inc. v. Triconsultants, Inc., 770 P.2d 1301, 1303 (Colo.App. 1988).* The court then turned to a review of professional duties and standards of care to determine if a unique duty exists for land planners. The court did not find, nor did Coleman allege, that land planners have to adhere to a professional standard of care as detailed in title 12, C.R.S. 2012. *Id.*

Coleman's allegation of negligence all stem from the contract, not a claim independent from the contract. Furthermore, the court stated that after reviewing several factors, including 1) economic risks involved, 2) foreseeability and likelihood of economic loss, 3) the burden placed upon a developer to guard against these risks, and 4) the consequences of placing such a burden, the court decided not to "recognize, for the first time, an independent professional duty of care for land planners." *Id.* at 1047.

Based upon the foregoing, and the fact that the issue of professional duty was a question of law and not fact, the court affirmed the district court's ruling. *Id.* at 1048.

3. On March 14, 2013, the court reviewed *Byerly v Bank of Colorado* regarding a mechanic's lien issue. *David Daniel Byerly v Bank of Colorado and Delta Properties II, LLC*, 2013 COA 35. In 2006, a developer hired Byerly to assist in developing a residential subdivision. The contract included a monthly fee, as well as the option for a set number of lots for each phase of development or their cash equivalent, with certain conditions precedent. *Byerly v Bank of Colo., et al.*, 2013 COA at ¶3. In 2009, the lender foreclosed on the property. Shortly before foreclosure, Byerly filed a mechanic's lien, a breach of contract claim, and then a complaint regarding the foreclosure proceedings. *Id.* at ¶5. The trial court entered a default judgment for Byerly for unpaid monthly compensation, but did not grant Byerly's claim for the lot option or cash equivalent. *Id.* ¶¶6-8.

The lender appealed stating that Byerly filed an "excessive lien", because the amount sought was in excess of the contract price. *Id.* at ¶12. The trial court determined that because the agreement was not recorded, as required by statute since the contract price exceeded $500, Byerly's lien was "equal to what it found to be the 'value' of his services." *Id.* at ¶16.

The appeals court recognized that this would lead to "unintended and absurd" results where contractors would be incentivized to "value" their services at rates higher than their contractual agreements. *Id.* at ¶29. The statute provides that a lien filer must have a reasonable expectation that the amount claimed is due, and only file for a maximum of that amount. *Id.* at ¶34. The court reviewed the record and noted that Byerly's own testimony revealed that Byerly was aware that the amount he claimed, at least regarding the lot options or equivalent, was not "due" at the time of filing. As such, the lien filed was "excessive" and is therefore forfeited. The judgment was reversed and the case remanded for judgment in the lender's favor. *Id.* at ¶¶38-43.

4. On March 14, 2013, the court reviewed another summary judgment regarding the economic loss rule. *Engeman Enterprises, LLC v Tolin Mechanical Systems Co.*, 2013 COA 34. The plaintiff, Engeman Enterprises, LLC (Engeman), operates a facility where the ammonia-charged cooling system required an emergency repair. Engeman's representatives signed a service report and a refrigerant report with Tolin Mechanical Systems Company (Tolin) for the repairs. Both documents contained provisions that Tolin would "perform his work in a 'prudent and workmanlike manner'". *Engeman*, 2013 COA at ¶¶3-4. During the repair process, an explosion occurred causing significant clean-up and repair costs, as well as lost profits. Engeman brought suit claiming negligence, vicarious liability, and negligent supervision, but did not claim breach of contract. *Id.* at ¶¶5-6. The trial court determined that the parties had a contract between them, although acknowledged that the terms may be in dispute regarding whether the service report, refrigerant report, or oral agreement prevails. As such, the court determined that Tolin did not owe an independent duty of care to Engeman and therefore, the tort claims were barred by the economic loss rule. *Id.* at ¶¶6-7.

On appeal, Engeman argues that its claim is not barred because (1) Tolin owed an independent duty to safely handle the ammonia, (2) the damage is property harm, not "economic loss", (3) Tolin owed an independent duty to supervise and train employees, (4) the economic loss rule should not apply to service contracts, and (5) Tolin's conduct was willful and wanton. *Id.* at ¶9.

The court looked at three factors: "(1) whether the relief sought in negligence is the same as the contractual relief; (2) whether there is a recognized common law duty of care in negligence; and (3) whether the negligence duty differs in any way from the contractual duty." *Id.* at ¶13, citing *BRW, Inc. v Dufficy & Sons, Inc.*, 99 P.3d 66, 74 (Colo. 2004). The court determined that the damages could have provided the same relief in either tort or contract, and that the limitation of liability clause in the contract does not change their opinion because the clause applies to both tort and contract actions. *Id.* at ¶16. The court then considered whether a common law duty exists, and stated that at a minimum, Tolin owed a duty of reasonable care in handling a hazardous substance. *Id.* at ¶18, referencing *Imperial Distribution Services, Inc. v Forrest*, 741 P.2d 1251, 1254 (Colo. 1987). The court then turned to whether the common law duty differs from the contractual duty, and determined that standards of care vary and "do not seem to follow a clear pattern". *Id.* at ¶21, comparing *Imperial Distribution*, 741 P.2d at 1256 (EPA-designated hazardous waste does not require highest duty of care) with *Blueflame Gas, Inc. v Van Hoose*, 679 P.2d 579, 588 (Colo. 1984) (propane gas required highest duty of care). In this case, the court found no difference between the common law or contractual duty, and because the subject matter is an agreement between two commercial entities, "to decide otherwise would defeat the principle of risk allocation at the heart of commercial contract law". *Id.* at ¶27, citing *Town of Alma*, 10 P.3d at 1261.

5. On April 25, 2013, the court decided a breach of contract matter in *Tarco, Inc. v Conifer Metropolitan District*, 2013 COA 60 (Colo.App. 2013). Conifer Metropolitan District (CMD) had several contracts with Tarco to develop a shopping center. CMD withheld payment and Tarco sued stating that work regarding two of the contracts was substantially complete and therefore, CMD's withholding of payment was wrong. *Tarco,* 2013 COA 60 at ¶*5.* CMD counterclaimed on the basis of material breach by Tarco's not satisfying the bond statute, and subsequently moved for partial summary judgment. The trial court granted CMD's motion. *Id.* at ¶¶5-6.

In this appeal, Tarco argued that (1) the contracts were not for "public works"; (2) it is a nonclaim statute; (3) CMD waived or should be equitably estopped; (4) CMD failed to adequately plead breach; and (5) the trial court granted summary judgment. *Id.* at ¶*2.* CMD alleges that Tarco's appeal claims were frivolous and CMD is entitled to attorney fees and costs for defending the appeal. *Id.*

Tarco initially claimed that CMD did not file timely or sufficiently pursuant to C.R.C.P. 8(c) and 9(c). The court determined that even if Tarco's claim was true, CMD could still raise the defense for two reasons: (1) "[t]he defense of lack of subject matter jurisdiction may be raised at any point, even on appeal for the first time", and (2) Tarco didn't prove any prejudice from CMD's actions. *Id.* at ¶14-15. Tarco also argued that the contract was not for "public works" as required by the bond statute. The court was not persuaded and noted that the relevant portions of the development were, among other things, for "public use and convenience", to be paid for by taxpayers, and owned by a political subdivision of the state. *Id.* at ¶23. The court determined that the trial court was correct in granting CMD's motion. *Id.* at ¶25.

The court also found that "the bond statute is not a nonclaim statute, and compliance with its bond requirement is not a jurisdictional prerequisite to a contractor's filing suit to recover for a government entity's breach of contract". Tarco argued that the equitable defense of waiver should apply because CMD waived the bond statute requirement via its actions, such as progress payments to Tarco. *Id.* at ¶32. The court disagreed stating that "[s]pecial districts are creatures of statute, and may exercise only those powers that are expressly conferred by the constitution or statute or exist by necessary implication", and that any "implied powers" must be construed narrowly.

The court then turned to Tarco's argument of equitable estoppel. CMD relied upon *Dept. of Transportation v First Place* in claiming that "those who deal with the [g]overnment are expected to know the law and may not rely on the conduct of government agents contrary to law". *Id.* at ¶40, citing *Dept. of Transportation v. First Place, LLC,* 148 P.3d 261, 267 (Colo.App. 2006), quoting *Emery Mining Corp. v Sec'y of Labor*, 744 F.2d 1411, 1416 (10th Cir. 1984). The court disagreed stating that *First Place* is based on the theory of promissory estoppel, not equitable estoppel, which is an "offensive theory of recovery". Whereas the doctrine of equitable estoppel is a defensive theory and may be invoked to "cut off rights or privileges conferred by statute". *Id.* at ¶¶40-2, referencing *Bd. of County Comm'rs v DeLozier*, 917 P.2d 714, 716 (Colo. 1996). The court determined that the evidence supports the finding that "(1) CMD was aware that it could have included bonds on each contract; (2) CMD wanted Tarco to proceed with performance under the contracts despite the absence of bonds; (3) Tarco reasonably relied on CMD's conduct; and (4) Tarco suffered resulting injury". *Id.* at ¶¶42-3.

Based upon the foregoing, the court determined that there is a material issue of fact and that the trial court erred in granting summary judgment on this issue. *Id.* at ¶44.

Finally, the court reviewed CMD's counterclaim that it should be awarded attorney fees and costs for having to defend itself against Tarco's "frivolous claims". The court disagreed, stating that it found "no evidence that Tarco's appeal is 'for the sole purpose of harassment or delay'." *Id.* at ¶46, referencing *Mission Denver Co. v Pierson*, 674 P.2d 363, 366 (Colo. 1984).

6. On August 1, 2013, the court of appeals decided an interlocutory appeal regarding the economic loss rule, on the issue of "whether 'homeowner' includes a wholly-owned subsidiary of the construction lender on the project, which holds title to the home solely for purposes of resale?". *Mid Valley Real Estate Solutions V, LLC v Hepworth-Pawlak Geotechnical, Inc., et al.*, 2013 COA 119, ¶1 (Colo.App. 2013).

Hepworth Pawlak Geotechnical, Inc. (HP) was hired by the original land developer to analyze soils and prepare a report including a recommendation regarding the type of foundation that should be used. Fellow defendant, S K Peightal Engineers. Ltd. (SKP), was hired to provide structural engineering services. *Mid Valley*, 2013 COA at ¶4. The developer subsequently defaulted on a construction loan agreement. The bank accepted a deed-in-lieu agreement so that the property could avoid foreclosure, and title was transferred immediately to Mid Valley, which entity was created to hold the house until resale. *Id.* at ¶5. Before the house was sold, structural damage to the foundation began to appear and Mid Valley sued HP and SKP for negligence. *Id.* at ¶6.

HP and SKP argued that Mid Valley is not a traditional homeowner and therefore may not claim under the rule. The court disagreed stating that "allowing defendents to avoid liability merely because Mid Valley is not a traditional home owner would afford defendents a windfall resulting solely from the fortuity that the latent defect caused damage before Mid Valley could sell the house." *Id.* at ¶17.

The court reviewed *Cosmopolitan Homes* and further determined that Mid Valley should also not be barred from benefitting from the economic loss rule simply because it is a subsequent purchaser, nor because it does not reside in the home. *Id.* at ¶¶37-38. In fact, the court stated that "[r]ather than limiting its reasoning to noncommercial property owners, as defendents suggest, Cosmopolitan Homes, 663 P.2d at 1045, extends a builder's duty to all 'foreseeable users of the property'." *Id.* at ¶45.

In short, the court stated that the purpose of the rule is to promote "quality construction" to discourage misconduct, and to incentivize preventing harm. *Id.* at ¶50. As such, the trial court's decision was affirmed. *Id.* at ¶52.

7. On September 12, 2013, the court decided "whether an insured's breach of a 'no voluntary payment' clause will always bar the insured from recovering benefits." *Stresson Corp v Travelers Property Casualty Co. of America*, 2013 COA 131, ¶2. This case involved a construction accident where one worker was killed and another gravely injured when a portion of a building collapsed at Fort Carson Army Base. *Stresson*, 2013 COA at ¶6. Three lawsuits were filed including one brought by Mortensen (the GC) against the concrete company, its subcontractor (Sub), in which the general contractor claimed it was entitled to contract damages incurred because of the length of time that the project was delayed. *Id.* at ¶7. Pursuant to the

contract, the GC was liable for delays and the GC informed the Sub that it expected reimbursement for any damages resulting from the collapse. The Sub notified Travelers of the GC's claim. *Id.* at ¶10. Travelers sent two "reservation of rights" letters informing the Sub that the delay damages might not be covered by the policy. Travelers also sent a letter to the GC denying any Sub liability, and therefore coverage available to the GC. *Id.* at ¶11.

Subsequently, the Sub settled the dispute with the GC, but without notifying Travelers in advance of the settlement. *Id.* at ¶12. The Sub later sued Travelers to recover the settlement amount it paid the GC. The Sub claimed that Travelers acted in "bad faith" by breaching its duty to the Sub as Travelers' insured, and had "violated section 10-3-1115(1)(a), C.R.S. 2012, by 'unreasonably delay[ing] or den[ying]' its claim for benefits." *Id.* at ¶14. The case went to trial and the jury found that Travelers had acted unreasonably, had not been prejudiced by the Sub's settlement with the GC, and awarded damages. *Id.* at ¶18. However, based upon a prior trial between the Sub and the crane team, in which the Sub was awarded damages for the collapse, the trial court reduced the amount of the award that Travelers would pay, so as to credit the damages apportioned against the crane team to avoid a double recovery. The trial court also awarded attorney fees to the Sub, but reduced the amount by 20%, and denied "fees on fees" "to reflect the time and effort that the concrete company [Sub] had wasted by not clarifying whether its claims against the crane team were grounded in tort or in contract." *Id.* at ¶¶19-20.

Travelers appealed claiming that the trial court erred by not granting its motion for directed verdict on two grounds: 1) the notice-prejudice rule is not applicable to a breach of a "no voluntary payment" clause, and 2) Travelers was prejudiced as a matter of law. *Id.* at ¶24. The appeals court first turned to the notice-prejudice rule and noted that Colorado does not strictly enforce the rule, unless there is evidence of prejudice. *Id.* at ¶26. The insurer cannot simply prove the possibility of prejudice, but must prove a "substantial likelihood of avoiding or minimizing the covered loss." *Id*. at ¶33.

The appeals court rejected Travelers' argument that the *Friedland* rule does not apply for a variety of reasons. First, the relevant facts of *Friedland* mirror those in the present case – an insured settled without prior notice in violation of a "no voluntary payment" clause. The court noted that the supreme court "made clear that the insured's settlement was *the* reasons for the creation of a presumption of prejudice in favor of the insurer." *Id.* at ¶37. The court then discussed several other semi-related cases and other jurisdictions, but settled on the findings of a New Mexico court in the *Roberts Oil* case, stating "[t]he purposes of a voluntary payment provision are to 'obviate the risk of a… collusive combination between the assured and the injured third party' and to 'restrain the assured from voluntary action materially prejudicial to the insurer's contractual rights'." *Id.* at ¶43, citing *Roberts Oil Co. v Transamerica Ins. Co.*, 833 P.2d 222, 229 (N.M. 1992). The court further stated that "forfeiting insurance benefits when the insurer has not suffered any prejudice would be a disproportionate penalty and provide the insurer a windfall based on a technical violation of the policy." *Id.* at ¶44-5, citing *Roberts Oil*, 833 P.2d at 231, and *Lauric v USAA Casualty Ins. Co.*, 209 P.3d 190, 193 (Colo.App. 2009).

The court then turned to Travelers' claim that the notice-prejudice rule is "per se" inapplicable because the settlement occurred before the GC sued. *Id.* at ¶47. The court disagreed, stating that "even if the concrete company [Sub] had asked the insurance company [Travelers] to represent it in the settlement negotiations, the insurance company would have refused." *Id.* at ¶52. Once the burden shifted, Travelers had to prove that iy sustained actual prejudice, not just potential prejudice. *Id.* at ¶53. Travelers argued that "it was prejudiced as a

matter of law because (1) the settlement denied the insurance company its status as an excess insurer; (2) the unallocated settlement exceeded the amount of the concrete company's liability; and (3) the settlement was an attempt to 'maximize a payout by [the insurance company]'." *Id.* at ¶55.

The court noted that Travelers did not appeal the trial court's ruling that it was not an excess carrier and that the other two claims were questions of fact of the jury to decide. The court noted that despite the fact that Travelers reservation-of-rights letters "did not expressly state that it would not pay benefits, the insurance company took no other action to determine the amount of the concrete company's liability". Furthermore, Travelers sent a letter to the GC stating that it would not pay on this matter. *Id.* at ¶69.

**Legislation:**

1. **House Bill 13-1025** - **Authorized Increased Deductible for Workers Compensation Claims -** Authorizes an employer to pay an increased deductible on a worker's compensation claim, which allows construction companies to more effectively manage insurance premiums and experience modification rates.

2. **House Bill 13-1292 - Keep Jobs in Colorado Act of 2013 -** Revised state and local public work project requirements to 80% Colorado labor on public work projects; a disadvantage for non-resident bidders based upon the non-resident bidder's State's preference requirements; new standards for competitive sealed best value bidding; reporting requirements for use of foreign manufactured iron and steel; and a prohibition for outsourcing work.

3. **Senate Bill 13-147 - "Statutory Employer" Not Liable for Workers Compensation Claim Filed by Supplier Injured Outside of the Buyers Premises**- Clarifies that a buyer of materials or equipment has no "statutory employer" liability when a supplier delivering such goods sustains an injury while not on the buyer's premises.

4. **Senate Bill 13-161 - Continuation of the State Board of Licensure for Architects, Professional Engineers, and Professional Land Surveyors and Adoption of Recommendations of Department of Regulatory Agencies** - Authorized continuation of the state board of professional licensure for architects, professional engineers and professional land surveyors through September 1, 2024 related to discipline and disciplinary proceedings, professional seals, the unauthorized practice of architecture, and monument records.

5. **Senate Bill 13-214 - Public School Capital Construction -** Provides additional oversight for the funding of public school construction under the Building Excellent Schools Today Act.

6. **Senate Bill 13-162 - Continuation of State Board of Plumbers –** Continues the State Plumbing Board through September 1, 2024, requires adoption of a Colorado Fuel Gas Code, empowers the State Plumbing Board to oversee the compliance with plumbing standards by towns, counties and cities, and revises plumbing license requirements.

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*these and other decisions, readers may review the Colorado Bar Association's 2013 Annual Survey of Colorado Construction Law. This publication should be available shortly at* http://cle.cobar.org/.

## Connecticut

### Case law:

1. In *State of Connecticut v. Lombardo Brothers Mason Contractors, Inc.*, 307 Conn. 412 (2012), the Connecticut Supreme Court held that the doctrine of *nullum tempis occurrit regi (*no time runs against the king) *("nullum tempis")* was alive and well in Connecticut common law and that the State's right to bring suit against contractors and design professionals in connection with a State project completed twelve years earlier, was unaffected by the passage of time, laches, Connecticut's statutes of limitations and/or repose for contract and tort claims, and contractual provisions purporting to limit the State's right to pursue its causes of action.

In *Lombardo Brothers*, the State brought an action against twenty-eight defendants, including design professionals, contractors and others, to recover damages for defective design and construction of the University of Connecticut Law library, more than twelve years after completion of the project. The State was seeking to recover the costs of work needed to correct water infiltration problems that the State claimed to be the result of deficient design and construction. In response, all of the defendants raised the defense that the State's claims were time-barred by statutes of limitations or repose found in CGS §§ 52-577, 52-577a, 52-584, 52-584a and 52-576. One defendant, the construction management firm for the project, also raised the defense that the State had waived *nullum tempis* by contractually agreeing to application of the seven year statute of repose for professional design work contained in CGS § 52-577. The trial court rendered judgment for all defendants, finding that *nullum tempis* had never been adopted as the common law in Connecticut, and that as a result, the State's claims were barred by the foregoing statutes of limitations or repose. The trial court also agreed with the construction manager's claim of contractual waiver of *nullum tempis*.

The State appealed, arguing that the trial court committed error by ignoring centuries old precedent recognizing and applying *nullum tempis* in Connecticut, as well as the fundamental principal that statutes of limitation are not to be interpreted as applicable to the State absent the clear expression of legislative intent to the contrary. The Connecticut Supreme Court agreed with the State, holding that the trial court had no basis for rejecting *nullum tempis* which had been recognized by Connecticut's courts since the nineteenth century. The Court reasoned that *nullum tempis* is part of the State's common law and a privilege afforded to the federal and state governments as one of incidents of sovereignty, which furthers the public policy of preserving the rights, revenues, and property of the State from loss caused by the negligence of public officers. The Court rejected the defendants' claim that the Court should abolish *nullum tempis* as unfair, inequitable and inconsistent with the changing needs of society. The Court reasoned that *nullum tempis*, like sovereign immunity, is beyond the reach of the Court's authority over the common law, because *nullum tempis* is derived from the sovereignty of the State. The Court noted that the rationale for both doctrines is protection of the fiscal well-being of the State, therefore, there is no reason to treat *nullum tempis* differently than it would a claim that sovereign immunity should be judicially abolished. The Court expressly held that only the

legislature may properly make the decision to abolish sovereign immunity, and therefore, only the legislature could abolish *nullum tempis*.

In rejecting the defendants' argument that CGS §§ 52-577, 52-577a, 52-584, 52-584a apply to the State by necessary implication, the Court utilized the standard traditionally used to determine whether the language of a particular statute necessarily implies that through the subject statute, the State has waived sovereign immunity. In addition to concluding that a textual analysis of the subject statutes does not support the conclusion that they were to apply to the State, the Court also noted that by not amending the subject statutes following prior judicial decisions that denied application to the State, the legislature is deemed to have acquiesced in the Court's interpretation of the statutes. The Court further rejected the defendants' related argument that the waiver of sovereign immunity in CGS § 4-61, also waived *nullum tempis*, concluding that a limited statutory waiver of sovereign immunity does not encompass a waiver of *nullum tempis* because the statute only pertains to actions against the State, not by the State.

As to the construction manager's claim that the State contractually waived *nullum tempis*, the Court held that the clause in the subject contract relied on by the trial court was invalid, because the commissioner of the Connecticut Department of Public Works, who had signed the contract, lacked statutory authorization to waive *nullum tempis* on the State's behalf. The Court reasoned that language in CGS § 4b-99 giving the commissioner authority to enter into contracts on behalf of the State, did not expressly or by necessary implication, authorize the Commissioner to waive the State's immunity from application of the statute of repose in CGS § 52-584a.

Similarly, the Court rejected the construction manager's argument that the State's tort claims were barred by the limitation of remedies provisions in its contract with the State. The Court flatly rejected the construction manager's interpretation of the contract as a bar to the State's tort claims, concluding that the contractual language clearly and unambiguously reserved the State's right to pursue tort claims against the construction manager.

2. In *Department of Transportation v. White Oak Corporation, 141 Conn. App. 738 (2013)*, the Connecticut Appellate Court considered the permissible scope of arbitration proceedings commenced under the limited waiver of sovereign immunity contained CGS § 4-61. In this case, the Connecticut Department of Transportation ("ConnDOT") and the defendant-contractor entered into contracts for two bridge reconstruction projects ("Tomlinson Project" and Bridgeport Project"). The projects suffered numerous delays and following an agreement between ConnDOT, the contractor and the contractor's surety, the contracts were reassigned to other completion contractors. The contractor filed separate notices of claims and separate demands for arbitration pursuant to CGS § 4-61(b), claiming wrongful termination of the contracts and seeking damages. In response, ConnDOT commenced suit in State Court to enjoin the contractor and the American Arbitration Association ("AAA") from prosecuting the two arbitrations on grounds that AAA lacked subject jurisdiction due to the contractor's failure to follow the notice requirements contained in CGS § 4-61(b).

Before the trial court made its decision in ConnDOT's action to enjoin arbitration, the arbitration panel presiding over the contractor's claims relating to the Tomlinson Project rendered a final award rejecting the contractor's sole claim for wrongful termination. Thereafter, the trial court refused to enjoin arbitration of the contractor's claims relating to the Bridgeport

Project, finding that the contractor had complied with the requirements of CGS § 4-61(b), for giving a written notice of claim and making a demand for arbitration. The trial court rejected ConnDOT's argument that the demand for arbitration was defective because it failed to state the amount of damages for the wrongful termination claim. The trial court found that although the demand for arbitration was formatted to include what appeared to be three separate claims for delays, nonpayment and wrongful termination, the wrongful termination claim incorporated the allegations supporting the delay and nonpayment claims and therefore subsumed those claims, making the statement of single amount of claimed damages sufficient to support the wrongful termination claim and satisfy the requirements of CGS § 4-61(b). The trial court expressly held that the contractor's demand for arbitration alleged a single claim for wrongful termination and sought damages on that claim only. Thereafter, the parties proceeded with arbitration relating to the Bridgeport Project.

Meanwhile, the contractor filed another notice of claim and demand for arbitration, now seeking delay damages plus interest in relation to Tomlinson Project. ConnDOT filed another action seeking a permanent injunction barring arbitration of that claim, which was denied by the trial court. However, the trial court's decision was reversed by the Connecticut Supreme Court in *Department of Transportation v. White Oak Corp*, 287 Conn. 1 (2008) ("*White Oak I*") in which the Court held that the waiver of sovereign immunity in CGS § 4-61 permits only a single action or arbitration wherein all existing disputed claims under a public works contract must be pursued and resolved. Accordingly, CGS § 4-61 did not waive sovereign immunity as to the contractor's claim for delay damages, because the contractor failed to pursue that existing claim in its first notice of claim relating to the Tomlinson Project.

In the Bridgeport Arbitration, notwithstanding the arbitration panel's findings that ConnDOT did not terminate its contract with the contractor and that the contractor did not prove wrongful termination, the panel still considered and awarded the contractor delay damages that were separate and distinct from the damages claimed for wrongful termination, as well as interest. ConnDOT argued that the panel lacked subject matter jurisdiction over the delay claim because the contractor had not given sufficient notice of that claim pursuant to CGS § 4-61. The panel disagreed, stating that the contractor's notice of claim and demand for arbitration contained a claim for wrongful termination, as well as a claim for damages, thus allowing arbitration of the delay damage claim under CGS § 4-61. ConnDOT filed an application in State Court to vacate, correct, or modify the award, arguing that the arbitration panel exceeded its authority granted by to CGS § 4-61, because it found against the contractor on the one claim over which it had subject matter jurisdiction, yet awarded damages to the contractor on a claim not submitted to the panel. The contractor responded by filing its own application to confirm the award, which was granted by the trial court upon findings that the panel properly decided issues presented by an *unrestricted* arbitration submission (i.e. the contractor's demand for arbitration), and the award was properly made because the delay damage award was part of the wrongful termination claim that subsumed the allegations supporting the other claims. In so finding, the trial court relied on its earlier decision in which it denied ConnDOT's action for injunctive relief, as law of the case for the issues of arbitrability and jurisdiction.

ConnDOT appealed the trial court's decision to confirm the arbitration award, arguing that the trial court applied the incorrect legal standard by considering the matter to have been before the panel upon an unrestricted arbitration submission, resulting in the trial court's deference to the panel's decision as final and binding, without reviewing the award for errors of

law or fact and leading to the confirmation of the panel's award for a delay claim over which it lacked jurisdiction. The Appellate Court agreed.

The Appellate Court first noted that unlike a matter submitted to arbitration upon the agreement of the parties, a matter referred to arbitration through the waiver of sovereign immunity contained in CGS § 4-61 is *restricted* by the scope of the arbitral submission made by a claimant pursuant to CGS § 4-61. Accordingly, the Appellate Court turned to the record of proceedings in ConnDOT's action to enjoin arbitration relating to the Bridgeport Project, to determine the scope of the arbitral submission, given that the trial court's decision there was the basis for the trial court's decision to confirm the arbitration award. From the record, the Appellate Court found that the trial court, upon the contractor's repeated affirmations, held that the contractor's arbitration demand alleged a single claim for wrongful termination, to the exclusion of other claims to recover other damages, including delay claims. The Appellate Court determined that the trial court properly adopted its prior ruling as law of the case on issues of arbitrability and jurisdiction. However, the trial court's error was in how it applied its earlier ruling on the scope of claims referred to arbitration.

The contractor attempted to argue that ConnDOT had waived the ability to seek judicial review of the arbitrability of the issues reviewed by the panel at arbitration, under theories that ConnDOT consented to submission of the issue of arbitrability to the arbitrators, and that ConnDOT failed to appeal the trial court's decision in the injunction action. The Appellate Court rejected both arguments, noting that ConnDOT's conduct gave no indication that ConnDOT had agreed that issues of arbitrability would be submitted to the arbitration panel for resolution, given ConnDOT's vigorous opposition to any exercise of jurisdiction by the panel over any claim other than the wrongful termination claim. The Appellate Court specifically relied on *White Oak I* as precedent requiring the courts, not arbitrators, to resolve issues of arbitrability of claims made pursuant to CGS § 4-61.

Having resolved the foregoing preliminary issues, the Appellate Court considered whether the arbitration panel exceeded its authority in rendering the arbitration award. The Appellate Court agreed with ConnDOT, holding that the arbitration panel exceeded its authority by determining the scope of its own jurisdiction and then further determining that the contractor's claim contained more than a claim for wrongful termination, before making an award for a delay claim over which it had no jurisdiction. The arbitration panel's principal error was concluding that its own rules vested it with authority to resolve issues of arbitrability, rather than realizing its jurisdiction was limited to resolving the single claim referred to arbitration by the trial court in rendering its decision in ConnDOT's injunction action. In doing so, the arbitration panel violated the holding set forth in *White Oak I* and departed from the trial court's holding in the injunction action. As such, the Appellate Court held that the arbitration panel lacked jurisdiction to make the award for delay damages and interest, because it had already resolved the contractor's wrongful termination claim in favor of ConnDOT.

3. In *E and M Custom Homes, LLC v. Negron, 140 Conn. App. 92 (2013),* the Connecticut Appellate Court upheld the methodology used by the trial court in determining that the value of the plaintiff-contractor's mechanic's lien against the home of the defendant/counterclaim-plaintiff's, was less than the value of damages sustained by the home-owner due to the plaintiff's breaches of contract. The contractor had brought an action for breach of contract and foreclosure of a mechanic's lien against the homeowner. The

homeowner counterclaimed for violation of the New Home Construction Contractor's Act and The Connecticut Unfair Trade Practices Act.

After trial, judgment was rendered for the homeowner because the homeowner's damages exceeded the court's calculation of the appropriate value of the contractor's mechanic's lien, after application of setoffs for defective work. The trial court determined the value of the mechanic's lien based on the value of labor and materials represented in the construction budget prepared by the principal of the plaintiff, to assist the defendant in obtaining third-party construction financing. The budget segregated the value of labor and materials into five separate stages, each stage having a separate value, and conditioned the contractor's right to payment from loan draws on having first completed the detailed work set forth in each stage of the budget. The contractor completed stages one through four, and provided corresponding lien waivers. The trial court, however, determined that the contractor did not complete phase five and therefore failed to substantially complete the contract, thus precluding use of the total contract value as the value of labor and materials that would support the lien. Rather, the trial court used the value of labor and materials identified in the construction budget to determine the value of work provided by the contractor that supported its mechanic's lien, rendering a lower result than if the trial court had used the overall contract price.

The contractor appealed, claiming that the trial court 1) improperly calculated the amount of the mechanic's lien because it utilized a construction loan budget prepared by the contractor as the basis for the value of materials and labor provided, instead of the total price of the construction contract; and 2) improperly interpreted affidavits by the contractor submitted to obtain financing for each of the project's five stages as lien waivers for the first four stages, leaving only the budget for the fifth stage to be considered in calculating the potential lien amount.

The Appellate Court affirmed trial court's decision. The Court ruled that the trial court properly calculated the lien value on the basis of the cost to complete the work as evidenced by the loan budget and not the balance of the total contract price, because the contractor had not substantially completed its work and the contract price did not represent the value of materials and services the contractor had provided, but had not been paid for. The Court noted that there was a $40,000 difference between the total cost of construction in the loan budget and the contract price, and that the difference appeared to be the contractor's anticipated profit, which the trial court properly excluded from the value of materials and services provided by the contractor when calculating the amount of the lien.

The Court also held that the trial court properly calculated the lien value with reference to only stage five of project, because the contractor had prepared and signed affidavits affirming that stages one through four had been paid for, and by doing so had unambiguously waived lien rights for labor and materials included as part of stages one through four. Accordingly, because the contractor had waived its lien rights for stages one through four, the trial court did not err in calculating the lien value by using only the cost to complete stage five of the project, as contained in the construction loan budget.

4. In *Capstone Building Corp. v. American Motorists Ins. Co*., 308 Conn. 760 (2013), the Connecticut Supreme Court considered whether the definition of "occurrence" within a commercial general liability insurance policy ("CGL") may include defective construction or

faulty workmanship on a construction project, and the extent to which "property damage" resulting from defective construction or faulty workmanship constitutes an insured loss.

In this case, the plaintiff-contractor entered into a contract with the University of Connecticut ("UConn") for the construction of an on-campus student housing complex, for which UConn obtained an owner controlled insurance program ("OCIP") CGL policy. More than three years after completion of the project, UConn notified the contractor of construction defects. The contractor notified the defendant, the CGL insurer under the OCIP, of UConn's allegations, and demanded that the insurer defend against UConn's claims. The insurer denied coverage on the grounds that the claims arose out of the contractor's own work.

The contractor settled with UConn, then brought suit against the insurer in Alabama State Court. After removal to Alabama Federal Court, the Federal Court certified questions concerning interpretation of the subject CGL policy under Connecticut Law to the Connecticut Supreme Court.

The Connecticut Supreme Court first addressed whether defective construction or faulty workmanship qualified as an "occurrence" under the terms of the subject CGL policy. The CGL policy at issue defined an "occurrence" as "an accident including continuous or repeated exposure to substantially the same general harmful conditions." The Court reasoned that negligent work may constitute an accident or occurrence under the CGL policy because it is a sufficiently fortuitous event that is unintentional from the perspective of the insured.

The Court then considered whether the claimed damage at issue constituted "property damage" under the subject CGL policy. The relevant categories of damage at issue were (1) damage to non-defective property including mold and water damage, cracked piping and structural problems; (2) the defective work in and of itself and building code violations; and (3) repairs to damaged work. The Court determined that the definition of "property damage" in the CGL policy did not only apply to the property of third-parties, but permitted coverage for physical injury or loss of use to the contractor's work, beyond the defective work itself. The Court concluded, however, that defective work itself did not constitute "property damage" as defined by the CGL policy, unless it also results in damage to other non-defective property. Accordingly, the Court also held that the CGL policy did not cover claims for repairs to the defective work itself, but did cover claims for repairs to nondefective property damaged by defective work.

The Court went on to examine the extent to which coverage exclusions in the CGL policy, and exceptions thereto, were determinative of the coverage issues presented. In particular, the Court considered applicability of the CGL policy's "your work" exclusion, which precludes coverage for damage to "'your work', arising out of it or any part of it." The Court also considered the "subcontractor exception" to the "your work" exclusion, which precluded application of the exclusion if the property damage at issue arose from work performed by the insured's subcontractors. The Court determined that the entire project constituted "your work" within the meaning of the exclusion, because all work was performed by the contractor and/or its subcontractors. However, the Court ruled that questions of fact prevented it from determining the extent to which the subcontractor exception applied. Accordingly, the Court held that work that was performed by the contractor would be precluded from coverage, however, there would be coverage for property damage arising from a subcontractor's defective work.

5. In *Scottsdale Insurance Company v. R.I. Pools Incorporated*, 710 F.3d 488 (2013), the United States Second Circuit Court of Appeals ("Second Circuit") ruled that the United States District Court for the District of Connecticut had incorrectly granted summary judgment to the plaintiff, an insurer, in an action against its insured, a pool contractor, in which the insurer sought a declaratory judgment that it had no duty to defend against lawsuits brought against the insured by its customers upon claims of defective work.

In the lawsuits brought by the insured's customers, the customers complained that cracking, flaking and deteriorating concrete had caused the subject pools to lose water, and in some cases, rendered them unusable. The insured had employed outside companies as subcontractors to furnish and install the concrete for the pools. The insurer initially furnished defense costs, but later filed suit seeking a declaration that it had no duty to defend because there was no coverage under the subject commercial general liability ("CGL")policies, and that it was entitled to reimbursement of the costs expended to date. The trial court granted summary judgment to the insurer, finding that the CGL policies provided coverage for damage caused by an "occurrence" defined by the CGL policies as an "accident", and that because the damage claimed by the insured's customers in the insured's workmanship could not be considered an "accident," there was no coverage and therefore, no duty to defend. The trial court also ordered the insured to reimburse the insurer for defense costs already expended. The insured appealed.

On appeal, the Second Circuit vacated the judgment in favor of the insurer and remanded the case for further proceedings. The Second Circuit ruled that the trial court incorrectly relied upon the case of *Jakobson Shipyard, Inc. v. Aetna Casualty & Surety Co*., 961 F.2d 387 (2d Cir. 1992), because the trial court failed to consider the application of certain coverage exceptions in the CGL policies which were not present in the policies at issue in *Jakobson*. Specifically, a coverage exclusion in the CGL policies applied to damage to work performed by the insured or on its behalf, but created an express exception to the exclusion for damage arising from work performed on the insured's behalf by subcontractors. The Second Circuit held that the trial court committed error by failing to consider whether the defects alleged in the customer lawsuits came within the subcontractor exception to the "your work" exclusion.

6. In *Suntech of Connecticut v. Lawrence Brunoli, Inc.*, 143 Conn. App. 581 (2013), the Connecticut Appellate Court upheld the judgment of the trial court rendered in favor of a defendant-general contractor to a construction project with the State of Connecticut Department of Transportation ("ConnDOT") and its payment bond surety, because under the terms of the applicable subcontract, the general contractor was not responsible for additional costs, expenses, damages and delays claimed by a subcontractor, in the absence of trial evidence that proved a breach of the subcontract or that the subcontractor's claimed damages were caused by the general contractor.

In this case, the plaintiff brought suit for damages including unpaid contract work, unpaid change orders and delay damages, alleging claims breach of contract, unjust enrichment, delay, violation of prompt payment obligations under CGS § 49-41a, and a statutory payment bond claim pursuant to CGS § 49-42. In its breach of contract claim, the plaintiff alleged that the general contractor committed breach by failing to pay the plaintiff on a monthly basis for completed work, by failing to request payment from ConnDOT, by failing to pay the plaintiff for completed and approved change order work, and by failing to pay the plaintiff following full performance of the subcontract.

Following trial, the trial court focused on the actual provisions of the subcontract to ascertain exactly what the general contractor's obligations were, and as a result, refused to find that the general contractor breached the subcontract. The trial court interpreted the subcontract as requiring all of the plaintiff's "billings" to be approved by ConnDOT. Accordingly, after ConnDOT's review of invoices submitted by the general contractor for itself and its subcontractors, including the plaintiff, ConnDOT would pay the invoices according to its own opinion of the amount of work in place, and the general contractor would then, in turn, pay the plaintiff for the portion of payment received that was attributable to the plaintiff's work. The trial court also recognized that the general contractor's contract with ConnDOT was incorporated by reference into the subcontract, including provisions giving ConnDOT ultimate decision-making authority to approve any of the plaintiff's particular invoices. Based on the evidence presented, the trial court concluded that the general contractor forwarded the plaintiff's monthly invoices to ConnDOT in satisfaction of if its contractual obligations.

Although it was undisputed that the project suffered delays resulting from a variety of causes, there was insufficient evidence to prove that the general contractor was responsible for the delays. Per the trial court, the subcontract lacked any contractual provision that made the general contractor responsible for delay damages absent evidence that it caused the delay, and there was no legal basis to hold the general contractor responsible to the plaintiff for delays caused by ConnDOT or other subcontractors.

The trial court also concluded that the claim for unjust enrichment was barred by the existence of remedies within the subcontract, that the claim for "delay" was no different than the breach of contract claim, and that the claim for violation of statutory prompt payment obligations under CGS § 49-41a, failed in the absence of evidence that the general contractor received money on account of the plaintiff's work, which was not paid over to the plaintiff.

The trial court also refused to find that the surety violated CGS § 49-42 by failing to pay the plaintiff's payment bond claim. The trial court noted that a claim CGS § 49-42 arises after the general contractor has received payment from the owner of the project, then fails to pay the subcontractor per the terms of CGS § 49-41a. The trial court granted judgment for the surety because the plaintiff failed to prove that the general contractor received funds from ConnDOT on account of the plaintiff's work or that the general contractor breached the subcontract. The trial court noted that there is no authority that CGS § 49-42 allows prosecution of claims against a contractor for which the contractor would not otherwise be responsible and no authority that the statute is meant to circumvent the subcontract between the parties.

On appeal, the Appellate Court rejected the plaintiff's claims that the trial court erred in concluding that the plaintiff hat not proven breach of contract or violation of CGS § 49-42. In rejecting the plaintiff's appeal, the Appellate Court confirmed all aspects of the trial court's interpretation of the general contractor's obligations under the subcontract, focusing on the fact that ConnDOT had ultimate authority over the approval of payments to the plaintiff. Per the Appellate Court, the subcontract only required the general contractor to pay the plaintiff within a certain time period of receiving payment from ConnDOT, and there was no breach because there was no obligation to make payments to the plaintiff that had not been approved and paid for by ConnDOT.

The Appellate Court also ruled that the under the terms of the subcontract and the circumstances present, the plaintiff clearly and unambiguously waived delay damage claims

against general contractor. The subcontract provided: "The Subcontractor agrees not to assess any delay damages or claims against [the general contractor] unless the Owner accepts responsibility and payment." The Appellate Court interpreted this language, as applied to the undisputed facts of the case, as precluding the plaintiff's claim for delay damages because the subcontract permitted the general contractor to pass the plaintiff's claims on to ConnDOT, without any obligation to pay such claims unless ConnDOT made payment to the general contractor. In expressly rejecting prior precedent offered by the plaintiff as authority governing the application and effect of pay-when-paid clauses, the Appellate Court suggested that under the facts of this case, the subcontract created a valid condition precedent to the general contractor's obligation to pay because ConnDOT, not the general contractor, had control over the "condition," the plaintiff had available recourse through appeals to ConnDOT, and the parties knowingly contracted for the allocation of risk in dealing with the sovereign.

Additionally, the Appellate Court concluded that the trial court did not commit error in denying the plaintiff's breach of contract claim, therefore, it properly found in favor of the surety on the payment bond claim. In doing so, the Appellate Court appears to have concluded that a subcontractor's cause of action under CGS § 49-42 does not accrue until payment is owed by a contractor to a subcontractor (or subcontractor to sub-subcontractor, etc.) under CGS § 49-41a, following the contractor's receipt of payment from the project owner on account of the subcontractor's work.

7. In *Clem Martone Construction v. DePino,145 Conn. App. 316 (2013),* the Connecticut Appellate Court considered the extent to which a contractor is entitled to recover attorney's fees pursuant to CGS § 52-249(a), in an action to foreclose a mechanic's lien. In this case, the plaintiff-contractor filed a one count action seeking to foreclose a mechanic's lien filed in connection with the construction of a home for the defendants. The defendants filed a counterclaim for breach of contract. Following a hearing, the trial court determined that there was an unpaid balance on the contract between plaintiff and defendants, that the plaintiff was entitled to foreclose on its mechanic's lien, that the defendants proved their breach of contract claim, and that the damages owed by the defendants to the plaintiff was the unpaid balance of the contract less the damages for breach of contract established by the defendants at trial. The trial court deferred determination of an attorney's fee award, pursuant to CGS § 52-249(a), until the trial court's entry of the judgment of foreclosure.

Subsequently, plaintiff's counsel submitted an affidavit showing a total of $37,000 in attorney's fees in support of plaintiff's request for an award pursuant to CGS § 52-249(a). Defendants' counsel opposed plaintiff's request to the extent the request included any fees related to defense of the contractual aspects of the defendants' counterclaim. The trial court ruled that determination of attorney's fees recoverable pursuant to CGS § 52-249(a) in a mechanic's lien foreclosure action, required segregation of the fees incurred to prosecute the lien foreclosure from fees incurred to defend the defendants' counterclaims. Relying on the case of *Russo Roofing, Inc. v. Rottman, 86 Conn. App. 767 (2005)*, the trial court determined that the plaintiff should be awarded $10,368.75 in attorney's fees, that being the sum necessitated by the prosecution of the foreclosure aspects of the subject mechanic's lien. The trial court found that the "foreclosure aspects" included determining the debt owed to the plaintiff based on the cost of work remaining after substantial completion and subtracting that value from the contract price, as well as determining whether the plaintiff had actually achieved substantial performance of the contract. The trial court recognized that the plaintiff's burden to prove substantial performance was intertwined with its defense of the defendants' counterclaims, but

refused to award the plaintiff fees beyond those it found to be specifically related to the foreclosure aspects of the case. The plaintiff appealed the trial court's refusal to award attorney's fees for the costs to defend the defendants' counterclaim.

On appeal, the Appellate Court reversed the trial court's award of attorney's fees to the plaintiff on the grounds that the trial court applied an incorrect legal standard for determining the amount of attorney's fees due under CGS § 52-249(a). Specifically, the Appellate Court found that the trial court improperly applied *Russo Roofing* in determining that recovery of attorney's fees under CGS § 52-249(a) was limited to the "foreclosure aspects" of the case.

In *Russo Roofing* the Appellate Court held that the plaintiff was entitled to attorney's fees under CGS § 52-249(a) as well as CGS § 42-150aa(b) pertaining to consumer contracts, and remanded the case to the trial court with instructions to award fees under CGS § 52-249(a) for the foreclosure aspects of the case and to award fees under CGS § 42-150aa(b) for the contract aspects of the action, so that the plaintiff would not obtain duplicative fee awards under both statutes. In this action, there was no contractual provision or applicable statute, other than CGS § 52-249(a), that allowed the plaintiff to recover attorney's fees, therefore, the trial court committed error by improperly interpreting *Russo Roofing* as requiring a categorical exclusion of all attorney's fees related to the contract aspects of the case.

The Appellate Court held that the trial court abused its discretion in refusing to award attorney's fees for the defense of the counterclaim because the success of the plaintiff's foreclosure action was contingent on its success in defending the counterclaim. The Appellate Court noted that the plaintiff's successful prosecution of its foreclosure action and defense of the counterclaim, both required the plaintiff to prove that it substantially performed its obligations under the contract. Additionally, the Appellate Court noted that defending the counterclaim directly correlated to whether the plaintiff was entitled to foreclosure, because the amount of the mechanic's lien was determined after the trial court offset the defendants' counterclaim damages against the debt owed to the plaintiff.

8. In *Country Squire I, Inc. v. Raw Construction, LLC*, 2013 WL 4420981, Superior Court, Judicial District of Middlesex (July 20, 2013) (Aurigemma, J.), the Connecticut Superior Court expressly held that the economic loss rule barred the plaintiff-owner's negligence claim against the defendant-contractor hired to perform diagnostic and repair work to the roof at the plaintiff's condominium complex. The plaintiff filed suit against the defendant and others, alleging claims for breach of contract and negligence against the contractor, based on identical factual allegations. The defendant moved to strike the plaintiff's negligence claim on the grounds that it failed to state a cognizable cause of action, because the economic loss doctrine bars recovery in tort when the basis for that tort claim arises from a contract and damages are purely economic.

The Court acknowledged that there had been no Connecticut appellate decisions regarding the scope of the economic loss doctrine since the decision in *Flagg Energy Development Corp v. General Motors Corp*., 244 Conn. 126 (1988), in which the Connecticut Supreme Court applied the economic loss doctrine as a bar to tort claims in the context of a sale of goods, where the plaintiff sought recovery of a solely commercial loss and was limited to its contract remedies under the Uniform Commercial Code. The Court, however, further examined the bases for the Supreme Court's decision, including its reliance on out-of-state authority in which the economic loss doctrine was applied to bar tort claims outside the sales of goods

context. The Court was compelled by the reasoning contained in out-of-state decisions in which claims for negligence and/or negligent misrepresentation were precluded by the existence of contract remedies. The Court focused on the examination of the different concerns intended to be addressed by contract versus tort law. Per the Court, tort redress should be available to persons who suffer physical injury or damage to property caused by the subject of a transaction to which they are not a contracting party. To allow contracting parties to proceed in tort, however, would eliminate the power of the parties to allocate risks in their own transactions.

Relying on *Flagg Energy* and the out-of-state cases cited therein, the Court held that the economic loss doctrine is not limited to cases involving the sale of goods and specifically stated that "imposing tort remedies on commercial contracts improperly and unnecessarily interferes with legitimate expectations and powers of the parties to allocate their risks." The Court concluded by recognizing the routine application of the economic loss doctrine to eliminate tort claims purportedly arising from construction contracts, and that to allow otherwise would be to permit tort law to interfere with the parties' ability to allocate their contractual risk of nonperformance in advance.

**Legislation:**

1. **Public Act No. 13-304. An Act Concerning the State Fleet and Mileage, Fuel and Emissions Standards, the Certification of Minority Business Enterprises and Preference for a Bond Guaranty Program.** This act makes various changes to the state's small and minority business set-aside program (also called the supplier diversity program). This act does not pertain to the Disadvantaged Business Enterprise Program for Project performed for the Connecticut Department of Transportation.

a. **Section 1. Repeal and Replacement of MBE and SBE Program Definitions and Requirements in CGS §4a-60g.** The act adds to the certification standards that contractors must satisfy in order to participate in the program, by requiring: (1) a business be "independent" in order to be certified as a small contractor (also called a small business enterprise (SBE)); and (2) a certified minority business enterprise's (MBE) owners possess managerial and technical competence and experience directly related to the enterprise's principal business activities. The act now defines "independent" to mean "the viability of the enterprise of the small contractor does not depend upon another person, as determined by an analysis of the small contractor's relationship with any other person in regards to the provision of personnel, facilities, equipment, other resources and financial support, including bonding."

The act increases certain performance targets that set-aside contractors must meet. Under prior law, state agencies had to require a contractor or subcontractor awarded a set-aside contract to perform at least 15% of the work with its own forces. They also had to require that at least 25% of the work under such a contract be performed by SBEs or MBEs. The act doubles both of these percentages (to 30% and 50%, respectively).

The act allows the Department of Administrative Services (DAS), which administers the set-aside program, to adopt regulations to implement its requirements. It also expands existing law's enforcement provisions by allowing

the Commissioner of DAS to levy a civil penalty of up to $10,000 against prospective or certified SBEs and MBEs who make materially false statements in an application for certification, and by allowing revocation of SBE/MBE certifications upon notice and opportunity for hearing. A person aggrieved by a revocation of an SBE/MBE certification may appeal the revocation through the procedure set forth in the Connecticut Uniform Administrative Procedure Act (CGS § 4-183).

b. **Section 2. Amendment of CGS §§ 4a-100 to include subsection (p), Requirements Relating To the DECD Bond Guaranty Program**. The act requires: (1) DAS to give each prequalified contractor and substantial subcontractor written notice of the Department of Economic and Community Development's (DECD) bond guaranty program; and (2) DECD to give priority in the program to prequalified contractors and substantial subcontractors. The DECD guaranty program, which is administered by the Hartford Economic Development Corporation, assists minority contractors with the bonding requirements of public works projects. A prequalified contractor or substantial subcontractor is one that has received a prequalification certificate from DAS; such a certificate is required in order to bid on most state public works contracts that cost more than $500,000 (or, for substantial subcontractors, subcontracts that cost more than $500,000).

2. **Public Act No. 13-196. An Act Concerning Minor and Technical Changes To Department of Consumer Protection Statutes.** This act makes various changes to the Connecticut Department of Consumer Protection Statutes (DCP), including changes pertaining to New Home Contractor certification renewals, payments from the state Home Improvement Guaranty Fund, penalties against Home Improvement Contractors, licenses for elevator related work, and reinstatement of expired occupational trade licenses.

a. **Section 11. Amendment of the Expiration Period for New Home Construction Contractor Certificates.** The act: (1) allows a new home construction certificate to be renewed after its one year expiration; and (2) clarifies that the renewal is valid for two years and costs the same $240 as the original application. Under prior law, a certificate could not be restored unless it was renewed within a year of its expiration.

b. **Sections 12 and 25. Repeal and Substitution of subsections (d) and (g) of CGS § 20-432 to Change Procedures Pertaining to Payment From the Home Improvement Guaranty Fund.** The act requires the DCP commissioner to notify a home improvement contractor before issuing a payment out of the Home Improvement Guaranty Fund, so that the contractor can contest the payment if the contractor is complying with a payment schedule in accordance with a court judgment. By law, DCP already provides this notification regarding contractors who have already paid the owner.

The law requires an applicant for payment from the guaranty fund to first attempt to collect on a court judgment against the contractor. The act requires the owner to attempt to collect on the contractor's personal, rather than real, property. Under prior law, the applicant was required to affirm under oath that

the contractor had no real property that could satisfy the judgment. By law, the applicant must also attempt to levy a contractor's bank account to satisfy the judgment.

c. **Sections 14 and 26. Amendments to Definitions Applicable to Home Improvement Act in CGS § 20-419.** The act extends existing home improvement contractor penalties to persons who offer or propose to do work without the proper certificate. Violators may be guilty of a class A or B misdemeanor depending on the price of the project, and be subject to a civil penalty of up to $500 for the first violation, up to $750 for a second violation within three years of the prior violation, and up to $1,500 for a third or subsequent violation within three years of the prior violation (CGS § 20-427).

The act specifies that a condominium association working as an agent for condominium owners has the same rights as a private owner under the Home Improvement Act, including access to the Home Improvement Guaranty Fund. It also limits an association to one claim for each contract from the guaranty fund, regardless of the number of units for which it acts as an agent.

d. **Sections 16. Repeal of the Requirement to Obtain an Elevator Craftsmen License in subsection (a)(3)(a) of CGS § 20-334a.** The act eliminates the elevator craftsman license and elevator helper's license. There are currently no elevator craftsman or helper licensees.

e. **Sections 17, 18 and 20. Amendments to the Consumer Protection Statutes Pertaining to License Expiration and Renewal.** The act amends CGS § § 20-335 and 21-4(d), to allow an applicant whose occupational trade license has lapsed beyond the time allowed for automatic reinstatement, to apply for reinstatement to the appropriate DCP licensing board. The application must include the proper fee, along with a notarized letter stating the applicant's related work experience in his or her occupation or profession during the period since its license lapsed. The applicant must, upon board approval, pay all back license and late fees. The act also amends CGS § 20-335(d) to extend the time certain licensees have to reinstate their licenses without retaking a licensing examination from one year to two years. The affected licensees are electricians; plumbers; solar, heating, piping and cooling contractors and journeymen; elevator and fire protection sprinkler craftsmen; irrigation contractors and journeymen; gas hearth installer contractors and journeymen; automotive glass or flat glass work contractors and journeymen; limited sheet metal power industry contractors and journeymen; television and radio service dealers; and electronic technicians.

3. **Public Act No. 13-244. An Act Concerning Revisions to the State Codes of Ethics.** Among other various changes to the state codes of ethics for public officials and lobbyists, this act expands the grounds for contractor disqualification by the State Contracting Standards Board (SCSB) and makes contractors, consultants, and certain other people liable for damages if they willfully violate the law concerning unethical bidding or contracting practices to advance their own financial interests.

a. **Section 13. Expansion of Penalties Under CGS § 1-88 for Ethics Violations by State Contractors and Consultants.** The act makes state contractors and potential state contractors liable to the state for damages if they knowingly act in their own financial interest in violation of CGS §§ 1-84, 1-86e and 1-101nn by: (1) soliciting undisclosed information for their competitive advantage; (2) intentionally or recklessly charging the state or a quasi-public agency for unperformed work or undelivered goods, including submitting meritless change orders in bad faith with the sole intention of increasing the contract price without authorization, falsifying invoices or bills, charging unreasonable and unsubstantiated rates for services, or charging unreasonable and unsubstantiated prices for goods; (3) intentionally violating or attempting to circumvent competitive bidding or ethics laws; (4) attempting to unduly influence the award of a state contract by providing, or directing others to provide, information concerning the donation of goods or services, to the state, its agencies or quasi-public agencies, or any member of a bid selection committee; or (5) when serving as a consultant for the state in relation to the specifications for a state contract, also acting as a consultant for anyone bidding or otherwise attempting to obtain that contract, anyone serving as a contractor for that contract, or anyone serving as a consultant or subcontractor for the person who obtains that contract. Under the act, the State may recover damages for the foregoing violations in an amount equal to the amount of the financial advantage obtained by the violator. The penalty applies to anyone who commits the violation or knowingly receives financial gain from the violation. Additionally, the Citizens Ethics Advisory Board must immediately inform the attorney general of the violation.

Additionally, the act subjects state consultants and independent contractors to the aforementioned damage penalties if they: (1) abuse their contractual authority or use confidential information acquired in performing their contract with the state to obtain financial benefit for themselves, an employee or an immediate family member; (2) accept another state contract that impairs their judgment in the performance of the existing contract; or (3) accept anything of value on the understanding that a person acting on the state's behalf would be influenced. The act also subjects *any* person to the damage penalties applicable to consultants and independent contractors, if that person gives anything of value to a state consultant or independent contractor with the understanding that the consultant or contractor would be influenced in acting on behalf of the state.

b. **Section 24. Amendment of subsection (b) of CGS § 4e-34 to Include Ethics Violations as Grounds for Contractor Disqualification.** In addition to ethics violations previously set forth in CGS § 4e-34(b), the act makes a willful or egregious violation of the ethical standards set forth in CGS §§ 1-84, as amended, and 1-101nn, cause for the SCSB, pursuant to CGS § 4e-34(a), to disqualify a contractor or subcontractor from bidding, applying for, or participating on State contracts for a period of up to five (5) years. The determination of whether there has been a willful or egregious violation is to be made by the Citizens Ethics Advisory Board.

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## Delaware

### Case law:

1. In *Exterior Erecting Servs., Inc. v. Metropolitan Regional Council of Carpenters, No. S12L-08-024, 2013 WL 2151692 (Del. Super. May 16, 2013)*, a sub-contractor had filed suit against the general contractor and project owner, and the general contractor and project owner had filed a counterclaim seeking to recover amounts expended to complete the sub-subcontractor's work. Although the counterclaim plaintiff asserted that a joint check agreement and assignment provided the necessary privity to sustain the counterclaim, the court found that these agreements only related to how the sub-subcontractor would be paid and otherwise created no contractual relationship. As such, the economic loss doctrine barred the counterclaim plaintiffs' claims, necessitating their dismissal.

2. In *Smyrna Hospitality, LLC v. Petrucon Constr., Inc., No. N10C-01-061, 2013 WL 6039287 (Del. Super. Sep. 27, 2013)*, the court considered whether to grant summary judgment in favor of a general contractor on a hotel construction project primarily on the issue of whether the owner could recover consequential damages such as lost profit and diminution in business value for issues relating to water intrusion. Applying the economic loss doctrine, the court determine that the owner could not claim consequential damages under a negligence cause of action because such action was not based on any duty arising apart from the underlying construction contract. Furthermore, the contract contained an express bar to consequential damages, which was enforceable under Delaware law, thereby precluding their recovery in a breach of contract action. Therefore, the court held that the owner's damages were limited to the cost of repair of the defects.

### Legislation:

1. **H.B. 6, Amendments to Prevailing Wage Requirements for Public Works Projects.** H.B. 6 amends Section 6960, Chapter 69, Title 29 of the Delaware Code, raising the threshold for public works projects subject to the prevailing wage requirement to $350,000 for new construction and $100,000 for alteration, repair, renovation, rehabilitation, demolition or reconstruction.

2. **H.B. 172, Amendments to Electrician Licensing Requirements.** H.B. 172 amends Sections 1408, 1423, and 1424 of Title 24 of the Delaware Code to require journeyperson electrician license applicants to have performed at least 8000 hours of electrical work and passed the journeyperson exam in order to obtain a license. H.B. 172 also requires employers, supervisors and owners of businesses to report if they have knowledge that an electrician working for them is unlicensed, and to ensure that electricians working for them have a proper electrical license.

3. **S.B. 132, Delaware Works Trust Fund**. S.B. 132 establishes the Delaware Works Trust Fund. This fund shall be used to support unfunded capital projects in Delaware that

improve Delaware's educational system and infrastructure. The fund shall be funded by a fuel tax.

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## District of Columbia

### Case law:

1. In *Bell v. Elite Builders and HVAC, Inc.*, 949 F. Supp. 2d 143 (D.D.C. 2013), a homeowner brought suit against the contractor remodeling her home after she slipped on a drop cloth in front of her kitchen door while trying to photograph possums in her backyard in the middle of the night. The contractor, who had been remodeling the home for approximately 2.5 months, moved for summary judgment arguing that the homeowner assumed the risk of the drop cloth and therefore could not pursue her negligence action. The court agreed, finding that the homeowner had voluntarily exposed herself to an "obvious" risk when she approached the drop cloth in the dark "not once, but twice." The court also reasoned that the homeowner was fully aware of the danger posed by the drop cloth because it had been in her kitchen for several days, and because she had previously characterized it as a tripping hazard. In the court's view, the homeowner did not need to be a safety engineer or review "research studies on injury-causing worksite mechanisms" to apprehend the "danger of slipping or tripping on a cloth" on a slippery wooden floor.

2. In *Mariano v. Gharai*, No. 12-1400, 2013 WL 6098236 (D.D.C. Nov. 21, 2013), a homeowner brought suit against the owner of a neighboring property after the homeowner's backyard collapsed into the neighboring property due to excavation being done to prepare for the construction of a condominium building. The homeowner sued the owner of the neighboring property, (the "LLC Owner"), one of its members (the "LLC Owner Member"), and the architect. In response, the LLC Owner Member filed a Third-Party breach of contract and negligence action against the general contractor responsible for the excavation, asserting that it was a beneficiary of the contract between the general contractor and the LLC Owner. Based on that admission, the general contractor moved to compel arbitration against the LLC Owner Member under the arbitration clause in the contract with the LLC Owner. The court denied the motion, finding that the question of whether the LLC Owner Member was a third-party beneficiary was a question of fact and "therefore is not susceptible to judicial admissions." Accordingly, the court looked beyond the LLC Owner Member's admission to determine whether the general contractor and LLC Owner intended to benefit the LLC Owner Member. After reviewing the evidence in detail, the Court found that the only evidence to support such a conclusion was the fact that the LLC Owner Member was a member of the LLC Owner, which, in its view, "is plainly insufficient" to conclude that the LLC Owner Member was an intended third-party beneficiary

### Legislation:

1. **D.C. Code § 27-131 *et seq.*, Private Contractor and Subcontractor Prompt Payment Act of 2013.** On August 2, 2013, the D.C. Council enacted the Private Contractor and Subcontractor Prompt Payment Act of 2013 (the "Act"), which establishes new time requirements for payments by owners to contractors, and by contractors to subcontractors.

Under the new law, if a construction contract between an owner and contractor does not specify a payment schedule, the owner is required to pay the contractor any undisputed amounts within the earlier of (a) 15 days after the occupancy permit is granted; (2) 15 days after the owner or his agent takes possession; or (c) 15 days after the owner receive a contractor payment request. If the contract does specify a payment schedule, the owner is required to pay the contractor within 7 days after the date specified in the contract. Any amounts not paid in accordance with the Act are subject to an interest penalty of 1.5% per month. Contractors may also be entitled to recover reasonable attorneys' fees in an action to collect unpaid amounts. The Act imposes similar prompt payment obligations on contractors and requires that they pay their subcontractors within 7 days after the contractor receives payment for work performed by a subcontractor. Like an owner, a contractor is also subject to an interest penalty and payment of reasonable attorneys' fees if it fails to promptly pay its subcontractors. The Act became effective on November 5, 2013 and applies to all contracts entered into on or after October 1, 2013.

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## Florida

### Case law:

1. In *Tiara Condominium Ass'n, Inc. v. Marsh & McLennan Cos.*, 110 So.3d 399 (Fla. 2013), the Florida Supreme Court held that the application of the economic loss rule is limited to products liability cases, receding from prior case law and directly rejecting and reversing the application of the economic loss rule to professional malpractice, fraudulent inducement, and negligent misrepresentation.

2. In *Maronda Homes, Inc. of Florida v. Lakeview Reserve Homeowners Association, Inc.*, 2013 WL 3466814 (Fla. July 11, 2013) the Florida Supreme Court held that the implied warranties of fitness and merchantability apply to infrastructure, drainage systems, retention ponds, and underground pipes which "directly impact" homes and "provide essential services" to the habitability of the residences, disapproving of *Port Sewall Harbor & Tennis Club Owners Ass'n, Inc. v. First Fed. Savings & Loan Ass'n of Martin County*, 463 So. 2d 530 (Fla. 4th DCA 1985).

3. In *Posen Construction, Inc. v. Lee County*, 921 F.Supp.2d 1350 (M.D.Fla. 2013), the Middle District of Florida held that the sovereign immunity doctrine does not extend to counties and similar municipal corporations, denying a motion to dismiss a diversity action against Lee County arising out of road construction project.

4. In *Earth Trades, Inc. V. T&G Corporation*, 108 So.3d 580 (Fla. 2013), the Florida Supreme Court held that the *in pari delicto* ("equal wrongdoers") defense is not available to an unlicensed contractor under Florida Statute § 489.128, as "the fault of the person or entity engaging in unlicensed contracting is not substantially equal to that of the party who merely hires a contractor with knowledge of the contractor's unlicensed status," disapproving *Austin Building Co. v. Rago, Ltd*., 63 So.3d 31 (Fla. 3d DCA 2011).

5. In *Pilot Construction Services, Inc. v. Babe's Plumbing, Inc*., 111 So.3d 955 (Fla. 2d DCA 2013), the Florida Second District Court of Appeals held that a release provision in a settlement agreement between a subcontractor and an owner did not bar the general contractor's indemnification claims against the subcontractor.

6. In *Plantation Key Office Park, LLLP v. Pass International, Inc.*, 110 So.3d 505 (Fla. 4th DCA 2013), the Florida Fourth District Court of Appeals reversed summary judgment in favor of a general contractor where there were general issues of material fact as to whether the general contractor and developer intended to include AIA document A201 as part of their contract, where A201 was referenced on most of the pages within the A111-1997 contract that formed the written agreement.

7. In *Marble Unlimited, Inc. v. Weston Real Estate Investment Corp.*, 2013 WL 1222779 (Fla. 4th DCA, Mar. 27, 2013), the Florida Fourth District Court of Appeals held that a lienor who is in privity with an owner is not required to serve a notice to owner under Florida Statute § 713.06., and reversed dismissal of the lawsuit.

8. In *Villalta v. Cornn International, Inc.*, 109 So.3d 278 (Fla. 1st DCA 2013), the Florida First District Court of Appeals reversed entry of summary judgment granted by the trial court where there was a genuine issue of material fact as to whether a HVAC subcontractor was grossly negligent in creating and failing to cover a hole in a floor that lead to the death of a drywall subcontractor.

9. In *Attaway Electric, Inc. v. Kelsey Construction, Inc.*, 2013 WL 4006417 (Fla. 4th DCA Aug. 7, 2013), the Florida Fourth District Court of Appeals held that the mandatory venue provision of Florida Statute § 713.24(3) prevailed over a contrary venue provision in a contract between a prime contractor and the lien claimant, and required that suit to enforce the obligation of a lien transfer bond be filed "in the circuit court of the county where such security is deposited."

10. In *Pulte Home Corp. v. Bay at Cypress Creek Homeowners' Association Inc.*, 2013 WL 4033989 (Fla. 2d DCA Aug. 9, 2013), the Florida Second District Court of Appeals held that a home contractor may compel arbitration of a complaint based on the violation of Florida Statute § 553.84, where the arbitration agreement applied to statutory claims as well as to claims for breach of warranty. The court further held that subsequent purchasers who assumed a contractor's limited warranty in favor of initial purchasers were third-party beneficiaries of the contract, and could be compelled to arbitrate.

**Legislation:**

1. No legislation relevant to the construction industry was amended or enacted in Florida in 2013.

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## Georgia

### Case law:

1. In *Taylor Morrison Services v. HDI-Gerling American Insurance Company*, 293 Ga. 456, 746 S.E.2d 587 (Ga. 2013), a homebuilder sought coverage under its commercial general liability for a claim arising from allegations that it improperly constructed the foundations of several residential properties. The insurer denied coverage and filed a declaratory judgment action in the federal district court. The coverage issues of the declaratory judgment action were eventually certified to the Georgia Supreme Court. The Georgia Supreme Court was asked to determine (1) whether the homebuilder's construction of faulty foundations could constitute and "occurrence" as defined by the policy when there was no damage to anything other than the work performed by the homebuilder, and (2) whether the allegations of fraud and breach of warranty could constitute an "occurrence." The Court concluded that it was not necessary for the work of a construction contractor to damage more than its own project in order to constitute an "occurrence" as defined by a standard commercial general liability. The Court then held that claims for fraud could not be an "occurrence" because claims of fraud necessarily involved intentional acts – that is, no accidents. Conversely, the Court held that a breach of warranty could be the result of some intentional, or accidental act, and therefore, a breach of warranty claim could constitute an "occurrence" under a standard form commercial general liability insurance policy.

2. In *Benchmarck Builders, Inc. v. Schultz*, 294 Ga. 12 (Ga. 2013), the Supreme Court of Georgia affirmed the grant of attorneys fees to the homebuyers as the prevailing party whether or not the homebuyers recovered any damages. The Schultzes, homebuyers, contracted with Benchmark Builders, Inc., for the construction of the Schultzes' home. *Id*. at 13. The Schultzes refused to close because they claimed the home was not built in conformance with the contract, and Benchmark sued for specific performance or, in the alterative, the money damages for breach of contract. *Id*. The Schultzes filed their answered and a counterclaim for money damages for earnest money and the value of certain light fixtures, as well as attorneys fees due to the alleged breach. *Id*. at 12-13. The jury rewarded the Schultzes zero dollars on the claim for the light fixtures and earnest money, and $16,555.00 for attorneys' fees. *Id*. at 13. The subject contract stated "if any action at law or in equity… is brought to enforce or interprets the provisions of this agreement, the prevailing party shall be entitled recover reasonable attorney's fees from the other party, which fees may be set by the court in the trial or appeal of such action or may be enforced in a separate action brought for the purpose of which fees shall be in addition to any other relief which may be awarded." *Id*. In reviewing this language the Supreme Court affirmed the Court of Appeals holding that the contract gave rise to a separate and distinct claim for attorneys fees by the prevailing party to any litigation of claim. *Id*. In sum, the Supreme Court of Georgia found the contract provision in this case authorized the "prevailing party as a separate, distinct claim that is not ancillary to recovery of relief on other claims asserted in the action." *Id*. at 15. Thus, the Schultzes were authorized to retain attorney's fees, as they were the prevailing party even though, other than attorney's fees, they obtained no monetary relief. *Id.*

3. In *District Owners Association v. AMEC Environmental & Infrastructure, Inc.*, 322 Ga. App. 713 (Ga. Ct. App. 2013), the Court of Appeals affirmed the trial court's dismissal of District Owners Association, Inc.'s ("DOA") common-law indemnification and apportionment claims on the ground that such claims were barred by O.C.G.A. § 51-12-33. Corbett filed a

premises liability action against DOA for injuries he allegedly sustained when he jumped off a wall between a sidewalk and parking lot. *Id*. at 713. DOA filed a third-party complaint against third-party defendants as the designers and builders of the wall and parking deck, claiming that the third-party defendants are labile to DOA under theories of common-law indemnification and common-law apportionment. *Id*. Third-party defendants filed motions to dismiss the complaint arguing DOA's claims were barred by O.C.G.A. § 51-12-33. *Id*. The Court explained that the "Supreme Court of Georgia has held 'the purpose of the apportionment statute is to have the jury consider all of the tortfeasors who may be liable to the plaintiff together, so their respective responsibilities for the harm can be determined.'" *Id*. at 715. Further, in analyzing subpart (b) of the statute, the "Supreme Court has held that as to contribution [the statute] flatly states that apportioned damages shall not be subject to any right of contribution...and the statute reiterates this point by saying that damages shall not be a joint liability among the persons liable." *Id*. (internal quotations and citations omitted). First, the Court found because the language of the third-party complaint does not allege contractual indemnity or vicarious liability based on any agent-principal or employer-employee relationship, but rather seeks payment from the third-party defendants as joint tortfeasors, the trial court correctly dismissed the DOA's common law indemnity claim. *Id*. at 716. Second, the Court affirmed the trial court's dismissal of DOA's claims under common-law apportionment. *Id.* DOA alleged in alternative to its common-law indemnity claim, that under O.C.G.A. § 51-12-33, if the trier of fact finds DOA liable to Plaintiff, those damages must be apportioned to the third parties. *Id*. at 716-717. The Court explained that "not only did O.C.G.A. § 51-12-33 fail to create a cause of action for apportionment, it abrogated such actions under the common law." Thus, DOA's common-law indemnity and common law apportionment claims were properly dismissed and barred by O.C.G.A. § 51-12-33. *Id.*

4. In *Archer Western Contractors, LLC v. Holder Construction Company*, 751 S.E.2d 908 (Ga. Ct. App. 2013), the Court of Appeals affirmed the trial court's grant of the contractors' motion to compel arbitration. Archer Western Contractors and Capital Contracting Company ("AWC") filed suit against Holder Construction Company, Manhattan Construction Company, C.D. Moodly Construction Company, and Hunt Construction Group ("HMMH"), seeking a declaration that HMMH's assertion of its right to withhold payments to its subcontractor AWC was barred by res judicata. *Id*. at 910. HMMH filed a motion to dismiss AWC's action and to compel arbitration, which the trial court granted and the Court of Appeals affirmed. The main subcontract at issue included a general provision that disputes "arising out of or related to the Work or the [Phase 3] Subcontract or any breach thereof…shall be decided, at the sole option of [HMMH], by binding arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then in effect." *Id*. at 911-912. No party disputed that the FAA applied to the contract, which includes that "all matters relating to the validity, performance or interpretation of this Subcontract shall be governed by the laws of the state where the Project is located" in this case Georgia. *Id*. at 912. AWC argued that the provision relating to venue and jurisdiction of any legal proceeding supplanted the arbitration provisions, but the Court of Appeals disagreed, finding that the provision merely provided for venue and jurisdiction if HMMH decided not to submit to binding arbitration. *Id*. at 912-913. AWC also argued that a Georgia court enforcing an arbitration agreement under FAA should first decide if the dispute was barred by res judicata, which the appellate court found that the question of whether HMMH's defense of nonpayment was barred by res judicata was both procedural and one that emerged out of the parties' dispute and thus, properly left to the arbitrator to decide. *Id*. at 913-914. Therefore, the Court of Appeals affirmed and found the trial court did not err in granting the motion to compel arbitration. *Id*. at 914.

5. In *Campbell v. Assurance Company of America*, 2013 U.S. Dist. LEXIS 118180 (M.D. Ga. August 21, 2013), the United States District Court for the Middle District of Georgia granted summary judgment to Assurance Company of America ("Assurance") on Plaintiff Campbell's claim for breach of contract after Assurance denied coverage under the policy. Assurance issued Campbell a policy for the period of April 29, 2008 to April 29, 2009. *Id*. at *2. On April 8, 2009, a fire damaged the property. *Id*. at *4. The Court found the policy was clear and unambiguous, that the builder's risk Policy provided $205,000 coverage for "New Construction" but provided $0 coverage for "Existing Building or Structures". *Id*. at *6-7. The Court explained that the Policy specifically excluded coverage for "existing building or structure to which an addition, alteration, improvement or repair is being made, unless specifically endorsed." *Id*. The Policy also specifically excluded coverage for "Existing Inventory," which was defined as "buildings or structures where construction was started on completed prior to the inception date of this policy." *Id*. The Court found it is undisputed that the construction on the Property was complete before the Policy's issue date and that no construction took place during the Policy period; therefore the Policy did not cover the damage for the April 8, 2009 fire. *Id*. at *7.

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6. In *Estate of Pitts v. City of Atlanta*, 323 Ga. App. 70, 746 S.E.2d 698 (Ga. App. 2013), a worker was killed in a vehicular accident at the city's new international airport terminal while working on a construction project. The city, prime contractor, and a first tier subcontractor contractually agreed that the construction companies would maintain a designated amount of automobile liability insurance coverage. The contracts also required that the three upstream parties would require their lower tiered subcontractors to have the same automobile liability insurance coverage. At issue was whether the three upstream parties were liable to the deceased worker's estate based on third-party beneficiary clauses in their contracts.

Initially, the Estate brought a wrongful death suit against a lower tiered subcontractor and received a favorable judgment. However the responsible lower tiered subcontractor did not carry adequate insurance as mandated by its contract. Therefore, the liable subcontractor's financial resources could not cover the judgment. The Estate next bought suit against all three upstream parties with the financial resources to cover the judgment (owner, prime contractor, and first tier subcontractor). The Estate alleged breach of contract and that the deceased worker was an intended third-party beneficiary of the contracts between the upstream parties. The Estate maintained that the breach occurred when the three upstream parties failed to insure that all contractors on the project carried $10 million in auto liability insurance as required by the contracts at issue. The trial court disagreed with the Estate and the upstream parties were granted summary judgment while the Estate was denied summary judgment.

The Georgia Court of Appeals reversed the trial court's summary judgment ruling in favor of the two construction companies and found that the breach of contract action could proceed against them, which in effect set aside Georgia's workers compensation exclusivity clause. As to the City of Atlanta, the Court of Appeals affirmed the trial courts grant of summary judgment to the city on the Estate's breach of duty claim. The Georgia Supreme Court vacated the Court of Appeals judgment, and found no evidence of a breach on behalf of City of Atlanta. With regard to the two remaining construction companies, the case was remanded for further

consideration by the Court of Appeals to rule on the interpretation of to the third-party beneficiary clauses in the two upstream parties' contracts.

On remand, the Court of Appeals affirmed the trial court's grant of summary judgment to the City of Atlanta, and denial of summary judgment to the Estate on the breach of contract claim against the city. Remarkably, the Court of Appeals again found that the deceased worker was an intended third-party beneficiary of the two construction companies' contracts, exposing them to liability for both a workers compensation claim and breach of contract damages. The court again found that the Workers Compensation Act's exclusive remedy did not bar the Estate's claim. On February 24, 2014, the Supreme Court denied the two construction companies' Petition for Writ of Certiorari.

7. In *Vratsinas Constr. Co. v. Triad Drywall, LLC*, 321 Ga. App. 451, 739 S.E.2d 493 (Ga. App. 2013), a defendant general contractor appealed a Georgia trial court judgment, which awarded over $465,888 in damages to a plaintiff subcontractor after a jury trial. At issue was whether the general contractor waived a pay-if paid provision of its agreement with the subcontractor by making an oral promise and exhibiting conduct consistent with that oral promise. An agent of the general contractor orally expressed that the company would pay the subcontractor from its own pocket if necessary, and the company subsequently did pay the subcontractor despite not being paid by the owner. On appeal, the general contractor successfully argued that the issue of waiver should have never been submitted to a jury for resolution.

The dispute arose from a shopping center construction project after the owner became insolvent. After making four payments, the general contractor refused to pay the remaining installments and the subcontractor continued to work until the shopping center was completed. Testimony and evidence established that prior to receiving the fourth and final payment, the subcontractor became concerned about rumors of the owner's imminent insolvency. The subcontractor brought its concerns to the general contractor in a meeting. At that meeting an agent of the general contractor orally expressed to the subcontractor not to worry about the owner's finances because the general contractor would cover payments in the event of the owner's insolvency. Based on the assurance made in the meeting, the subcontractor continued to work. The general contractor made good on its oral promise because the fourth payment to the subcontractor was made despite the fact the general contractor had not been paid by the owner. Payments to the subcontractor ceased after the fourth payment due to the owner's bankruptcy. The subcontractor completed the project and subsequently filed suit to recover seven unpaid applications totaling $465,888 from the general contractor.

At trial, the defendant general contractor argued that the pay-if-paid clause relieved it of any obligation to make payments to the plaintiff because it was not receiving payments from the owner. The subcontractor argued that the pay-if-paid clause was waived by the general contractor's oral promise and conduct. The trial court agreed with the plaintiff subcontractor and denied the defendant's motion for summary judgment. The trial court held that a genuine issue of material fact existed for the jury to resolve with respect to the waiver of the pay-if-paid clause. The trial court also denied the general contractor's motion for directed verdict. The jury awarded the plaintiff subcontractor $465,888 plus interest and the trial court entered judgment on the verdict, and also denied the defendant's motion for judgment notwithstanding the verdict.

On appeal, the general contractor argued that the trial court erred in denying its motions because the plaintiff failed as a matter of law to offer sufficient evidence of a waiver. Surprisingly, the appellate court agreed with the general contractor and reversed the lower court's decision. The Court held that in this particular case, the issue of waiver became a question of law. To justify its position, the Court stated that: wavier must be clear and unmistakable, must clearly indicate an intent to relinquish a particular right or benefit, and that the burden of proof lies with the party asserting waiver. Here, the Court gave very little weight to the general contractor's oral promise to pay from its own pocket. Furthermore, the general contractor's fulfillment of its oral promise to the plaintiff appeared to lack evidentiary heft in the Court's analysis.

Ultimately, the Court of Appeals ruled that the trial court did indeed err in submitting the waiver issue to the jury and that because the facts and circumstance essential to the waiver issue were clearly established, waiver became a question of law. Finally, the Court determined that the conduct of all parties established a lack of intent or understanding that the defendant general contractor had waived the pay-if-paid provision, and therefore it reversed the lower court's decision.

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## Legislation

1. **O.C.G.A. § 13-10-30, Large Public Work Contracts; Requirements for Bid Bonds; Withdrawal of Bid**, provides that a bid bond is not required for certain public works construction contracts when a sealed competitive proposal for a public works contract is requested and price or project cost is not a selection or evaluation factor.

2. **O.C.G.A. § 13-10-70, Liquidated Damages for Late Completion and Incentives for Early Completion**, provides that public works construction contracts may include both liquidated damages provisions for late construction project completion and incentive provisions for early completion. Terms for liquidated damages for late completion and incentives for early completion must be decided in advance of contract and be included in the terms of the bid or proposal.

3. **O.C.G.A. § 36-91-23, Disqualification of Otherwise Bidder from Bid or Proposal or Prequalification Based Upon Lack of Previous Experience with Job of that Size Prohibited**, provides that in awarding contracts based upon sealed competitive bids, a bidder cannot be disqualified from a bid or denied prequalification based upon lack of experience so long as (1) the proposed job is not more than 30% larger in scope or cost than the bidder's previous experience; (2) the bidder has relevant experience and training, and (3) the bidder is capable of being bonded.

4. **O.C.G.A. § 32-2-41.2, Development of Benchmarks; Reports; Value Engineering Studies**, provides that a value engineering study shall be conducted for all Department of Transportation construction projects that exceed $50 million in costs. The statute further provides that the Director of the Department of Transportation shall submit an annual value engineering study to the Governor, Lieutenant Governor, Speaker of the House of Representatives, and Chairpersons of the House and Senate Transportation Committees

detailing the amount saved as a result of the value engineering studies, and that report shall also be published on the Department of Transportation's website.

5. **O.C.G.A. § 48-8-3, State Sales and Use Tax, General Provisions, Exemptions**, was amended to provide a sales tax exemption for any tangible personal property used for the renovation or expansion of any zoo or nonprofit wildlife park. The tax exemption is only available from July 1, 2013 until June 30, 2015.

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6. **HB 434, Amendment to Part 3 of Article 8 of Chapter 14 of Title 44 of the Official Code of Georgia Annotated.** Governor Nathan Deal signed this bill in May 2013. The amendments went into effect and became law on July 1, 2013. This legislation addresses liens of mechanics and materialmen, so as to provide that special liens include the amount due and interest on such amount. This legislation was the result of a recent Georgia Court of Appeals decision, *182 Tenth, LLC v. Manhattan Constr. Co.,* 316 Ga. App. 776, 730 S.E.2d 495 (Ga. Ct. App. 2012). The construction industry was troubled by the fact that this decision ultimately restricted the value of mechanic's liens in Georgia to labor and materials that actually went into or become part of the property.

This legislation added two subsections to make it clear that Georgia lien values are not as limited as the Georgia judiciary indicated. Now it is clear that a lien can include all amounts due and owing as stated in the construction contract in addition to interest. The two new subsections state:

> (c) Each special lien specified in subsection (a) of this Code section shall include the amount due and owing the lien claimant under the terms of its express or implied contract,subcontract, or purchase order subject to subsection (e) of Code Section 44-14-361.1.
>
> (d) Each special lien specified in subsection (a) of this Code section shall include interest on the principal amount due in accordance with Code Section 7-4-2 or 7-4-16."

7. **SB 179, Amendment to Chapter 10 of Title 13 and Chapter 91 of Title 36 of the Official Code of Georgia Annotated.** Governor Nathan Deal signed this bill in May 2013. The amendments went into effect and became law on May 6, 2013. This legislation is significant in that it precedes a massive new stadium construction project in the city of Atlanta for the National Football League's Atlanta Falcons. The new stadium project is estimated to be as high as $1.4 billion.

This legislation will prohibit Georgia government entities from requiring collective bargaining agreements (CBA) or project labor agreements (PLA) with labor unions as a condition of performing work on public projects such as the Atlanta Falcons' new stadium Supporters state that it will keep construction costs down and lower the burden on taxpayers by creating fair and open competition. Opponents of the legislation argue that it will be devastating to working families because local communities will lose the ability to hire skilled, Georgia workers for taxpayer-funded projects because out of state contractors will have easier access to Georgia projects.

This legislation also addressed what has been described as “glitches” or “loopholes” in public works laws. Specifically, bid bond requirements. Georgia’s competitive sealed bid projects awarded based on qualification (as opposed to project cost) will no longer require a bid bond. Additionally, Georgia governments will now be allowed to provide contract incentives for early completion of certain construction projects.

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## Hawaii

### Case law:

1. In *Group Builders, Inc. v. Admiral Ins. Co.*, 2013 Haw. App. LEXIS 207 (Haw. Ct. App. April 15, 2013), the Hawaii Intermediate Court of Appeals (“ICA”) determined there was a duty to defend construction defect claims under Hawaii law. In a prior, related case, the ICA determined a construction defect claim did not arise from an “occurrence” and there was no duty to indemnify under a comprehensive general liability policy. *Group Builders, Inc. v. Admiral Ins. Co.,*123 Haw. 142, 231 P.3d 67 (Haw. Ct. App. 2010).

The underlying suit involved allegations by Hilton Hotels Corp. that Group Builders, a subcontractor working on an addition to the hotel, was responsible for mold found after completion of the project. Hilton alleged that the "design, construction, installation, and/or selection of the . . . building exterior wall finish . . . did not provide an adequate air and/or moisture barriers." The counts alleged against Group Builders included breach of contract and negligence.

Notwithstanding its prior determination that there was no duty to indemnify Group Builders, the ICA found Admiral had a duty to defend. The ICA noted that under Hawaii law, before Admiral could deny a defense, it had to prove it would be "impossible" for Hilton to prevail against Group Builders in the underlying suit on a claim covered by the policy. Under Hawaii law, this determination was strictly based upon a comparison of the allegations in the underlying complaint with the policy language. It was of no consequence if the court later determined that there was no duty to indemnify.

2. In *Dist. Council 50 v. Lopez*, 129 Haw. 281, 298 P.3d 1045 (Haw. 2013), the Supreme Court overturned the Contractors License Board decision to allow a general contractor to perform extensive glazing work at an elementary school even though the general contractor did not possess a proper license for glazing. The Board determined an exception in the statute for “incidental and supplemental” work allowed the contractor do the work under its C-5 license for cabinet, millwork and carpentry remolding and repairs. The Court determined that the Board’s interpretation of “incidental and supplemental” was entitled to no deference because it let C-5 specialty contractors do substantial work for which they did not possess the minimum expertise, experience and training.

3. In *Ass’n of Apt. Owners of Nihilani v. Nihilani Group, LLC*, 2013 Haw. App. LEXIS 574 (Haw. Ct. App. Sept. 30, 2013), the court considered the enforceability of a settlement agreement resolving breach of construction contract and damage claims pursued by the AOAO

against the contractor. The agreement required the contractor to replace existing grass crete and install pervious concrete in the project's visitor parking lot. Subsequently, the contractor offered $60,000 to complete its obligations. Subcontractors were only willing to complete the work for between $200,000 and $240,000. The contractor argued that the agreement was entered under the mistaken belief that the paving would cost $60,000- $80,000, not $200,000 to $240,000. The trial court granted the AOAO's motion to enforce the agreement. The Intermediate Court of Appeals affirmed. The contractor bore the risk of its mistake. The discrepancy between the initial subcontractor's bid and the subsequent, much higher quotes meant that the contractor should have investigated the initial low bid. By failing to do so, the contractor bore the risk of entering the agreement with limited knowledge.

4. In *Safeway, Inc. v. Nordic PCL Constr., Inc.,* 2013 Haw App. LEXIS 626 (Haw. Ct. App. Oct. 30, 2013), the Intermediate Court of Appeals held that where there are disputed issues of material fact as to the existence of an arbitration agreement, the trial court must resolve those issues through an evidentiary hearing. Nordic was the general contractor in constructing a new store. Upon completion, there were roof leaks. Safeway sued Nordic and Nordic moved to compel arbitration. There was a dispute as to whether supplemental documents added to the construction contract eliminated the arbitration provision. The trial court denied the motion to compel arbitration. It found there was more than one reasonable interpretation as to whether an arbitration agreement existed. Therefore, the agreement was ambiguous and arbitration could not be compelled. The ICA vacated the trial court's decision and remanded. The trial court was instructed to conduct an evidentiary hearing. At a minimum, where live witness testimony or cross examination of affiants would meaningfully promote resolution of factual disputes, the evidence was to be received.

**Legislation:**

1. **H.B.1202, Licensees, Contractors.** Clarifies that a professional or vocational licensee who inadvertently fails to maintain licensing requirements but who subsequently corrects the failure so that there was no lapse in licensure shall not be guilty of unlicensed activity. Clarifies that a contractor who inadvertently fails to maintain licensing requirements and who subsequently corrects the failure so that there was a lapse of no more than sixty days in licensure shall not be guilty of unlicensed contracting activity.

2. **S.B. 633, Unlicensed Contracting; Unlicensed Contractor Fraud.** Prohibits the value of any work done by a unlicensed contractor to be used as an offset for the value of the property calculated in unlicensed contractor fraud cases.

3. **S.B. 1077, Owner-builders; Owner-builder Exemption; Fines.** Sets forth specific responsibilities of and protections for owner-builders exempted from contractor licensing and other requirements; amends the fine schedule to be based on the circumstances of each case.

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## Idaho

### Case law:

1. In *Am Bank v. Wadsworth Golf Constr. Co. of the Southwest*, 307 P.3d 1212 (Idaho 2013), the district court erred in finding that the priority of the parties' interests in the property became irrelevant upon the posting of the lien release bond, Idaho Code Ann. § 45-519 where "such amount as a court of competent jurisdiction may adjudge to have been secured by his lien" was limited to the amount that the lien holder could have recovered against the real property in a foreclosure action.

In addition, the Idaho Supreme Court determined there was no room for dispute that the amount secured by the subcontractor's lien was zero, as the foreclosure sale upon the bank's credit bid left no surplus proceeds available to lien holders with priority behind the bank.

2. In *Parkwest Homes, LLC v. Barnson*, 154 Idaho 678 (2013), the Idaho Supreme Court affirmed a district court decision determining that a mechanic's lien complaint was ineffective as to a new purchaser of the property because the lien claimant failed to name the original trustee and successor trustee on the deed of trust (the claimant only named the owner and contractor).

### Legislation:

1. No legislation relevant to the construction industry was amended or enacted in Idaho in 2013.

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## Indiana

### Case law:

1. In *Welty Bldg. Co., Ltd. v. Indy Fedreau Co., LLC*, 985 N.E.2d 792, 795 (Ind. Ct. App. 2013), an owner, Indy Fedreau Company, LLC ("Indy"), contracted with a general contractor, Welty Building Company Ltd. ("Welty"), to build an FBI headquarters building in Indianapolis which would be leased to the FBI. A performance bond on Welty's behalf was provided by Ohio Farmers Insurance Company ("OFIC"). Welty hired multiple subcontractors for the project and each of the subcontracts contained the same mediation and arbitration provision providing for mandatory mediation for any dispute. The provision also gave Welty, in its sole discretion, the option to choose whether any claim was to be tried by a court or subject to arbitration.

When Indy became dissatisfied with Welty's performance on the project, Indy filed suit against Welty and OFIC. Among other things, Indy claimed that Welty failed to timely pay its subcontractors even though payments had been made by Indy to Welty for the subcontractors' work as of yet performed. The subcontractors, in turn, filed mechanics liens as a result of not being paid. While specific work-out agreements were made with some of the subcontractors,

Welty counterclaimed against Indy and joined all of the subcontractors still having any interest in the property. The trial court denied Welty's motions to the court to stay the proceedings and compel arbitration.

In analyzing whether the trial court erred in deciding that Welty had waived the arbitration provisions of its contract by answering and counterclaiming, the Court of Appeals stated that such provisions can be waived under the right set of facts. Such facts might include acts inconsistent with the terms of the applicable arbitration provision, omissions, certain conduct, timing of the arbitration request, filing of dispositive motions, unfair manipulation of the judicial system, and most importantly—an intentional relinquishment of a known right. In determining whether waiver has occurred, courts look at these factors, but the determination in each case depends on the specific facts at issue.

Because none of the parties contended that the mediation/arbitration provisions were void or inapplicable, the sole issue applicable here was whether the provisions had been waived by Welty's conduct. The Court mentioned Indiana's favorable stance towards the enforceability of arbitration provisions and that the Federal Arbitration Act ("FAA") applies to this interstate dispute. Citing a federal case on the matter, the Court stated that due to the state and federal policies favoring arbitration, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."

The subcontractors' waiver argument centered on their contention that because Welty answered their complaints and filed counterclaims, the arbitration provisions of their respective contracts had been waived. The Court, on the other hand, agreed with Welty's argument, and the subcontractors provided no reason against the notion that Welty's counterclaims were mandatory, and, therefore, had to be asserted. Additionally, since the foreclosure of mechanics' liens were partly at issue, and pursuant to Trial Rule 19(A), all parties with an interest in the property are necessary parties to the action, the Court found, contrary to the contentions of the subcontractors that Welty did not elect to sue the subcontractors nor institute legal proceedings against them in a voluntary manner. Further, in answering the complaints against it, Welty explicitly reserved its rights and did not explicitly waive arbitration. Welty also engaged in timely mediation where possible and did not disregard the contractual terms of its mediation and arbitration provisions.

It was also argued that because Welty had not commenced mediation or arbitration with some of the subcontractors before this case arose, this was a waiver of the respective provisions of their contracts. However, the Court again found that this was not a waiver of a right to arbitrate because mere silence would not constitute wavier in such a case. The subcontractors also raised the issue that Welty was now insisting on arbitration and that the mandatory mediation had not been conducted with some of the parties. To this, the Court found that the subcontractors were insisting on litigation and not on mediation and no one was asking that the mediation be commenced. Therefore, the Court found this argument unavailing. The Court also easily dispensed with the argument that Welty was using the arbitration provision to delay payment to the subcontractors. Even if this was true, it did not have any bearing on Welty's right to arbitrate as Welty had consistently insisted on such a right, and it was for the arbitrator to decide whether or not Welty was rightfully or wrongfully delaying making payments.

The Court concluded that, as the Supreme Court has found, any doubts must be resolved in favor of arbitration. This is still true under the FAA even if it results in piecemeal litigation of the case for those issues that are not arbitrable. Welty did not waive its right to arbitrate and the trial court's denials of motions to stay and to compel arbitration were reversed.

2. In *SAMS Hotel Grp., LLC v. Environs, Inc.*, 12-2979, 2013 WL 2402824 (7th Cir. May 31, 2013), the Plaintiff, SAMS Hotel Group, LLC ("SAMS"), contracted with an architectural firm, Environs, to build a six-story hotel in Fort Wayne, IN. For its services, Environs was paid a flat fee of $70,000. The contract between the two parties contained a clause limiting Environs' liability for breach of contract which stated:

> The Owner agrees that to the fullest extent permitted by law, Environs Architects/Planners, Inc. total liability to the Owner shall not exceed the amount of the total lump sum fee due to negligence, errors, omissions, strict liability, breach of contract or breach of warranty.

When the construction of the hotel was almost complete, it was discovered that serious structural defects existed which led to the condemning of the structure by the county building department. Remediation was not possible, and the hotel had to be demolished at an estimated total cost of $4.2 million.

SAMS file suit against Environs for breach of contract and negligence alleging that Environs provided defective design and negligently performed under the contract. Applying Indiana law, the district court granted summary judgment in favor of Environs on the negligence claim. The district court also held that any recovery SAMS was entitled was limited by the limitation of liability clause set forth above. Thereby, SAMS could not recover more than $70,000 from Environs, and the district court found for SAMS on the breach of contract claim in that amount.

On appeal, the Court considered whether the limitation of liability provision was enforceable. SAMS propounded the argument that because the clause did not specifically state that it applied to Environs' own negligence, the provision was unenforceable. Without much trouble, the Court came to the conclusion that the Indiana Supreme Court would uphold the validity of the clause.

In so holding, the Court found that the two parties were sophisticated business entities and understood the risk posed by the contractual language. Further the parties had prior dealings and were in the best position to allocate the risk amongst themselves. While not arguing that the provision was against public policy, SAMS purely asserted the argument that because the language did not refer explicitly to Environs' own negligence, it was unenforceable. SAMS cited various cases dealing with indemnification or exculpatory clauses where Indiana Courts strictly construed the respective provisions, but the Court found that these case were not applicable here between businesses well apprised of the obligations and risks present within their contract.

In deciding the case, the Court noted that the facts of *Indianapolis–Marion County Public Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722 (Ind. 2010) ("IMCPL"), were very similar in which the Indiana Supreme Court found that IMCPL's negligence claims were barred by the economic loss rule. Important here is the *IMCPL* court's distinction between claims arising from

breach of contract and claims arising in negligence. That court asserted that "the resolution of liability for purely economic loss caused by negligence is more appropriately determined by commercial rather than tort law." Thus, if the Appellate Court in the case at hand was to find the under Indiana law that SAMS could go beyond the unambiguous terms of the contract and recover under its asserted theories, it would essentially abolish the important tort/contract distinction. Thus, the Court decided that "without any indication in the Indiana case law that the Indiana Supreme Court would extend the specificity rule to a limitation of liability clause that was freely and knowingly negotiated by two sophisticated commercial entities in a dispute in which the underlying cause of action is for breach of contract and not negligence," the Court must reach the conclusion that SAMS be held to the clear terms of its contract and could recover no more than $70,000 from Environs.

**Legislation:**

1. No legislation relevant to the construction industry was amended or enacted in Indiana in 2013.

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## Illinois

**Case law:**

1. In *J.S. Riemer, Inc. v. Village of Orland Hills*, 2013 IL App (1st) 1120106, the Illinois Appellate Court held an action against an architect for actions concerning the design, management, or supervision of the construction was barred by the stature of limitations under section 13-214 of the Code of Civil Procedure, which provides a four-year statute of limitations for actions "against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property." The contract between the parties had a provision, typically found in certain standard AIA forms, which automatically triggered the running of the statute of limitations upon the date of substantial completion. The circuit court ruled in favor of the architect, and the appellate court agreed and affirmed the circuit court's decision, finding there was awareness of the defects within the four-year statute of limitations period. The court also found the architect was not estopped from raising the statute of limitations claim because it did not agree the architect lulled the Village into complacency by undertaking responsibility for remedial measures until the statute of limitations ended. Finally, the court found the architect had not fraudulently concealed the cause of action by misrepresenting to the Village that the excavator was to blame for the defects.

2. In 1324 *W. Pratt Condominium Ass'n v. Platt Const. Group, Inc*., 2013 IL App (1st) 130744, the Illinois Appellate Court clarified and expanding the application of the holding in *Minton v. Richards Group of Chicago,* 116 Ill. App. 3d 852 (1st Dist. 1983) to allow homeowners to assert claims against contractors or subcontractors where the builder-vendor or general contractor is insolvent, even if the builder-vendor or contractor becomes insolvent during the course of litigation. The case of *1324 W. Pratt Condominium Ass'n v. Platt Const. Group, Inc*. gave rise to three appellate decisions analyzing the application of the implied warranty of

habitability to subcontractors. The *Pratt I* Court expanded the reach of the implied warranty of habitability by holding that the warranty applies to builders of residential homes regardless of whether they are involved in the sale of the home. The *Pratt II* Court acknowledged that it had recently expanded the reach of the implied warranty of habitability itself in *Pratt I* when it extended the implied warranty of habitability to apply to builders who are not vendors of the new homes. The *Pratt II* Court again expanded the application of the implied warranty of habitability by reversing the trial court and holding that a waiver of the implied warranty of habitability does not extend beyond the contracting parties that agreed to the waiver. The *Pratt II* Court also confirmed that to extend the implied warranty of habitability to subcontractors, the builder-vendor had to be insolvent. In *Pratt III* the Illinois Appellate Court confirmed that the date for determining the insolvency of the developer or general contractor is the date of the latest amended complaint. The Court also held that insolvency was all that was necessary to bring a claim for breach of the implied warranty of habitability against a contractor or subcontractor.

3. In *Asset Recovery Contracting, L.L.C. v. Walsh Constr. Co. of Ill.*, No. 1-10-1226 (Ill. App. Ct. Nov. 1, 2012), the Illinois Appellate Court held that a subcontractor was barred from invoking exceptions to a "no damages for delay" clause because the project delays were deemed reasonably foreseeable, and the subcontractor had notice of the schedule changes and chose not to negotiate different terms. Furthermore, the parol evidence rule did not bar the court from examining extrinsic evidence in interpreting the subcontract agreement because evidence of delays and schedule changes did not vary or modify the subcontract's terms, but rather clarified an ambiguity in the contract.

4. In *Schott v. Halloran Construction Co., Inc.*, the Illinois Appellate Court held that mere replacement or repair to an improvement to real property does not trigger anew the 10-year statute of repose for construction claims in Illinois. The appellate court observed that the definition of improvement in the Illinois construction statute of repose, 735 ILCS 5/13-214(b), includes "a valuable addition made to the property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement …". Improvements fall within the purview of the construction statute of repose; repairs or replacements do not. In the underlying suit, the appellate court found that because the repairs simply restored the retaining wall to its original condition and therefore did not add value to the property, the work did not constitute an improvement to real property. As a result, the construction statute of repose was not retriggered, thus making the plaintiff's claims untimely.

5. In *Gerdau Ameristeel US, Inc. v. Broeren Russo Const., Inc.,* 2013 IL App (4th) 120547, the Illinois Appellate Court found subcontractors' recovery is limited to their pro rata share of funds due on the date mechanic's lien notices were served. On appeal, the Court held the trial court erred by not limiting recovery to only the *pro rata* shares of the amount of unpaid contract funds remaining at the time they served their notices of lien. The Court's analysis focused on the purpose of the Act and how it seeks to balance the rights and duties of subcontractors, materialmen, and owners alike. The Court reasoned that an owner should not be required to pay more than he contracted for, absent notice of subcontractors' claims and therefore recovery was limited to the unpaid amount due to their immediate contractor as of the date they served notice of their liens.

6. In *Illinois Emcasco Insurance Co. v. Waukegan Steel Sales, Inc.*, 2013 IL App (1st) 120735 (September 13, 2013), the Illinois Appellate Court held that even if an employee of a subcontractor files a personal injury suit against only the contractor and alleges only direct

negligence of that contractor, a court may nonetheless look to allegations in third-party complaints (including those filed by other parties) to establish that the additional insured (contractor) could have been found negligent solely due to the actions of the primary insured (subcontractor). In the underlying action, a contractor and subcontractor entered into an agreement, when an employee of the subcontractor injured himself while on the jobsite, and filed a personal injury action alleging direct negligence against the contractor. The trial court found the subcontractor's CGL insurer who named the contractor as an additional insured on its CGL policy, had a duty to defend the contractor. The insurance carrier appealed and argued that the trial court erred in finding that it had a duty to defend because the underlying complaint failed to allege facts of vicarious liability as required for additional insurance coverage to apply based on the language of the particular endorsement. The court clarified the issue, stating that the allegations of the third-party complaints (filed by other co-defendants) only need to raise the *potential* for the allegations to fall within the ambit of the insurance policy. The contract between the contractor and subcontractor demonstrated the intent of both parties to limit the liability of the contractor in relation to the subcontractor's employees and equipment. The Appellate Court affirmed the trial court's ruling, finding a duty to defend.

**Legislation:**

1. **H.B. 3636, Mechanics Lien Foreclosure; Forfeiture Notice.** On February 11, 2013, Illinois Governor Pat Quinn signed HB 3636 which, among other things, overrules the Illinois Supreme Court's decision in *LaSalle Bank N. A. v. Cypress Creek I, LP*, 242 Ill.2d 231 (2011). The Illinois Supreme Court in *Cypress Creek* decided that mortgage lenders would have a priority interest over secured lien claimants in a financially troubled project to the extent that its loan proceeds paid for improvements to the real estate. In particular, where foreclosure funds were insufficient to satisfy the mortgage lender and lien claimants, the court ruled that the lender had priority for the value of the property when the contract was entered into and the value of the improvements on the property that were paid for by the lender's loan. The court held lien claimants are entitled to priority only over the value of their improvements erected on the property not otherwise paid for by loan proceeds. Where the proceeds of a foreclosure sale are insufficient to satisfy all claims, HB 3636 now gives lien claimants priority to the value of improvements even if such improvements were paid for with the lender's loaned funds. The bill takes effect immediately.

2. **H.B. 2832, Fraudulent Filings.** House Bill 2832 is effective immediately, and provides that a county recorder may establish a Review Index and procedures for investigating filings that would cause the county recorder to reasonably believe that the filing may be fraudulent, unlawfully altered, or intended to unlawfully cloud or transfer the title of any real property. House Bill 2832 provides the recorder with an expedited review process.

3. **H.B. 2905, Criminal Liability for Clouding Title.** House Bill 2905 provides for criminal penalties to any person who intentionally records or files any document in the office of the recorder or registrar of titles, knowing that the theory upon which the purported cloud on title is based is not recognized as a legitimate legal theory. It increases the penalty for unlawful clouding of title from a Class A misdemeanor to a Class 4 felony for first offense. House Bill 2905 is effective in January 2014.

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## Iowa

### Case law:

1. In *Hardin County Drainage Dist. 55, Div. 3 v. Union Pac. R.R. Co.,* 826 N.W.2d 507 (Iowa 2013), a century old drainage tile running underneath a railroad owned by Union Pacific collapsed. Union Pacific workers tried filling in the hole containing the unobservable tile with rock, plugging the tile and causing flood damage to nearby farmland. Iowa Code 468.109 requires railroads to pay for repairs to any "culvert" that crosses a railroad right-of-way and that is located on a "natural waterway" or in a place chosen by the railroad. Union Pacific refused to pay for the repairs, and the drainage district sued for breach of statutory duty to repair the tile, negligence for failing to discover the tile when filling in the hole, and negligent repair. The district court awarded damages to the drainage district for costs of construction, crop loss, and various other costs. The Iowa Supreme Court reversed on appeal, holding that the tile at issue was not a "culvert" within the meaning of Iowa Code section 468.109. The Court observed that the ends of a culvert are normally open to the air, and the purpose of a culvert is to allow surface runoff to cross through an embankment. The drainage tile at issue did not meet the definition of a "culvert" because it was underground and its purpose was to drain subsurface water. Therefore, the court determined that the railroad was not obligated under 468.109 to pay for the drainage tile repair.

### Legislation:

1. **H.F. 211, An Act Requiring In-State Construction Contracts and Disputes Thereof to be Governed by Iowa Law and Including Effective Date.** This Act mandates that Iowa law govern all contracts involving the "construction, alteration, repair, or maintenance of any real property" in Iowa. "Real property" includes "buildings, shafts, wells, and structures," both above ground and underground. Any dispute resolution, arbitration, or mediation related to an in-state construction contract must be conducted in Iowa. Any provision in such a contract that requires the parties to resolve disputes in another state or under another state's laws will be void. This law only applies to construction contracts entered into after January 1, 2014.

2. **H.F. 397, An Act Relating to the Administration of Duties and Programs by the Economic Development Authority.** This Act makes various changes to the Iowa Economic Development Authority, including extending the time period that the Authority can enter into a contract for services from two years to three; prohibiting the Authority from providing economic development assistance to businesses that have a record of consistent or "intentional, criminal, or reckless" antitrust violations, unless these violations involved "mitigating circumstances" or did not have a serious impact on the environment, public safety, or public health; requiring the Authority and any of its business partners to agree to the requirements that the business must meet and maintain throughout the contractual period for the business to retain its financial assistance from the Authority; specifying that a business that does not meet its contractual requirements with the Authority must pay back its incentives in the form of a tax payment to the department of revenue; and eliminating the requirement that the Authority must make a recommendation to the city council or county board of supervisors before the value added from a reconstruction project of an existing building can be partially exempt from property taxation.

3. **H.F. 541, An Act Relating to Dam Reconstruction Standards.** This Act sets out the flood easement ownership requirements for a person reconstructing a dam that was damaged by a natural disaster. A person undertaking such a reconstruction "is only required to possess the flooding easements or ownership which were held prior to the reconstruction as long as the former normal pool elevation is not exceeded and the spillway capacity is increased by at least fifty percent." Additionally, a person reconstructing a dam only needs flooding easements or ownership "to the top of the reconstructed spillway elevation."

4. **H.F. 565, An Act Relating to Mechanic's Liens and the Mechanics' Notice and Lien Registry.** This Act makes the following changes relating to Mechanic's Liens and the Mechanics' Notice and Lien Registry: imposes a stricter requirement for the legal descriptions of property on the registry, in that descriptions must now be "adequately describe(d)"; clarifies that a contractor or owner-builder who contracts with a subcontractor must post a notice of the start of work on the registry website "no later than ten days after" starting work on the property; makes "any person" who posts false or forged information to the mechanics notice and lien registry legally liable; and requires the registry administrator to declare inactive any preliminary notices or notices of commencement of work on the registry that remain posted for two or more years, unless the postings have been renewed.

5. **S.F. 388, An Act Relating to Sponsor Projects Under the Water Resource Restoration Sponsor Program.** This Act amends the enumerated list of possible water resource restoration sponsor projects by adding "practices related to water quality or water quality protection," provided that these practices are included in the Iowa stormwater management manual or the U.S. Department of Agriculture's field office technical guide. This Act also prohibits parking lots as water resource restoration sponsor projects, unless the parking lot "is constructed in a manner to improve water quality" and in a manner that is "consistent with a field office technical guide" issued by the natural resources conservation service of the Department of Agriculture or the Iowa stormwater management manual.

6. **S.F. 427, An Act Relating to the Licensing of Plumbing, Mechanical, HVAC-Refrigeration, Sheet Metal, or Hydronic Professionals, Including Effective Date Provisions, and Making Penalties Applicable.** This Act makes the following changes to the plumbing, mechanical, HVAC-Refrigeration, Sheet Metal, and Hydronic Professionals licensing process, effective immediately: puts in place an expiration date of 3 years after issuance for licenses issued under section 105.9 on or after July 1, 2014; for any licenses set to expire before June 30, 2014, automatically extends the expiration date to June 30, 2014; eliminates the license filing fees that were in place for an initial apprentice license, initial journeyman license, and initial master license; calls on the labor services division of the Iowa Department of Workforce Development and the Iowa Department of Public Health to streamline the contractor registration and contractor licensing process into a combined application system; requires mechanical and sheet metal installers to be licensed by the plumbing and mechanical systems board in accordance with chapter 105; requires the board to adopt an "industry standardized examination" for workers applying for licenses under this section; provides that an individual who holds a master mechanical license or journey mechanical license is not required to get an HVAC-refrigeration, sheet metal, or hydronic license in order to do HVAC-refrigeration, sheet metal, or hydronic work; eliminates Section 105.10, subsection 5, which governed the licensing of geothermal heat pump system installers; authorizes the board to issue journeyperson licenses for plumbing, sheet metal, HVAC-refrigeration, and hydronic professionals; authorizes the issuance of a journeyperson mechanical license to an individual who completes both the

journeyperson HVAC-refrigeration exam and the journeyperson hydronic exam; authorizes the issuance of a master mechanical license to an individual who passes both the master HVAC-refrigeration exam and the master hydronic exam; and provides that after June 30, 2017, an application for a contractor license must include proof of unemployment insurance coverage, proof of worker's compensation insurance coverage, and, for contractors outside Iowa, a surety bond as described in Section 91C.

This act also requires the board to adopt, as applicable to all state-owned buildings and structures, the most recent version of the uniform plumbing code and the international mechanical code within 6 months of each code's release, provided that the codes are consistent with the state fire marshal's fire safety rules and standards. Local jurisdictions with a population greater than 15,000 are required to adopt these codes by December 31, 2016.

Finally, this act requires "written advertisements in this state relating to designing, installing, or repairing plumbing HVAC, refrigeration, sheet metal, or hydronic systems" to include the advertiser's contractor license number. The act makes it a simple misdemeanor to falsely list or display a contractor license number in an advertisement.

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## Kansas

### Case law:

1. In *Rinehart v. Morton Bldgs., Inc.*, 305 P.3d 622, 626-27 (Kan. July 26, 2013), the Kansas Supreme Court held that the economic loss doctrine does not bar negligent misrepresentation claims. The Court declined to establish a bright line rule that the doctrine cannot apply to cases in which the parties lack contractual privity.

2. In *Dun-Par Engineered Form Co. v. Vanum Constr. Co. Inc.*, 310 P.3d 1072, 1076-77 (Kan. Ct. App. August 23, 2013), the Kansas Court of Appeals defined what is a "claimant" and "jurisdiction" under a payment surety bond. The district court awarded summary judgment to Dun-Par, a third tier subcontractor, for award of its unpaid balance due under the payment bond. The bond's definition of "claimant" under the language of the payment bond was limited to those with direct contracts with the principal or "any individual or entity having valid lien rights which could be asserted in the jurisdiction where the project was located." The district court held that "jurisdiction" meant the jurisdiction of Kansas. The Kansas Court of Appeals reversed and reasoned that the language of the bond modified the word "jurisdiction" by the language "where the project is located" and because the project was located on federal property then federal law dictated whether Dun-Par had rights under the bond. The court noted that federal law prohibits lien rights for contractors and subcontractors who work on federal land or buildings. Dun-Par therefore did not have valid lien rights and could not meet the language of a "claimant" under the bond.

3. In *Martin Underground, LLC v. Trinity Excavating & Constr. Inc.*, 308 P.3d 31, at *7 (Kan. Ct. App. Sept. 13, 2013), subcontractor Martin Underground recovered judgment on its breach of contract claim against Trinity. The parties filed competing claims for attorneys' fees

and disputed whether the choice of law clause in the subcontract governed the dispute. The Court of Appeals, without deciding whether Missouri or Kansas law applied, held that Martin was the "prevailing party" under both Missouri and Kansas law and was therefore entitled to attorneys' fees.

4. In *Hewitt v. Kirk's Remodeling and Custom Homes, Inc.*, 310 P.3d 436, 444-45 (Kan. Ct. App. Oct. 11, 2013), homeowners brought claims against a builder for breach of contract and express warranty. The Court of Appeals held that the builder's refusal to repair defects triggered the statute of limitations on the express warranty claim. As such, for purposes of K.S.A. §60-511(1), a cause of action based upon a builder's express warranty to repair or replace construction defects in a newly built house must be brought within five years of the date the builder breached the warranty by refusing or failing to repair or replace the defects.

**Legislation:**

1. **S.B. 54 and H.B. 2053. Amends statutes concerning the state board of technical professions.** The bills amend the statutes dealing with "alternative project delivery" to clarify definitions of architects and engineers and to add a "standard of care" definition as "the duty to exercise the degree of learning and skill ordinarily possessed by a reputable licensee practicing in Kansas in the same or similar locality and under similar circumstances." The bills also delete the authority of a licensed professional to seal an out-of-state professional's documents and clarify that an architect or engineer may seal documents only under the "responsible charge of such licensee." It also clarifies that for companies with offices in Kansas, a licensed professional must regularly supervise work of that office. The bills are currently in the Senate Federal and State Affairs Committee and House Committee on Commerce, Labor and Economic Development.

2. **S.B. 93 and H.B. 2173. Prerequisites for Mechanic's Liens on commercial property: state construction registry, notice of commencement and notice of furnishings.** The bills amend the mechanic's lien statutes and require an original contractor to file a Notice of Commencement with the State Construction Registry with specific information for purposes of filing of mechanic's liens. It allows subcontractors to file a notice of furnishing of supplies and labor in excess of $5,000 and requires the formation of an online State Construction Registry to be implemented and maintained by the Secretary of State. The Senate bill is currently in the Senate Committee on Commerce and the House Bill is in the House Committee on Judiciary.

3. **S.B. 193 and H.B. 2332. Rules and regulations for hydraulic facturing and horizontal drilling.** The bills require that during fracking there must be a collection of monitoring samples from drilling site and adjacent water well areas within 1,000 feet before and after the drilling activities. Companies must report chemical composition. If the chemical composition is a trade secret, it still must be disclosed if there is a problem. The Senate bill is currently in the Senate Committee on Utilities and the House bill is currently in the House Committee on Energy and Environment.

4. **S.B. 42**, **Architects and engineers; immunity from liability in negligence under certain circumstances.** The bill would remove the risk of liability for architects and engineers who would like to help schools determine safer shelter areas through "safety audits." Although the bill removes the liability risk, it would not protect a licensed professional from gross

negligence or wonton behavior. The bill has passed the Senate 4-0 and is currently in the House Committee on Judiciary.

5. **S.B. 150. Prohibition on project specifications favoring a specific product or manufacturer.** The bill provides that the State may not use any specification that favors any specific product or manufacturer "by setting unreasonable requirements." Bidders are not to be disqualified by providing or using materials that are recognized as adequate and acceptable by "competent authorities in the industry." The bill is currently in the Committee on Ethics and Elections.

6. **S.B. 155, Ethical Marketing of Professional Services.** The bill adds the definition of "ethical marketing of professional services" to the licensing statutes and requires design professionals to not submit a fee on public projects until selected on qualifications. The bill has been referred to the Senate Committee on Federal and State Affairs.

7. **S.B. 183. Comprehensive plan for sales tax exemptions- tangible personal property or services.** The bill exempts from Kansas state sales tax all sales of tangible personal property or services purchased by a contractor on projects for the State of Kansas or its agencies. The bill is referred to the Senate Committee on Assessment and Taxation.

8. **H.B. 2065 Defining the crime of home improvement fraud and providing penalties.** The bill establishes a new crime of home improvement fraud. The crime is defined as: (a) knowingly using or employing deception, false pretense, or false promise; (b) knowingly creating or reinforcing a false impression regarding the condition of the owner's dwelling or property; (c) knowingly making a false statement of material fact or omitting a material fact relating to the contract for home improvement; (d) receiving money for the purposes of obtaining or paying for services, labor, materials, or equipment and failing to apply that money to those purposes. The bill has been passed by the House and is currently in the Senate Committee on Judiciary.

9. **H.B. 2158; Preference for Contracts with a Disabled Veteran Business.** The bill requires that in awarding contracts for a job or service, all state organizations and agencies must give preference to disabled veteran businesses doing business as a Kansas corporation. The Department of Administration's goal would be to award at least 3.0 percent of all work to such businesses. The bill has been referred to the Committee on Commerce, Labor and Economic Development.

10. **H.B. 2246. Peer review for certain technical professions**. The bill provides privileged review for design professionals. Disciplinary sessions are not considered peer review sessions. The bill is in the House Committee on Commerce, Labor and Economic Development.

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## Kentucky

### Case law:

1. In *PBI Bank, Inc. v. Schnabel Found. Co.*, 392 S.W.3d 421 (Ky. App. 2013), the Court held that under certain circumstances the doctrine of equitable tolling may apply to mechanic lien statements resulting in the statement relating back and being timely.

In *PBI Bank*, a subcontractor provided labor and materials that were incorporated into a project. After not being paid, on February 22, 2008, the subcontractor attempted to file a timely lien statement. The statement was signed by the subcontractors attorney in one place, but was not separately signed under the "prepared by statement." Because this second signature was not on the statement, the clerk rejected the filing. The property was subsequently foreclosed by the lender. The subcontractor then resubmitted a second lien that included the signature missing from the initial filing. The lender then challenged the second filing because it was filed more than six months after the last day of work.

*PBI Bank* holds that equitable tolling may apply to mechanic lien filings and that when it does a later filling relates back to the date of the first. In doing so, the Court first found that here the clerk improperly rejected the first filing. Specifically, the Court noted that the Commonwealth's mechanic lien statute does not specify where the attorney preparing the lien must sign, only that they must sign on the instrument. Accordingly, the Court found the first filing was improperly rejected. Because the subcontractor could not force the clerk to accept the statement, the Court found equity compelled, under these facts, that the second filing relate back to the first filing that was improperly rejected. Accordingly, the subcontractors lien was enforceable.

2. In *Cincinnati Ins. Co. v. Staggs & Fisher Consulting Eng'rs, Inc.,* No. 2008-CA-002395-MR, Ky. App. Unpub. 2013 WL 1003543 (Ky. App. Mar. 15, 2013), the court held that the economic loss doctrine precludes an insurer from recovering in tort for payments made on behalf of a subcontractor against a designer or contractor with whom the insured has no privity of contract.

In *Cincinnati*, the Appellant was the subrogee of the insured subcontractor, Banta. Banta had performed work under contract with the general contractor who was in privity with the Commonwealth of Kentucky. Staggs & Fisher ("S&F"), like the general contractor, performed work under contract with the Commonwealth. Sometime after construction was complete, damage occurred and the Appellant paid damages under the Subcontractor's policy to the Commonwealth. Appellant then pursued S&F alleging the cause for which it paid damages to the Commonwealth was defective work performed by S&F. S&F moved the trial court for judgment on the pleadings, which the trial court granted.

On appeal, the Court held the economic loss doctrine precluded the claim. The Court reasoned that while Kentucky had not expressly adopted the economic loss rule in construction disputes, prior opinions in the state implied that application of the doctrines was appropriate here. In doing so, the Court dismissed Appellant's argument that the defective work of S&F was a destructive event. Instead, the Court stated that the Kentucky Supreme Court had previously refused to accept the "calamitous event" exception to the economic loss rule.

3. In *McBride v. Acuity,* 510 Fed. Appx. 451 (6th Cir. 2013), the Sixth Circuit held that if Kentucky were to decide whether a construction defect caused by a subcontractor faulty workmanship which results in damage to the subcontractor's work is an occurrence under a standard form CGL policy Kentucky would most likely not find an occurrence.

The facts in *McBride* are that McBride was a general contractor who built a home in Kentucky. After construction was complete, the home experienced differential settlement that resulted in structural concrete cracking. The homeowners sued McBride for the defects. McBride, in turn, sought a defense from its CGL carrier. That carrier refused to provide a defense. McBride then sued the carrier to determine if the carrier owed McBride a duty to defend. The Carrier removed the case to federal court; then moved for summary judgment, which was granted. McBride appealed to the Sixth Circuit.

The Sixth Circuit held that the CGL carrier did not owe McBride a duty to defend. Neither party disputed that "Kentucky law provides that faulty workmanship does not ordinarily constitute an 'occurrence' within the meaning of the CGL." McBride, however, argued that Kentucky would adopt a subcontractor exception to this rule when the faulty work was performed by a subcontractor. The Court, relying on a footnote in the case establishing the general rule in Kentucky, found that Kentucky would most likely find an occurrence only when the damage caused by the subcontractors workmanship caused damage to property other than the insured's work, i.e., the home the insured was contracted to build. The Court found that under these facts Kentucky would most likely not find an occurrence; therefore, the CGL carrier did not owe McBride a duty to defend.

4. In *Ohio Cas. Ins. Co. v. Wellington Place Council of Co-Owners Homeowners Ass'n,* No. 2012-CA-000382-MR, Ky. App. Unpub. 2014 WL 97395 (Ky. App. Jan. 10, 2014), the court held that an insurer's failure to issue a reservation of rights prevented the insured from asserting an appellate court's intervening decision changing established law as to whether construction defects are an occurrence under a standard form CGL policy.

In *Ohio Casualty*, a condo association sued the developer/contractor and its CGL carrier over construction defects that manifest after construction was completed. While the case was pending, an intervening appellate court decision changed whether construction defects constitute an occurrence under a standard form CGL policy in Kentucky. The CGL carrier subsequently filed for summary judgment based on that decision asserting that under the new regime there could not be coverage and, thus, the carrier was entitled to judgment as a matter of law. The court, however, refused to apply the new regime because the CGL carrier had failed to issue a reservation of rights letter preserving the defense to coverage. While the insured had agreed to allow the carrier to assert all defenses, the court found that agreement was insufficient as it did not anticipate all future defenses, including that the law would change during the pendency of the litigation.

5. In *United States ex rel Forrest B. White, Jr. Masonry, Inc. v. Safeco Ins. Co. of Am.*, Civ. No. 5:13-CV-00009-TBR, U.S. Dist. 2013 WL 5970435 (W.D. Ky. Nov. 8, 2013), the Court held, in the alternative, that the Kentucky Fairness in Construction Act ("KFCA"), Ky. Rev. Stat. §371.400 et seq., invalidates no-damage-for-delay clauses in construction contracts. While *Safeco* is a Miller Act case, i.e., federal question, it is illustrative that Courts across the Commonwealth are recognizing that the KFCA invalidate a no-damage-for-delay clause.

In *Safeco*, the United States Corp of Engineers notified Safeco, the prime contractor's surety, that it intended to terminate the prime contractor for cause. In response, Safeco and the owner entered into a take-over agreement. The masonry contractor subsequently filed suit on the payment bond issued by Safeco for, *inter alia*, nonpayment of a delay claim. Safeco defended on several grounds, including that the contract contained a no-damage-for-delay clause. The Court held that such a clause was invalid under the Miller Act because it amounted to a waiver executed before completion of the work which, the Court found, violated 40 U.S.C. §3133(c). In the alternative, the Court found that under the KFCA no-damage-for-delay clauses are void and unenforceable.

6. In *Ford Contr., Inc. v. Ky. Transp. Cabinet*, No. 2012-CA-000554-MR, Ky. App. 2014 WL 495579 (Ky. App. Feb. 7, 2014), the Court held that when a public construction contract is terminated for convenience (1) idle equipment is compensable and (2) FAR Cost Principles are only guidelines that may be deviated from in making a just and equitable award.

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

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

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

*Ford* also held that FAR Cost Principles are not mandatory. The contractor argued that Kentucky law requires the use of FAR to determine the costs incurred by the contractor when a

contract is terminated for convenience. The Court, however, disagreed and, instead, found that FAR Cost Principles are mere guidelines to be used when appropriate. The Court further explained FAR Cost Principles are "appropriate" only when the "long-developed jurisprudence for determining breach-of-contract damages" "fail to make the non-breaching party whole." Because the court here found the more familiar breach of contract damage determining principles resulted in the contractor being justly compensated, FAR Cost Principles need not be applied.

**Legislation:**

1. **Kentucky Revised Statute §413.140, Statute of Limitations for Actions Other Than Those Relating to Real Property.** Statute was amended providing a one year statute of limitations for all actions brought against professional land surveyors for actions relating to a survey or plat.

2. **Kentucky Revised Statute §176.431, Transportation Cabinet's authorization for maximum of five demonstration road and bridge related projects in each fiscal year—Bidding process and basis of selection for projects—Annual report to Interim Joint Committee on Appropriations and Revenue.** House Bill 445 was enacted providing for a maximum of five road and bridge projects, not to exceed $30,000,000, to be procured through design-build, qualification-based procurement process.

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## Louisiana

**Case law:**

1. In *Ogea v. Merritt*, 2013-1085 (La. 12/10/13), 2013 WL 6439355, the Louisiana Supreme Court addressed an attempt by a homeowner to impose personal liability on the sole member of an LLC construction company for construction defects in the work performed by the LLC. The residential construction contract was entered into by contractor Merritt Construction, LLC, with Travis Merritt, the sole member of the LLC, signing the contract on behalf of the LLC. Merritt himself operated a bulldozer to prepare a dirt pad upon which a subcontractor then poured a slab foundation. Significant problems with the foundation were later discovered and the owner sued both the LLC and Merritt, personally. The district court rendered judgment in favor of the owner and against the LLC and Merritt. The basis for Merritt's personal liability was that he personally performed some of the defective foundation work and failed to properly supervise the subcontractor who poured the slab. The Third Circuit Court of Appeal affirmed.

In reviewing the lower courts' imposition of personal liability on Merritt, the Louisiana Supreme Court, as a matter of first impression, interpreted La. R.S. 12:1320's provisions regarding the shield of limited liability for members of an LLC and the statutory exceptions to that limitation of liability. Under La. R.S. 12:1320(A), the liability of members and managers of an LLC "shall at all times be determined solely and exclusively by the provisions of this Chapter." Subsection (B) provides that members and managers are generally not liable for the debts, obligations, or liabilities of the LLC. Subsection (D) prescribes the exceptions to this

limitation of liability, to include fraud, breach of professional duty, and any other negligent or wrongful act by the member or manager. The first exception, fraud, was rejected because no evidence in the record supported a finding that Merritt committed fraud. Turning to the next exception, the court rejected the argument that plaintiff breached a professional duty as the sole member of the LLC. The professions recognized in Louisiana's corporate laws do not include individuals who perform construction work. Thus, Merritt could not breach a "professional duty" as contemplated by the statute. The court also noted that the contract at issue only recognized Merritt Construction, LLC as a licensed contractor and did not reference any contractor's license held by Merritt personally.

With respect to the final exception to limited liability, a negligent or wrongful act, the owner argued that the term "negligence" in the statute only required proof of a tort by the individual. The court rejected this argument, noting that such an interpretation would improperly expand the liability of LLC members. The court instead set forth four factors to assist in the analysis under the last "negligence" exception: 1) whether a member's conduct could be fairly characterized as a traditionally recognized tort; 2) whether a member's conduct could be fairly characterized as a crime, for which a natural person, not a juridical person, could be held culpable; 3) whether the conduct at issue was required by, or was in furtherance of, a contract between the claimant and the LLC; and 4) whether the conduct at issue was done outside the member's capacity as a member. The court found there was no evidence of a violation of a duty owed in tort. Merritt's individual activities fell within the contract. A showing of poor workmanship arising out of a contract entered into by the LLC, in and of itself, does not establish a negligent or wrongful act as that terminology is used in the statute. Further, there was no evidence showing there was a violation of a criminal statute intended to protect the claimant from the type of harm which ensued. Finally, there was no evidence suggesting Merritt acted outside of the structure of the LLC. Accordingly, the court found Merritt was not personally liable to the owner.

2. In *Shaw v. Acadian Builders and Contractors, LLC*, 2013-0397 (La. 12/10/13), 2013 WL 6474946, the Louisiana Supreme Court examined the provisions of the New Home Warranty Act ("NHWA") regarding major structural defects. The plaintiff claimed that water damage allegedly caused by improper installation of stucco was a "major structural defect," subject to a five year peremptive period under the NHWA. The NHWA defines a major structural defect as any actual physical damage to designated load-bearing portions of a home, including, among other things, walls, caused by failure of the load-bearing portions which affects their load-bearing functions to the extent the home becomes unsafe, unsanitary, or is otherwise unlivable. The First Circuit Court of Appeal, overruling the trial court, held the water damage did, in fact, cause physical damage to load bearing portions of the home. However, the improperly installed stucco was not a load bearing part of the home, and therefore, was not a major structural defect under the NHWA. The First Circuit thus found that the plaintiff's claims were subject to a one year peremptive period under the NHWA, and were perempted because suit was filed four years and nine months after the warranty commencement date.

The Louisiana Supreme Court reversed the First Circuit, holding that under the NHWA, there is no requirement that the failed component of a wall also be load-bearing. All that is required is physical damage to one of the designated load-bearing portions be caused by the failure of that designated portion. According to the court, the failure of the walls in allowing extensive water intrusion caused actual physical damage, namely, rotting and deterioration of the studs and OSB. The deterioration of the studs left the load-bearing exterior walls severely

compromised and subject to collapse; therefore, this damage affected the walls' load-bearing functions to the extent the home became unsafe, unsanitary, or otherwise unlivable.

3. In *USA Disaster Recovery, Inc. v. St. Tammany Parish Government*, 2013-0656 (La. 5/31/13), 2013 WL 2361009, the Louisiana Supreme Court found that, under the theory of unjust enrichment, a post-Hurricane Katrina disaster clean-up contractor was entitled to compensation for emergency road cleaning work performed for St. Tammany Parish ("Parish"), even in the absence of a contract with the Parish. The contractor's work, which was essential to search and rescue efforts following Hurricane Katrina, was done for the Parish sheriff. The First Circuit Court of Appeal found the sheriff's representative advised the contractor he could not pay for the work, and the contractor stated he was confident the Parish would pay for it (even though there was no verification by the Parish). The Court of Appeal held that the contractor performed the work at its own risk, and relief for unjust enrichment was therefore not available. The Court of Appeal further held that unjust enrichment relief was not available because another legal remedy existed. Specifically, the contractor (unsuccessfully) sought payment under Louisiana's open account statute, and alternatively, for unjust enrichment. The Court of Appeal held it was not the success or failure of the other cause of action, but rather its existence that determines whether there can be an award for unjust enrichment. Although the contractor failed to prove it should be awarded relief under the open account statute, it availed itself of that remedy, and unjust enrichment could not have been pled in the alternative.

In reversing the Court of Appeal, the Louisiana Supreme Court held that the contractor performed the work under the direction of the sheriff's office. The court further explained that the district court evaluated the elements of a claim for unjust enrichment, and made factual findings that each of the following five elements were met: 1) an enrichment; 2) an impoverishment; 3) a connection between enrichment and the impoverishment; 4) an absence of cause or justification for the enrichment and impoverishment; and 5) no other remedy at law. The Louisiana Supreme Court explained that in reversing the district court's judgment, the Court of Appeal improperly made its own factual findings that three of the five elements for unjust enrichment had not been satisfied. In so ruling, the Court of Appeal did not adhere to the manifest error standard of review, and instead, substituted its own judgment for that of the fact finder. The Louisiana Supreme Court went on to conclude that the district court's ruling was not manifestly erroneous, and reinstated the judgment of the district court awarding the contractor unjust enrichment damages.

4. *Employers Mutual Casualty Company v. Iberville Parish School Board*, 2013 WL 943759 (M.D.La. 3/11/13) involved an action arising from two separate Public Works projects solicited by the Iberville Parish School Board (the "Board"). JVV Consulting–Construction Management, LLC ("JVV") was the lowest bid for both projects and was awarded the contracts. JVV was ultimately terminated by the Board as a result of various alleged defaults on the projects. Several of JVV's subcontractors and suppliers on the projects made demand upon JVV's payment bonds for work performed and/or material supplied on the projects, alleging JVV had failed to pay. Further, the Board demanded that the surety fulfill JVV's performance obligations by completing both projects in full.

The issue before the court was whether a forum selection clause contained in the principal construction contracts was enforceable against JVV's surety. The court held that while the language of the forum selection clause in the underlying contracts between the Board and JVV did include the surety, JVV did not have the authority to bind its surety to terms of a

contract to which the surety was not a party and never agreed. The bonds did not contain the restrictive language of the forum-selection clauses found in the underlying contracts, and instead permitted suits to be brought "in any court of competent jurisdiction in the location in which the work or part of the work is located." The court found that the more expansive and permissive jurisdictional terms contained in the bonds, executed after the initial contracts between the Board and JVV, clearly demonstrated the surety's intent not to be bound by the forum-selection clauses found in the underlying construction contracts. Accordingly, it was held that the surety was not subject to the forum selection clause.

5. In *J. Reed Constructors, Inc. v. Roofing Supply Grp., L.L.C.*, 2012-2136 (La. App. 1 Cir. 11/1/13), 2013 WL 5864479, the First Circuit Court of Appeal addressed the timeliness of a material supplier's notice of nonpayment as required under La. R.S. 38:2242(F) of the Public Works Act in order to preserve a claim. The supplier provided roofing materials and supplies to a roofing subcontractor on a Public Works project, but had not been paid for several material deliveries occurring over the course of four months. Within 75 days of the date of the supplier's last material delivery (but more than 75 days from the date of some of the supplier's earlier deliveries), the supplier sent written notice to the general contractor and owner informing them of the subcontractor's nonpayment of invoices in connection with the deliveries of supplies and materials for the project. When it did not receive payment, the supplier filed a materialman's claim under the Public Works Act. The general contractor sought to have the claim cancelled, arguing that written notice of nonpayment must be provided within 75 days of each separate month in which materials were delivered in order to preserve a materialman's claim. Thus, according to the general contractor, the supplier lost its right to file a Public Works Act claim as to deliveries made more than 75 days from the date notice was provided to the general contractor and owner. The supplier contended that the Public Works Act does not require multiple notices of nonpayment, but rather, a single notice is required to be given within 75 days from the last day of the last month in which material is delivered. The district court ruled in favor of the general contractor, determining that the supplier's notice was untimely as to all deliveries for which notice was not provided within 75 days from the last day of the last month in which the material was delivered.

The First Circuit affirmed. The court found that the 75-day notice requirement of La. R.S. 38:2242(F) was clear and unambiguous. To preserve the right to file a Public Works Act claim, the supplier must send notice of nonpayment before 75 days from the last day of the month in which material was delivered. Regardless of the month of delivery or the number of deliveries, the 75-day period commences on the last day of that month. Accordingly, where multiple deliveries are made over the course of several months, separate 75-day notice periods commence at the end of each month in which materials are delivered. Thus, multiple notices may be required to preserve a supplier's Public Works Act claim for nonpayment.

Judge Higginbotham dissented. Unlike the majority, she found that La. R.S. 38:2242(F) was ambiguous, as it was not clear whether the statute requires that only one notice-of-nonpayment as to all deliveries is required to be issued within 75 days of the last day of the month of the last delivery or whether multiple notices-of-nonpayment must be sent within 75 days of each month in which material is delivered. Based on Miller Act jurisprudence and the rules applicable to the interpretation of statutes, Judge Higginbotham held that La. R.S. 38:2242(F) requires a supplier's notice-of-nonpayment concerning deliveries pursuant to an open account arrangement with a subcontractor to be sent to the general contractor and owner within 75 days of the last day of the month in which all of the materials are delivered for the

project, or in other words, when the claim for unpaid deliveries is mature because the supplier has made its final delivery. Accordingly, she concluded that the supplier's single notice-of-nonpayment within 75 days of the last delivery was timely as to all unpaid deliveries of materials.

6 In the case of *In re S. Louisiana Ethanol, L.L.C.*, 2013 WL 1788537 (Bankr. E.D. La. 4/26/13), the U.S. Bankruptcy Court for the Eastern District of Louisiana addressed a creditor's lien rights under the Private Works Act. In a brief opinion, the court recognized a secured interest in both immovables and movables by the contractor's Private Works Act lien. The court further explained that any Private Works Act claimant performing general contracting services while unlicensed cannot possess a valid Private Works Act lien. However, a Private Works Act claimant that acquires a license while performing general contracting services can hold a valid lien to secure the amounts owed for work performed after the license was acquired. The contractor in *In re S. Louisiana Ethanol* was initially unlicensed when it began work at the debtor's facility. However, it subsequently acquired its contractor's license. The court, therefore, found that amounts owed to the contractor for work performed prior to its acquiring a license were not secured by its Private Works Act lien. However, any work performed on or after the date it acquired its license was secured by the lien.

7. In *Urban's Ceramic Tile, Inc. v. McLain*, 47,955 (La. App. 2 Cir. 4/10/13), 113 So.3d 477, an issue arose over when the construction of a home was "substantially complete" for purposes of commencing a subcontractor's 60-day lien filing period under the Louisiana Private Works Act. The homeowner argued that the subcontractor's statement of claim or privilege was untimely, as it was filed more than 60 days after the home was substantially complete. The subcontractor countered that the house was not substantially complete at the time the subcontractor filed its statement of claim or privilege because, among other things, a long punch list of items (including several major items) remained incomplete. In determining when substantial completion of the home occurred, the following factors were considered by the court: the extent of the defect or nonperformance, the degree to which the purpose of the contract is defeated, the ease of correction, and the use or benefit of the work to be performed. *Id*. at 482 (citing *All Seasons Const. Inc. v. Mansfield Housing Auth.*, 40,490 (La. App. 2 Cir. 1/25/06), 920 So.2d 413). Applying these factors, the court found that the district court did not abuse its discretion in finding substantial completion occurred more than 60 days before the subcontractor filed its statement of claim or privilege. The court further awarded attorneys' fees to the homeowner under the Private Works Act, as the subcontractor's failure to deliver a written request for cancellation when requested was found to be without reasonable cause.

**Legislation:**

1. **La. R.S. 9:4822(G)(4)** – **Act No. 277.** Effective August 1, 2013, Act No. 277 amended the Louisiana Private Works Act statute La. R.S. 9:4822(G)(4) to provide that a Private Works Act claimant is not required to attach copies of unpaid invoices to its statement of claim or privilege unless the statement of claim or privilege specifically states that invoices are attached. The inclusion of invoices with a statement of claim or privilege under the Louisiana Private Works Act was never a mandatory requirement, and this amendment merely clarifies that fact.

2. **La. R.S. 9:4802(G)(1) – Act. No. 357.** Act No. 357, effective August 1, 2013, amends La. R.S. 9:4802(G)(1) to provide that a lessor of movables need not provide the owner

and contractor with a copy of the lease in order for its Private Works Act privilege to arise. Instead, the lessor must deliver notice to the owner and the contractor not more than ten days after the movables are first placed at the site of the immovable for use in a work. The notice must contain the name and mailing address of the lessor and lessee and a description sufficient to identify the movable property placed at the site of the immovable for use in a work. The notice must also state the term of rental, terms of payment, and must be signed by the lessor and lessee.

3. **Louisiana Civil Code Article 3505, *et seq.*** – **Act 88.** While not directly related to construction law, newly enacted Louisiana Civil Code Article 3505, *et seq.*, effective August 1, 2013, permits the extension of a liberative prescriptive period by juridical act. Article 3505 provides: "After liberative prescription has commenced to run but before it accrues, an obligor may by juridical act extend the prescriptive period. An obligor may grant successive extensions. The duration of each extension may not exceed one year." An extension of liberative prescription must be express and in writing. La. Civ. Code art. 3505.1. The period of extension commences to run on the date of the juridical act granting it. La. Civ. Code art. 3505.2. Prescription may be interrupted or suspended during the period of extension. La. Civ. Code art. 3505.4. While an extension of liberative prescription is only effective against the obligor granting it, the extension benefits all joint obligees of an indivisible obligation and all solidary obligees. La. Civ. Code art. 3505.3. Further, although an extension of liberative prescription by a principal obligor is effective against his surety, an extension of liberative prescription by a surety is effective only if the principal obligor has also granted it. *Id*.

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## Maine

### Case law:

1. In *Jim's Plumbing & Heating, Inc. v. Home Loan Investment Bank, 2012 ME 124, 55 A.3d 419,* the Maine Supreme Court held that a mortgagee's knowledge of the scope and extent of construction is enough to establish the mortgagee's consent to a particular contractor's work within that scope such that the contractor's mechanic's lien will take priority over the mortgage. A mortgagee is an owner for the purpose of the Maine Mechanic's Lien Statute. If consent of the mortgagee is not explicitly shown, the contractor can establish knowledge and consent by the circumstances. Here, the court rejects the mortgagee's argument that knowledge must be shown prior to the disbursement of the loan. Instead, the court states that the relevant time period for determining knowledge is both before the work has started and as the work progresses. The court then held that the mortgagee had knowledge of and consented to the contractor's work because the mortgagee lent $183,000 based on the scope and extent of the renovation project and additionally, the mortgagee made several visits to the site. The mortgagee also received several status reports, including details of the electrical, plumbing and HVAC work being done by the plaintiff contractor. The court held that even if the mortgagee did not know the name of an entity providing materials or services, lack of such detailed knowledge is irrelevant where, as here, the mortgagee was aware of the extent and type of work being performed.

2. In *Sinclair Builders, Inc. v. Unemployment Insurance Commission, -- A.3d --, 2013 WL 4426272 (Me. 2013) (not yet released for publication)*, the court reviewed the elements of the ABC test to determine whether salesmen and skilled workers were employees of a general contractor or independent contractors. To find an independent contractor rather than an employee, the would-be employer must establish that A) such individual is free from control and direction over his performance, B) such service is either outside the usual course of the business for which such service is performed or the service is performed outside of the places of business of the enterprise for which such service is performed and C) such individuals customarily engage in independently established trade, occupation profession or business. Focusing on the first element, the court held that the salesmen were employees because the contractor controlled the salesmen's performance by dictating the terms of sale, provided a set commission without negotiation, and gave the salesman business cards bearing the general contractors name and logo. Additionally, the president of the general contractor testified that he, and not the salesmen, made the ultimate decision on which sales to make.

As to skilled workers, the evidence in the record supported the general contractor's claim that the skilled workers were independent contractors. The skilled workers were free from the general contractor's direction and control: none of the workers exclusively worked for the general contractor, the general contractor hired them on a job by job basis, they often worked for competing contractors providing the same services, and they would occasionally turn down work from the general contractor if they were unavailable for that job. In addition, the workers provided their own insurance. These facts demonstrate the lack of direction or control required by element A) of the test. The general contractor's mandate regarding safety and the requirements of OSHA was not a factor as the court did not want the general contractor to have to choose between enforcing safety requirements and characterizing independent contractors as employees. As to the second element, the court held that a construction job site is not a "place of business" within the meaning of the test because to find otherwise would preclude any construction company from ever meeting the requirement of the test with regard to skilled workers.

**Legislation:**

1. **2013 Me. Legis. Serv. Ch. 296 (S.P. 456) (L.D. 1313), An Act to Amend Licensing Requirements for Professional Engineers.** Under this legislation the following persons are no longer qualified for licensure as a professional engineer in the state of Maine: a) a person with at least fifteen years' experience in engineering work, at least ten of which has been in responsible jobs of engineering work and who has a license to practice engineering in another state or any foreign country and who previously could have been licensed in Maine by passing an oral examination before the board and b) a person with less than fifteen years' experience who has a license to practice engineering in another state or any foreign country and who previously could have been licensed in Maine by passing an eight hour examination in the principles and practice of engineering.

2. **2013 Me. Legis. Serv. Ch. 120 (S.P. 64) (L.D. 175), An Act to Update the Laws Governing Energy Efficiency Building Performance Standards.** This legislation repeals whole sections of the Maine "Energy Efficiency Building Performance Standards Act", including the provisions: a) requiring agencies to coordinate energy performance building standards, as far as practicable, so that similar activities and buildings are treated in a similar way, and b) requiring the public utilities commission to assist state agencies in developing

energy standards that comply with the law and to administer the standards. The legislation then affirmatively requires the public utilities commission to repeal rules that established the standard that comprised the Maine Model Building Energy Code.

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## Maryland

### Case law:

1. In *Cuesport Properties, LLC v. Critical Development, LLC,* 209 Md. App. 607 (2013), the Maryland Court of Special Appeals validated a per diem liquidated damages clause contained in a contract for the sale of commercial property and applied the clause to the sellers failure to construct a code compliant demising wall within thirty days of closing.

2. In *Burns v. Betchel Corp.,* 2013 BL 144554 (2013), the Maryland Court of Special Appeals decided that the Statute of Repose, Maryland Code, Courts and Judicial Proceedings Article § 5-108 barred the plaintiffs' claims of wrongful death and personal injury resulting from the defective and unsafe condition of an improvement to real property because the defendant, a construction contractor, did not possess and control the injurious real property.

3. In *Building Materials Corp. of America v. Board of Education of Baltimore County*, 428 Md. 572 (2012), the Maryland Court of Appeals held that Maryland Code, Education Article § 5-112 – requiring county school boards to use competitive bidding procedures to procure construction, improvement, supply, or equipment contracts worth $25,000 or more – does not prevent county school boards from procuring roofing repair services through membership in an intergovernmental purchasing consortium.

4. In *Kane Builders S&D, Inc. v. Maryland CVS Pharmacy, LLC*, 2013 WL 2948381 (D. Md. 2013), the United States District Court for the District of Maryland denied a defendant's motion to dismiss plaintiff's mechanic's lien based on the presence of the mandatory mediation clause in AIA Document A201-2007, § 15.3.1. The court determined that this clause encompassed a mechanic's lien because the clause contained no exception as to what types of matters fell under the contract's mediation clause. However, the Court also determined that the contract allowed parties to pursue a mechanics lien while mediating a dispute. Instead of granting defendant's motion to dismiss plaintiff's claim for a mechanic's lien, the Court stayed the plaintiff's mechanic's lien until the parties complied with the contract's mediation clause. In the Court's view, failing to comply with the mediation clause did not require the dismissal of the mechanic's lien, and staying the lien until mediation began placed both parties in their bargained for position without overly prejudicing either one.

### Legislation:

1. **Md. Code, State Fin. & Proc. § 17-110, Retention of Percentage of Contract as Security**. This law reduces the allowable retainage amounts on construction contracts entered into by public bodies other than the State of Maryland (i.e., local governments). If a contractor has furnished 100% payment security and 100% performance security for a construction contract, a local government may not retain more than 5% of the total amount of

the contract. The law revises the current law, which permits a local government to retain up to 10% of the total amount of a construction contract during the first half of the contract and 5% thereafter. The law brings local governments in line with the State with respect to retainage, as the State may not retain more than 5% of the total amount of construction contracts. The law only applies to construction contracts awarded on or after July 1, 2013.

2. **Md. Code, State Fin. & Proc. § 13-227, Subcontractor Equal Access to Bonding Act of 2013**. This law prohibits prime contractors that require subcontractors to provide bid, performance, or payment security on specified State contracts from imposing bonding requirements that are more stringent than what the State imposes on prime contractors. The law also requires prime contractors to accept bonds submitted by subcontractors if the bond would be accepted by the State and if the bond is provided by either (1) a surety authorized to do business in Maryland or (2) the Maryland Small Business Development Financing Authority. The law took effect on July 1, 2013.

3. **Md. Code, State Fin. & Proc. § 10A-101 *et. al.*, Public Private Partnerships**. This law establishes a State policy for public-private partnerships ("P3s") and authorizes certain State agencies, including the Department of General Services, the Maryland Department of Transportation, the Maryland Transportation Authority, and certain higher education institutions, to enter into them. P3s are a method for delivering public infrastructure assets using a long-term, performance-based agreement between an authorized State agency and a private entity where: (1) the private entity performs functions normally undertaken by the government, but the State agency remains accountable for the public infrastructure asset and its public function; and (2) the State may retain ownership of the public infrastructure asset while the private entity may be given additional decision-making authority in deciding how the asset is financed, developed, constructed, operated, and maintained over its life cycle.

The law allows a private entity to submit an unsolicited proposal to an authorized State agency and then allows the entity to participate in the competitive procurement process if the agency determines that the unsolicited proposal meets its needs. The law also requires, among other things that P3 agreements contain minority business enterprise participation goals, as established by the State, and that P3 projects comply with the State's prevailing wage, living wage, environmental, non-discrimination, and anti-collusion laws. The law took effect on July 1, 2013.

4. **Senate Bill 47 / House Bill 191, Purchase of American Manufactured Goods.** Subject to a number of exceptions, this bill creates a preference for American manufactured goods in State contracting by compelling public bodies of the State to require contractors and subcontractors to use or supply American manufactured goods when performing a contract either to build or maintain a public work or to buy or manufacture machinery or equipment to be installed at a public work site. The bill will take effect on October 1, 2013.

5. **House Bill 347, Professional Engineers – Firm Permits**. This bill requires that, after October 15, 2015, a corporation, partnership, or limited liability company must hold a permit issued by the State Board for Professional Engineers before the firm may operate a business through which engineering is practiced, except for specified circumstances relating to if the firm provides engineering services for itself or affiliated firms. The bill will take effect on October 1, 2013.

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## Michigan

### Legislation:

1. **The Michigan Legislation Broadens Anti-Indemnification Protection For Construction Professions in Public Works Projects** On March 1, 2013, legislation went into effect which further limits the permissible scope of indemnification obligations public entities may require from certain construction professionals and trades on public works projects. Prior to the recent legislation, MCR 691.991 prohibited indemnity provisions in contracts for construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition, and excavating from providing indemnification for damages arising out of bodily injury to persons or damage to property, where the claimed damages were caused by or resulting from the sole negligence of the indemnitee.

The March 1, 2013 amendment of MCR 691.991 expanded the scope of the anti-indemnity protection to include contracts for the construction, alteration, repair or maintenance of a highway, road or bridge, water and sewer lines or any other infrastructure or improvement to real property. However, the biggest change found in the revised MCR 691.991 prohibits a "public entity" (defined to include cities, villages, townships, counties, school districts, intermediate school districts, authorities, and community and junior colleges, but not state universities, which are exempt from this statute) from requiring architects, professional engineers, landscape architects or professional surveyors or contractors to defend or to assume liability for the public entity for any amounts greater than the degree of fault or negligence of the particular construction professional or trade. In the event a contract contains this restriction, the indemnity provision will be considered null and void. It is important to note that that this indemnity restriction does not apply to private contracts. This change reflects the legislations intent on moving indemnity provisions in construction contracts in line with Michigan's general comparative fault negligence statutes.

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## Minnesota

### Case law:

1. In *Eng'g & Const. Innovations, Inc. v. L.H. Bolduc Co., Inc.*, 825 N.W.2d 695 (Minn. 2013), the Minnesota Supreme Court determined whether appellants were obligated under an insurance policy and an indemnification provision in a construction contract to reimburse respondent Engineering and Construction Innovations, Inc. (“ECI”) for expenses ECI incurred in repairing a damaged sewer pipeline. Appellant L.H. Bolduc Company, Inc. (“Bolduc”), the subcontractor of ECI, damaged a sewer pipe during the course of a construction project. After ECI repaired the damage, it sought reimbursement from Bolduc's insurer, appellant The Travelers Indemnity Company of Connecticut (“Travelers”), under an endorsement to Bolduc's commercial general liability policy naming ECI as an additional insured

for liability “caused by acts or omissions” of Bolduc. Travelers denied coverage. ECI then sued Bolduc and Travelers for negligence and breach of contract to recover the costs ECI paid to repair the pipe. A jury found that Bolduc was not negligent, and awarded ECI zero dollars in damages. Following trial, the district court granted summary judgment in favor of Travelers and Bolduc on ECI's breach of contract claims, concluding that Travelers and Bolduc had no obligation to reimburse ECI for damages not caused by Bolduc. The court of appeals reversed, determining that ECI was entitled to coverage as an additional insured without regard to Bolduc's fault. The court also concluded that Bolduc was required to indemnify ECI, and that the subcontract between ECI and Bolduc did not violate Minnesota Statute § 337.02 (2012), which prohibits indemnification for the fault of others in construction contracts. The Minnesota Supreme Court reversed, concluding that ECI did not qualify as an additional insured with respect to the pipe damage and that Bolduc could not be required to indemnify ECI without violating Minnesota Statute § 337.02.

2. In *Big Lake Lumber, Inc. v. Sec. Prop. Inv., Inc.*, No. A11-2220, 2013 WL 4552363 (Minn. Aug. 28, 2013), the district court found that appellants Big Lake Lumber, Inc. (“Big Lake”) and J. DesMarais Construction (“DesMarais”) contributed to the same improvement project as Wruck Excavating (“Wruck”), and concluded that the mechanic’s liens of Big Lake and DesMarais related back to the date Wruck commenced work on the improvement project, and therefore had priority over the mortgage of respondent 21st Century Bank (the “Bank”). The Minnesota Court of Appeals reversed the district court’s lien priority decision by applying a new “integrated analysis” to find that the mortgage of the Bank was superior to the mechanic’s liens of Big Lake and DesMarais. The Minnesota Supreme Court reversed and concluded that the court of appeals erred by adopting and then applying a new “integrated analysis” to find the Bank’s mortgage superior to the liens, and that the district court did not clearly err when it found that the liens of Big Lake and DesMarais related back to the actual and visible beginning of the improvement by Wruck.

3. In *Centra Homes, LLC v. City of Norwood Young Am.*, 834 N.W.2d 581 (Minn. Ct. App. 2013), appellant-city appealed from a district court order denying appellant-city's motion to dismiss for lack of subject-matter jurisdiction respondents' lawsuit challenging the city's building-permit fees. The city argued that 1) because each of respondents' claims addressed the application and interpretation of the state building code, and an administrative process is available to address these matters, the district court erred in ruling that respondents did not need to exhaust administrative remedies before seeking judicial review; and 2) the municipal planning act did not apply to this case. The Minnesota Court of Appeals reversed, holding that because the city's building-permit fees are determinations made by the city building official relative to the application and interpretation of the state building code, respondents were required to exhaust their administrative remedies before seeking judicial review, and the district court erred in denying the city's motion to dismiss for lack of subject-matter jurisdiction.

4. In *State v. Hardy*, No. A12-0624, 2013 WL 1187961 (Minn. Ct. App. Mar. 25, 2013), appellant challenged three convictions for failure to obtain building permits and inspections for an addition to his residence in violation of the St. Louis Park City Code, arguing that the city ordinance and Minnesota State Building Code does not apply to his personal residence, that he is not a “person” within the meaning of the city ordinance and state building code, and that he was denied due process because he was unable to pursue an administrative appeal to the City of St. Louis Park. The Minnesota Court of Appeals held that the district court

correctly concluded that the city ordinance and state building code applied to appellant and his residence, and that he was afforded sufficient opportunity for administrative relief.

5. In *Lee v. Gorham Builders, Inc.*, No. A12-1619, 2013 WL 1707687 (Minn. Ct. App. Apr. 22, 2013), appellant-homeowners challenged the district court's order granting summary judgment in favor of respondent-contractor, arguing the district court erred by concluding that their statutory-warranty and common-law claims were barred by the applicable statutes of limitations. Minnesota Statute § 327A.02 states that contractors must provide homeowners a warranty ensuring a residential dwelling be free from major construction defects for a ten-year period. Further, Minnesota Statute § 541.051 requires statutory warranty claims to be brought within two years of the discovery of the breach of the statutory warranty. This two-year limitations period begins to run when the homeowner discovers, or should have discovered, the builder's refusal or inability to ensure the home is free from major construction defects. Appellant-homeowners initiated their statutory warranty claim over two years after they received an inspection report that identified several defects to their home. The Minnesota Court of Appeals concluded that this inspection report placed appellant-homeowners on notice of a "major construction defect", the statute of limitations had run, and thus upheld the district court's grant of summary judgment on the appellant-homeowners' statutory warranty claim.

6. In *Owners Ins. Co. v. Equal Access Homes, Inc.*, No. A12-1861, 2013 WL 2302062 (Minn. Ct. App. May 28, 2013), the Minnesota Court of Appeals considered an appeal from summary judgment in favor of respondent insurer in a declaratory-judgment action, in which the district court ruled that respondent's commercial general liability policy (CGL) did not cover damages awarded to appellants in an arbitration proceeding against respondent's insured. Appellants argued that the district court erred in ruling that 1) there was no "occurrence" within the meaning of the CGL policy and 2) the damages to appellant's house did not constitute "property damage" within the meaning of the CGL policy. The Minnesota Court of Appeals affirmed, holding that appellant's damages were not covered by an "occurrence" and found it unnecessary to reach the issue of whether the damage constituted "property damage" within the meaning of the policy.

7. In *Bright Star Sys. Corp. v. MN Theaters 2006, LLC*, No. A13-0012, 2013 WL 3155473 (Minn. Ct. App. June 24, 2013), the Minnesota Court of Appeals considered a series of appeals involving a mechanic's lien action arising out of the construction of a 15-screen movie theater complex. Appellants, who were also respondents on notice of related appeal, argued that the district court erred in 1) determining that respondent established its right to a mechanic's lien on the property; and 2) granting partial summary judgment to respondent and dismissing appellants' counterclaim for liquidated damages. In a related appeal, co-appellant argued that 1) the district court erred by determining that it did not provide lienable improvements to the property; and 2) in the alternative, that the district court abused its discretion by determining that co-appellant failed to meet its burden of proof on its claim of unjust enrichment. The Minnesota Court of Appeals held: 1) the mechanic's lien was timely filed as it was filed within 120 days of the last day of work; 2) appellants waived their right to deny heat and cover costs by waiting until the work was completed to object to the costs; 3) the district court did not err by granting partial summary judgment to respondent and dismissing appellant's counterclaim for liquidated damages as the liquidated damages provision in question never because a part of the contract; 4) co-appellant did not provide lienable improvements; and 5) co-appellant failed to meet its burden of proof on its claim of unjust enrichment.

8. In *Morgan Square, LLC v. Lakeville Land, Ltd. Ltd. P'ship*, No. A12-2271, 2013 WL 3779330 (Minn. Ct. App. July 22, 2013), the Minnesota Court of Appeals construed the extent of approval authority contained in restrictive covenants encumbering real property in Lakeville. Lakeville Land, Ltd., appealed from the district court's judgment that it could not use its approval authority to disapprove an affordable-housing project proposed by the Dakota County Community Development Agency, arguing that the district court erroneously held that Lakeville Land's approval authority extended only to exterior features of commercial properties and that units with one-car garages met city standards. Because the restrictive covenants unambiguously gave Lakeville Land approval authority over residential as well as commercial development, the court reversed in part. But because the express terms of the restrictive covenants gave Lakeville Land approval authority only as to structural and exterior features of property improvements and not to their floor plans, and because residential units with one-car garages meet city standards, the court otherwise affirmed the district court's judgment.

9. In *Northdale Const. Co., Inc. v. Veritas Dev., Inc.*, No. A12-2212, 2013 WL 3868149 (Minn. Ct. App. July 29, 2013), appellant NTC Homes, Inc. ("NTC") appealed the district court's entry of default judgment against them and foreclosure of respondent Northdale Construction Co.'s mechanic's lien. NTC contended that the district court erred as a matter of law by failing to apportion respondent's blanket mechanic's lien against the 17 affected lots on a pro-rata, per-lot basis as required by *Premier Bank v. Becker Dev.*, LLC, 785 N.W.2d 753 (Minn. 2010), and thus improperly calculated NTC's share of the amount owed. The Minnesota Court of Appeals concluded that the district court erred when it apportioned the lien on the basis of equity, rather than apportioning the lien on a pro rata, per-lot basis as required by Minnesota Statute § 514.09. Accordingly, the court reversed and remanded the case to the district court to determine, consistent with the opinion and *Premier Bank,* the appropriate apportionment of the blanket mechanic's lien.

10. In *Superior Classic, Inc. v. Taylor*, No. A12-0767, 2013 WL 4710640 (Minn. Ct. App. Sept. 3, 2013), the Minnesota Court of Appeals looked to the plain language of the construction contract between appellant and respondent-contractor to determine whether it was a lump-sum or unit-cost contract. Under lump-sum agreements, contractor agrees to complete the work for a set price, regardless of the actual costs incurred in completing the construction. Under a unit-cost contract, the contractor submits a price per unit for each of the various categories involved. The court determined that the plain language of the contract—"The Owner(s) shall pay the Contractor the sum of $58,240.25 for completion of the work"—clearly showed that it was a lump-sum contract. Appellant further contended that respondent-contractor was not entitled to a mechanic's lien judgment because appellant did not owe respondent any lienable sums at the time it filed the mechanic's lien statement. The court held that respondent-contractor was entitled to a mechanic's lien judgment pursuant to Minnesota's mechanic's lien statute.

**Legislation:**

1. **H.F. 450, Actions for damages based on services or construction to improve real property limitations modified.** Section 541.051 of the Minnesota Statutes, relating to the limitation of action for damages based on services or construction to improve real property, now provides that in no event may an action for contribution or indemnity arising out of the defective and unsafe condition of an improvement to real property be brought more than 14 years after substantial completion of the construction.

2. **S.F. 561, Building and construction contracts agreements in insure prohibition.** Paragraphs (a) through (e) were added to Section 337.05, subdivision 1 of the Minnesota Statutes, relating to valid agreements to insure. Paragraph (a) provides that except as otherwise provided in paragraph (b), sections 337,01 to 337.05 of the Minnesota Statutes do not affect the validity of agreements where a promisor agrees to provide insurance coverage for the benefit of others. Paragraph (b) then provides that provisions requiring a party to provide insurance coverage to one or more other parties for negligence or intentional acts or omissions of other parties is void and unenforceable as it is against public policy. Paragraphs (c) provides that paragraph (b) does not affect the validity of a provision that requires a party to provide or obtain workers' compensation insurance, construction performance or payment bonds, or project-specific insurance, including, without limitation, builder's risk policies or owner or contractor-controlled insurance programs or policies. Paragraph (d) provides that paragraph (b) does not affect the validity of a provision that requires the promisor to provide or obtain insurance coverage for the promisee's vicarious liability, or liability imposed by warranty, arising out of the acts or omissions of the promisor. Finally, paragraph (e) provides that paragraph (b) does not apply to building and construction contracts for work within fifty feet of public or private railroads, or railroads regulated by the Federal Railroad Administration.

3. **H.F. 677, Omnibus tax bill.** Section 290.9705 of the Minnesota Statutes, relating to surety deposits required for construction contracts, was amended to read: Subdivision 1. Withholding of payments to out-of-state contractors. (a) In this section, "person" means a person, corporation, or cooperative, the state of Minnesota and its political subdivisions, and a city, county, and school district in Minnesota. (b) A person who in the regular course of business is hiring, contracting, or having a contract with a nonresident person or foreign corporation, to perform construction work in Minnesota, shall deduct and withhold eight percent of payments made to the contractor if the value of the contract exceeds $50,000. The bill has certain semantic changes to the definition that was passed in 2012.

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## Mississippi

### Case law:

1. *Noatex Corp. v. King Constr. of Houston, LLC*, 732 F.3d 479 (5th Cir. 2013) the Fifth Circuit Court of Appeals, citing lack of procedural safeguards, affirmed a district court's determination that Mississippi's "Stop Notice" statute is unconstitutional because it deprived contractors of their property without due process. Mississippi's Stop Notice provision enabled subcontractors, who had not been paid by the contractor and who were not in privity of contract with the owner, to bind in the hands of the owner funds that would have otherwise been paid to the contractor. This holding effectively abrogated "lien rights" for first-tier subcontractors.

2. In *Ground Control, LLC v. Capsco Industries, Inc.*, 120 So. 3d 365 (Miss. 2013), neither the subcontractor nor the sub-subcontractor on a private construction project obtained certificates of responsibility as required by Miss. Code Ann. § 31-3-21. The sub-subcontractor sued for non-payment. The Supreme Court declared the sub-subcontractor's contract to be void but held that even under a void contract, an unpaid contractor, subcontractor or sub-

subcontractor could recovery under the equitable theories of unjust enrichment or quantum meruit.

3. In *Falkner v. Stubbs*, 121 So. 3d 899 (Miss. 2013), the Court found that pre-judgment interest, provided for by Miss. Code Ann. § 87-7-3 for late payments to a contractor who has made improvements to real estate, does not apply when there is a bona fide dispute as to the amount of damages allegedly owed to the contractor (*i.e.* unliquidated damages).

4. In *Harrison County Commercial Lot, LLC v. Gordon Myrick, Inc.*, 107 So. 3d 943 (Miss. 2013), the Court found that the arbitration clause found in the construction contract excluded aesthetic-effect claims from arbitration. Some of the claims against the contractor were aesthetic-effect claims and some were not. Accordingly, the Supreme Court remanded the case to the trial court for a determination of which claims were non-aesthetic and subject to arbitration and which claims were not.

5. In *Murphy & Sons, Inc. v. Desoto County Bd. of Supervisors*, 122 So. 3d 87 (Miss. 2013), the Court found that a request by a county board of supervisors that bidders provide a list of prior jail-construction experience did not amount to an impermissible prequalification of bidders because the prior-experience requirement: (1) did not violate any of the purposes of the competitive bidding process; (2) was not unreasonably restrictive to bidders; and (3) left discretion to the board to consider bids that did not conform to the bid specifications.

6. In *Ace Pipe Cleaning, Inc. v. Hemphill Constr. Co.*, No. 2012-CA-00550-COA (Miss. Jan. 7, 2014), the Court of Appeals held that the subcontractor, a company engaged to clean sewer pipes to prepare for a slip-lining project, was required to have a current certificate of responsibility in accordance with Miss. Code Ann. § 31-3-1, since the subcontract work was a necessary part of the reconstruction, repair, maintenance, or repair work on a public project. The Court further held that although the pipe-cleaning subcontract was void for the subcontractor's lack of certificate of responsibility, the subcontractor could nonetheless recover under a theory of *quantum meruit*.

**Legislation:**

1. **S.B. 2622 An Act To Provide For Contractor Liens and the Enforcement and Notice of Contractor Liens.** The Bill addresses the holding in *Noatex Corp. v. King Constr. of Houston, LLC*, 732 F.3d 479 (5th Cir. 2013), which declared Mississippi's Stop Notice provision to be unconstitutional. Currently, because of the *Noatex* holding, subcontractors, laborers and materialmen that are not in privity of contract with the prime contractor possess no lien rights under Mississippi law. Senate Bill 2622 grants a special lien on the real property or other property for which contractors, subcontractor, and materialmen furnish labor, services or materials for the improvement of real estate. To benefit from the construction lien, a claimant must follow the detailed notice and timing provisions provided within the Bill. Lien claimants will receive a pro rata share of the proceeds from the satisfaction of a construction lien. Owners are entitled to know the identity and existence of all down-stream contractors and materialmen providing work on the construction project.

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## Missouri

### Case law:

1. In *Best Buy Builders, Inc. v. Robyn Siegel*, 409 S.W.3d 562, 565-66 (Mo. Ct. App. E.D. September 24, 2013), the court upheld an oral modification of a builder's contract for the homeowner to pay more than the original contract price where there were reasonable inferences of mutual agreement on the homeowner's requests for additional improvements during remodeling and home repairs and where contractor informed the homeowner that work would increase the bid price.

2. In *City of Cape Girardeau v. Jokerst, Inc. et al.*, 402 S.W.3d 115, 121 (Mo. Ct. App. E.D. June 13, 2013), the court clarified the definition of "extra work" and stated that where a contract did not provide pricing for specific extra work, a claim could be made under a *quantum meruit* theory.

3. In *Fidelity Title Nat'l Ins. Co. v. Captiva Lake Investments, LLC*, 941 F.Supp.2d 1121, 1127-1128 (E.D. Mo. April 22, 2013), a title insurance company sued the insured for declaratory judgment concerning defense provided against mechanic's liens and that the policy did not provide coverage for alleged unmarketability title. The court held that under Missouri law, an exclusion in a title insurance policy for liens and encumbrances created by insured applied if insurer could show intentional misconduct, breach of duty, or otherwise inequitable dealings by insured or that recovery for individual lien claims would amount to unwarranted windfall because insured received benefit of work reflected in the liens without disbursing payment.

4. In *Jamison Electric, LLC v. Dave Orf., Inc. d/b/a Orf Const.*, 404 S.W.3d 896, 899-900 (Mo. Ct. App. E.D. April 9, 2013), the court found that the government's contracting RFP was insufficient proof of a promise or a contract, The RFP was a promise from the County and not the contractor and was not an offer to contract, but an offer to receive proposals to contract.

5. In *Paul Kelley, Jr. et al. v. Widener Concrete Constr., LLC*, 401 S.W.3d 531, 541-42 (Mo. Ct. App. S.D. June 11, 2013), the court held that although traditionally the measure of damages for damage to property is the cost of repair or diminution in value, for substantial but defective performance and where repairs would destroy the useful property or lead to economic waste, then the proper measure of damages is diminution in value.

6. In *Rental Co, LLC v. Carter Group, Inc.*, 399 S.W.3d 63, 67 (Mo. Ct. App. W.D. April 30, 2013), the court did not enforce a clause for prevailing party attorneys' fees when the plaintiff did not receive a judgment award on its breach of agreement claims.

7. In *Shawnee Bend Dev. Co., LLC v. Lake Region Water & Sewer Co.*, 2013 WL 1194758 at *6-8 (Mo. Ct. App. S.D. March 25, 2013), the court enforced a contractual incorporation clause where the first contract contained a requirement that was generally but not expressly incorporated into other agreements.

8. In *Travelers Prop. Cas. Co. of Am. v. The Manitowoc Co., Inc.,* 389 S.W. 3d 174 (Mo. January 29, 2013)(*en banc*), the court held that a third-party Plaintiff seeking contribution no longer is required to plead its fault as a part of its claims.

**Legislation:**

1. **S.B. 357 Modifies the law relating to mechanics' liens for rental machinery and equipment.** Modifies R.S.Mo. §429.010. Currently, liens involving the rental of machinery or equipment to others who use the machinery or equipment are for the reasonable rental value while the machinery or equipment is on the property. The bill does not require the machinery or equipment to be rented to others who actually use the machinery or equipment. Currently, parties claiming such a lien have to provide written notice to the property owner within five business days of the commencement of the use of the machinery or equipment that such machinery or equipment is being used on the property and the notice is required to include the rental rate. The act changes the notice to within 15 business days and removes the requirement that the notice include the rental rate. The bill goes into effect on August 28, 2013.

2. **HB 34, SS #2, Changes the way that the Department of Labor and Industrial Relations determines the prevailing hourly rate of wages on public work projects.** For public construction, other than MoDOT, the prevailing wage is the wage rate most commonly paid for that occupation in the locality. The Governor neither vetoed nor signed the bill. The proposed effective date is August 28, 2013.

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## Montana

**Case law:**

1. In *Total Industrial Plant Services Inc v. Turner Industries Group LLC, 2012 MT 5, 368 Mont. 189, 294 P.3d 363*, the Montana Supreme Court determined, where a subcontractor entered into a fixed price contract with a general contractor, the subcontractor was not entitled to additional compensation without evidence of any written request or agreement for additional compensation. TIPS entered into a subcontract with Turner for insulating a coker unit at a refinery in Laurel Montana, owned by Cenex Harvest States. The subcontract was a fixed price agreement which provided TIPS was responsible for the costs of all labor, services, and materials. TIPS claimed Turner requested changes in the work which increased its costs, and Turner orally promised to compensate TIPS for such changes. TIPS failed to request compensation in writing, and therefore no change order was entered into. The district court properly determined TIPS was not entitled to additional compensation under the fixed price contract where it did not request it in writing. Further, TIPS' claims for quantum meruit and unjust enrichment did not apply because an express contract governed the parties' relationship.

The Court also determined the district court correctly concluded TIPS filed its construction lien one day late. The evidence demonstrated Turner left the project on June 25, 2008. TIPS entered into a separate contract to continue work with the owner. The court held TIPS finished its work with Turner prior to June 25, 2008, and TIPS' work for the owner under a

separate contract did not extend the time period within which TIPS was allowed to file a construction lien for work under the Turner contract. TIPS' lien, filed on September 24, 2008, was untimely filed.

The Montana Supreme Court also held that where a contractor filed a bond to release a construction lien on the real property, the bond has the effect of a final lien release. After TIPS filed a construction lien on September 24, 2008, Turner filed a substitution bond. This had the legal effect of releasing the lien. The contract provided retainage would be paid upon a final lien release. Therefore, Turner owed TIPS the retainage upon filing the bond. Because Turner owed the money as of the filing of the bond but withheld payment, Turner owed TIPS interest at the legal rate of 10% from the date the bond was filed.

Finally, the Court reviewed the timing of filing a bill of costs. In the past, the Court determined that parties can alter by contract what type of costs will be paid to the prevailing party pursuant to § 25-10-201, MCA. However, where the contract is silent on the procedure for submitting costs following judgment, the statutory procedure requiring filing within five days of notice of the court's decision still applies. Because Turner failed to file its bill of costs within five days after notice of the decision of the district court, pursuant to § 25-10-501, MCA, it could not collect its costs.

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2. In *Mountain West Bank, N.A. v. Cherrad, LLC*, 2013 MT 99, 369 Mont. 492, 301 P.3d 796, a construction lien claimant's failure to seek a stay of an order dissolving its construction lien proved fatal to its ability to seek reversal on appeal.

The case arose out of the construction of a series of condominium buildings. The developer, Cherrad, LLC ("Cherrad"), contracted with CK Design and Construction ("CK") for the construction of the units. Although the parties entered into two AIA contracts, one for construction of the buildings and one for the construction of related infrastructure and improvements, the parties generally disregarded the provisions set forth in those agreements, especially the payment provisions.

Throughout the course of the project, Cherrad would pay CK after Cherrad was able to sell each completed unit instead of paying CK on an interval basis. This course of dealing applied to the first three units constructed. During construction of the final three units, CK ran into payment problems with several of its subcontractors and suppliers, resulting in multiple lien filings. This, in turn, slowed construction progress and resulted in CK's dismissal from the project. Shortly thereafter, CK's principal committed suicide and his estate filed a $3,300,000.00 lien against the three remaining units. CK's estate also sued Cherrad's principals for breach of contract.

At trial, the district court ruled that because the estate had no personal knowledge of the amounts owed CK, the estate's construction lien was invalid. The estate took no action to stay the order dissolving its lien. The court later held a trial on the estate's breach of contract claim against Cherrad's principals. After hearing the evidence presented, the trial court awarded the estate a total of $76,278.00.

On appeal, the Montana Supreme Court ruled that since the three units affected by the estate's lien had been sold between the time of the dissolving of the estate's construction lien and the appeal, the court could do nothing to afford the estate relief from the lower court's ruling that the estate's lien was invalid because the subject properties had been sold to third parties in good faith. The court warned future litigants that although they are not required to seek a stay of execution, they do so at their own peril.

3. In *Johnston v. Centennial Log Homes & Furnishings, Inc.*, 2013 MT 179, 370 Mont. 529, 305 P.3d 781, a set of homeowners obtained a reversal of summary judgment on statute of limitations grounds based on the court's holding that a question of fact existed as to whether the homeowners had notice of the latent defects plaguing their home. In addition, the court ruled that since the homeowners were not a party to a release signed by co-owners of the home, they were not barred from asserting independent claims against the home builder.

In 2001, a couple by the last name of Leonard hired the defendant, Centennial Log Homes & Furnishings, Inc. ("Centennial"), to construct a log home on property purchased by the Leonards. After completion of the home, the Leonards granted a 36% interest in the property to their relatives, the Johnstons. Within a year of completion, the Leonards began observing problems with the flooring in the home and some related mold intrusion. As a result of these problems, the Leonards pursued a claim against Centennial which resulted in a 2003 settlement and the Leonards' release of Centennial for the defective construction of their home. The release specifically covered future unknown damages. The Johnsons were not parties to the release despite the fact that they were co-owners of the home.

In 2004 and 2005, after the Leonards signed their release, the Johnstons hired a company to perform routine maintenance on the home which included leveling the home and repairing some of the log structural members. In 2008, the Johnstons began noticing some excessive cracking in the log structure and hired a consultant to inspect the home. The consultant identified several defects within the home and advised the Johnstons to hire a structural engineer to perform an additional inspection. This engineering inspection identified several additional deficiencies. Based on these reports, the Johnstons filed suit against Centennial. Centennial eventually obtained summary judgment on all claims based on statute of limitations and the release between Centennial and the Leonards.

On appeal, the Montana Supreme Court held that although the Johnstons may have been aware of some issues with the construction of the home back in 2004 and 2005, there was a question of fact regarding whether those minor issues placed the Johnstons on notice of the more serious latent defects that were not discovered until 2008. As a result, the court remanded the case back to the district court for trial on whether the Johnstons were put on notice of the major defects in their home back in 2004 and 2005.

The court also ruled that since the Johnstons were not parties to the release executed between the Leonards and Centennial, nothing contained in the release would bar the Johnstons claims as 36% owners of the home in question.

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**Legislation:**

1. **Mont. Code Ann. § 71-3-564 (H.B. 469), An Act Allowing Arbitration for Disputes Relating to Construction Liens.** The Montana Legislature enacted a new section under Montana's construction lien laws which allows parties to agree to arbitration of issues related to construction liens. The parties may agree to arbitration prior to creation of a construction lien, after a construction lien is created, or after a lien is discharged upon substitution of the lien with a bond.

2. **Mont. Code Ann. § 60-2-115 (H.B. 494), An Act Requiring State Agencies to Determine Final Payment for Construction Services.** The Montana Legislature amended the statute governing payment of contracts entered into by the Transportation Commission. The law requires the Department of Transportation to inspect a project and notify the contractor, within 30 days of a contractor's request for inspection, whether the department grants or refuses final acceptance. If the department refuses final acceptance, the department must give notice of all deficiencies that must be cured. Upon notification of final acceptance, the department must make final payment within 90 days.

3. **Mont. Code Ann. § 61-10-121 (H.B. 513), An Act Exempting Oversize Load Permits from the Montana Environmental Policy Act.** The Montana Legislature amended this statute to clarify that permits for oversize vehicles are exempt from environmental review requirements set forth in the Montana Environment Policy Act when the vehicles use existing roads through existing rights-of-way.

4. **Mont. Code Ann. §§ 30-22-101 & 45-6-320 (H.B. 463), An Act Revising Laws Related to Nonferrous Metal (The Copper Theft Law).** The Montana Legislature enacted § 45-6-320, specifically defining the theft of nonferrous metal, such as copper, brass, stainless steel and precious metals. Stealing nonferrous metal, or stealing or destroying other property for the purpose of obtaining nonferrous metal, falls within the act, and includes penalties of fines up to $50,000 and imprisonment up to 10 years, depending on the value of the property stolen or damaged.

5. **Mont. Code Ann. §§ 18-2-402, 18-2-411, 18-2-413 & 18-2-414 (H.B. 464), An Act Regarding Prevailing Wage Laws.** The Montana Legislature amended the prevailing wage laws to clarify how the prevailing wage rates and fringe benefits are determined. It reduces the number of prevailing wage rate districts from ten to no more than five.

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## Nebraska

**Case law:**

1. In *United States ex rel. Fritzsche v. Lexon Surety Group, No. 8:13CV146, 2013 WL 3872947 (D. Neb. July 25, 2013)*, a subcontractor that furnished quality control services and equipment to repair a Navy facility in Omaha filed a Miller Act claim solely against the general contractor's payment bond surety over one year after its claim had accrued. In opposition to the surety's motion to dismiss on the grounds that the action was filed past the one year limitations

period contained in 40 U.S.C. § 3133(b)(4), the subcontractor argued that its action against the surety had been stayed pursuant to 11 U.S.C. § 108(c) pending the resolution of the general contractor's bankruptcy action. However, finding that the general contractor's bankruptcy stay did not apply to actions against third-party guarantors on non-consumer debts, such as the surety, the court dismissed the action without prejudice in the event that the subcontractor could identify some basis as to why the limitations period should otherwise be tolled.

2. In *Hawkins Constr. Co. v. Peterson Contractors, Inc., No. 8:13CV46, 2013 WL 4774735 (D. Neb. Sept. 4, 2013)*, a contractor performing work for the Nebraska Department of Roads on United States Highway 75/United States Highway 34 filed suit against a subcontractor and its sub-subcontractors, surety, and insurer for damages incurred when the contractor was required to remove and replace certain work performed by the subcontractor. On the sub-subcontractor's motion to dismiss, the court ordered dismissal because "[p]rivity is a requirement under Nebraska state law, and the court [found] no exception that would apply in this case," no matter how the contractor formulated its claims. Although the insurer likewise moved to dismiss on the grounds that the contractor was not an additional insured under the policy and that the damages did not constitute an "occurrence" under the policy, the court determined that that the plaintiff had stated enough facts to state a claim and avoid dismissal. Therefore, only the sub-subcontractors were dismissed from the contractor's suit.

3. In *Paul Reed Constr. & Supply, Inc. v. Arcon, Inc., No. 8:12CV48, 2013 WL 202125 (D. Neb. Jan. 16, 2014)*, the United States District Court for the District of Nebraska considered, on summary judgment, whether lack of compliance with the contractor's change order notification provisions barred additional compensation as a matter of law, and whether lack of a sub-subcontractor's notice to the general contractor pursuant to the Nebraska Little Miller Act barred the sub-subcontractor's claim against the general contractor's surety. As to the first issue, the court found that the Nebraska Supreme Court had previously held that a defendant cannot deny a plaintiff additional compensation based upon failure to obtain prior approval of the additional work where the defendant 1) knew about the additional work performed and 2) its conduct indicated approval and authorization for the work to proceed. Because the plaintiff had identified enough disputed facts demonstrating that the defendant knew about the additional work and had, in emails, instructed the work to proceed, the motion for summary judgment was denied on this issue. As to the second issue, the court found that, while the sub-subcontractor may have failed to provide adequate notice, the surety had not raised lack of notice as an affirmative defense in its answer. Therefore, the court denied summary judgment as to the surety's claim as well. Thereafter, at *2014 WL 585748 (D. Neb. Feb. 13, 2013)*, the surety moved to amend its answer to add the affirmative defense of lack of notice. However, because the deadline for filing amended pleadings had passed, and the surety had not acted diligently in otherwise amending its answer, the court denied the surety's motion to amend.

4. In *Thurston v. Nelson, 21 Neb. App. 740 (2014)*, the Court of Appeals of Nebraska consider, among other issues, whether a trial court had erred in denying plaintiff homeowner's request for jury instructions on claims for negligent construction and breach of implied warranty against the general contractor. The Court of Appeals concluded that, because the acts supporting these causes of action were contained within the breach of contract instruction, it was not error to refuse to instruct the jury on the additional causes of action. Furthermore, the claim for negligent construction was barred by the economic loss doctrine, and the claim for breach of implied warranty was subsumed by with the breach of contract claim.

**Legislation:**

1. **LB 373, Amendment to Nebraska Construction Prompt Pay Act.** LB 373 significantly amends the Nebraska Construction Prompt Pay Act in Neb. Stat. §§ 45-1202 to 45-1204. The amendments limit retaining to 5% of the total contracted and improvements costs, permits a contractor bringing a claim under the Act to be awarded reasonable attorney's fees and costs, and requires a contractor to place all funds for subcontractors into a separate trust account.

2. **LB 1092, Issuance of Highway Bonds.** LB 1092 permits issuance of up to $400,000,000 in bonds to finance highway construction in Nebraska pursuant to the Build Nebraska Act. Due to historically low interest rates and highway contractors hungry for work, LB 1092 permits Nebraska to use bonds to accelerate construction of long-delayed projects.

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## Nevada

**Case law:**

1. In *Halcrow, Inc. v. The Eighth Judicial District Court*, 129 Nev. Adv. Op. 42, 302 P.3d 1148 (2013), the Nevada Supreme Court held that claims for negligent misrepresentation against an engineer/designer in the context of a construction project were barred by the economic loss doctrine. In this action, the general contractor sued the developer of a commercial, non-residential development. The developer counterclaimed against the general contractor alleging construction defects. The general contractor then filed indemnity-based third-party actions against two of its subcontractors. The subcontractors, in turn, filed third-party claims against an engineer/designer, Halcrow, Inc. ("Halcrow") and others. The subcontractors obtained the trial court's permission to assert a claim for negligent misrepresentation against Halcrow, alleging that Halcrow did not timely and accurately communicate to them. In response, Halcrow filed a motion to dismiss the subcontractors' negligent misrepresentation claim. Halcrow argued that the Nevada Supreme Court's ruling in *Terracon Consultants Western, Inc. v. Mandalay Resort Group*, 125 Nev. 66, 206 P.3d 81 (2009), barred unintentional tort claims against design professionals in commercial construction projects when the claimant claimed purely economic losses. The trial court granted the subcontractors' motions to amend, but stayed the proceedings pending the Nevada Supreme Court's resolution of the issue. Halcrow then filed a petition for the issuance of a writ of mandamus.

The Nevada Supreme Court granted Halcrow's writ. The Court noted that its decision in *Terracon* left open the existence of exceptions to the economic loss doctrine for negligent misrepresentation claims. However, the Court did not believe that such an exception is applicable in the underlying construction project context, concluding:

> "... in commercial construction defect litigation, the economic loss doctrine applies to bar claims against design professionals for negligent misrepresentation where the damages alleged are purely economic."

2. In *In re CityCenter Construction and Lien Master Litigation / The Converse Professional Group, dba Converse Consultants v. The Eighth Judicial District*, 129 Nev. Adv. Op. 70, 310 P.3d 584 (2013), the Nevada Supreme Court clarified the attorney affidavit and expert report requirements of 11.256, *et seq.* in actions against design professionals. Numerous parties were involved in this commercial, non-residential action. Certain subcontractors, who were named as defendants, brought cross-actions against The Converse Professional Group, dba Converse Consultants ("Converse") alleging that the damages Converse allegedly caused were actually due to Converse's allegedly performed negligent inspection services. Converse moved to dismiss the subcontractors' cross-actions on the grounds that it (Converse) was a design professional and that, due to the subcontractors' failure to file an attorney affidavit and expert report, their actions against Converse were barred by NRS 11.259 and subject to dismissal, pursuant to *Otak Nevada, LLC v. Eighth Judicial District Court*, 127 Nev. ___, 260 P.3d 408 (2011). After expressing concern that NRS 11.259, by its express terms, may require the dismissal of the entire litigation, the trial court denied Converse's motions to dismiss the subcontractors' cross-actions. Converse brought a petition for the issuance of a writ of mandate to the Nevada Supreme Court.

The Nevada Supreme Court granted Converse's petition. The Court concluded that Converse was acting as a design professional when it performed testing/inspection services related to the subcontractors' work, and that the subcontractors should have filed an affidavit and expert retort at the same time they filed the cross-actions against Converse. Due to their failure to file the affidavit and expert report, the subcontractors' claims were void *ab initio* and of no legal effect. However, the Court determined that NRS 11.259 required only the dismissal of the subcontractors' cross-actions, and not the entire litigation.

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3. In ***I*** *Cox Construction* Co. *LLC. v. CH2 Investments LLC.,* 129 Nev. Adv. Rep. 14, 296 P.3d 1202 (2013), the Nevada Supreme Court re-examined the definition of "work of improvement" for the first time since *Vaughn Materials v. Meadowvale Homes,* 84 Nev. 227, 443 P.2d 822 (1968) which was before the mechanic's lien states were revised. The appeal arose after the district court's order releasing a contractor's mechanic's lien in accordance with the frivolous lien statute, NRS 108.2275 because the lien was untimely recorded.

The contractor, I Cox, was hired by the owner to construct a shooting range. I Cox originally estimated the cost of construction to be approximately $37,000, but informed the owner that the number would change as I Cox ascertained actual construction costs. The parties did not execute a written contract. When the cost for the improvement exceeded $48,000, the owner ceased payments to I Cox who terminated performance and left the project. At the time of I Cox's departure, the improvement was near complete. The owner occupied and began use of the improvement. A few months after commencing operations at the property, the owner received complaints from its neighbors regarding the noise from the shooting range. In response to the complaints, the owner installed soundproofing at the property. I Cox subsequently recorded its mechanic's lien within 90 days of the soundproofing installation, but more than 90 days after Cox had completed its work on the project and more than 90 days after the owner initially commenced operation at the project after Cox's departure.

I Cox filed a complaint to foreclose on the mechanic's lien. The owner petitioned the court to remove the lien arguing that it was untimely and therefore frivolous. At the hearing before the

trial court the owner argued that I Cox's lien was untimely under NRS 108.226 because was not recorded within 90 days of when I Cox last provided work, nor was it recorded within 90 days of the "completion of the work of improvement". In response, I Cox argued that its lien was timely because it recorded the lien within 90 days of the completion of the sound proofing work the owner constructed after I Cox's departure. The trial court released I Cox's lien after it concluded that the lien was untimely and therefore frivolous because the "work of improvement" was completed when I Cox terminated its performance and the owner began operations at the property.

The Nevada Supreme Court upheld the trial court's decision. First the Nevada Supreme Court cited its previous holding in *Schultz v King,* 68 Nev. 207,214 228 P.2d 401,404 (1951) and noted that the scope and duration of the "work of improvement" is a fact for the district court to determine and that the court's finding would not be disturbed unless clearly erroneous. The Nevada Supreme Court noted that the trial court heard significant testimony and argument regarding the purpose of and the impetus for the soundproofing. Testimony included evidence that neither party contemplated the soundproofing as part of the project, that neither the building nor operating permits for the facility required soundproofing, and that the project was completed such that it was opened for business before the need for soundproofing arose. The Nevada Supreme Court refused to broaden the definition of "work of improvement" because such a broad interpretation would enable any number of unforeseen and unforeseeable project or repairs to continue the work of improvement and unreasonably extend the time the real property would be subject to a mechanic's lien.

4. In *Holcomb Condominium Homeowner's Association v. Stewart Venture LLC.,* 129 Nev. Adv. Rep. 18, 300 P.3d 124 (2013) the Nevada Supreme Court addressed the question of whether a developer/seller could shorten the statute of limitations for constructional defect claims by a waiver clause contained within an arbitration agreement incorporated by reference into the purchase agreement. The appeal arose from the trial court's dismissal of plaintiffs'/homeowners' warranty, negligence and intentional tort claims against the developer related to construction defects present in their condominiums.

In response to the plaintiffs' complaint, the developer filed a motion to dismiss the warranty claims contending that the warranty claims were barred by a reduced 2 year statute of limitations provisions contained within an arbitration agreement signed by the parties which was also incorporated into the condominium purchase agreement. The developer argued that NRS 116.4116 expressly permits parties to contractually reduce the six year limitation period for warranty claims to not less than two years if, the agreement to reduce the statute of limitations is contained in a "separate agreement". The developer argues that the arbitration agreement which contained the clause reducing the statute of limitations constituted a separate agreement. The trial court agreed and dismissed the plaintiffs' constructional defect warranty claims. The plaintiffs requested permission to amend their complaint to add claims for negligence and intentional torts. The trial court denied the motion to amend holding that these new claims would also be time barred under the shortened contractual statute of limitations.

The Nevada Supreme Court first addressed the question whether statutory limitations period may be contractually modified. The Court held that statutory limitation periods may be contractually reduced, as long as there is no statute to the contrary and the reduced limitation period is reasonable and does not violate public policy.

The Nevada Supreme Court next held that NRS 116.4116 allows parties to contractually reduce the limitations period for constructional defect warranty claims to two years provided the agreement to do so is contained in a "separate instrument". Thus, the key question in the case became, whether the arbitration agreement which reduced the statute of limitation period constituted was a "separate instrument". The Court found that it was not a "separate instrument". Because there is no statutory definition of "separate instrument", the Court looked to the plain meaning of the term. The Court relied on Black's Law Dictionary which defines "separate" as "individual; distinct; particular and disconnected". Black's Dictionary also defines "instrument" as "[a] written legal document that defines rights, duties, entitlement or liabilities." Combining these definitions, the Nevada Supreme Court found that a "separate instrument" under NRS 116.4116 is any legal document defining rights, duties or liability that is not attached to or incorporated into the primary agreement itself. Because the arbitration agreement which contained the reduced statute of limitations was incorporated by reference into the purchase agreement, the Court held that it was not a separate agreement under NRS 116.4116 making the clause reducing the statute of limitations for the warranty claims unenforceable. Additionally, the Court also held that the clause modifying the statute of limitation in this case only covered the warranty claims. Therefore, the trial court abused its discretion in denying the plaintiffs an opportunity to amend their complaint to add negligence and intentional tort claims.

5 In *Halcrow, Inc. v. Eighth Judicial District Court,* 129 Nev. Adv. Rep. 42, 302 P.3d 1148 (2013), the Nevada Supreme Court held that the economic loss doctrine bars negligent misrepresentation claims against commercial construction design professionals where the recovery sought is solely for economic losses. This case arose out of the litigation on the City Center project in Las Vegas. Two of the subcontractors on the project, Century Steel and Pacific Coast Steel ("PCS") were named as third-party defendants in the City Center litigation. They filed third- and fourth-party complaint against Halcrow, the project engineer, asserting claims for negligence, equitable indemnity, contribution and declaratory relief. In a motions to dismiss both complaints, Halcrow claimed *Terracon Consultants Western Inc. v. Mandalay Resorts Group,* 125 Nev. 66, 206 P.3d 81 (2009), barred unintentional tort claims against design professionals in commercial construction projects when the plaintiff incurs purely economic losses. The trial court agreed and granted Halcrow's motion to dismiss. PCS and Century Steel then sought leave to amend their respective complaints against Halcrow to assert a new claim for negligent misrepresentation. Halcrow opposed the efforts to amend the complaints arguing that the "economic loss doctrine" also precluded negligent misrepresentation claims. The trial court determined that negligent misrepresentation claims raised by PCS and Century Steel were an exception to the economic loss doctrine. Halcrow appealed the decision to allow PCS and Century Steel to amend their complaints.

In its decision, the Nevada Supreme Court reiterated its prior holding in the *Terracon* decision and explained that "the economic loss doctrine is intended to mark the fundamental boundary between contract law, which is designed to enforce the expectancy interest of the parties, and tort law, which imposes a duty of reasonable care and thereby [generally] encourages citizen to avoid causing physical harm to others." The Court acknowledged that the Restatement (second) of Torts § 552 provides an exception to the "economic loss doctrine" for negligent misrepresentation claims. However, the Court noted that the negligent misrepresentation claims allowed under section 552 were not based on general duty rules, but instead on a "restricted rule of liability". The Court further explained that liability is limited to special instances where the false information transmitted by the alleged tortfeasor is for the guidance of others and where the other party knows that the information will be relied upon by a

foreseeable class of persons. The Court stated that the negligent misrepresentation claims protected from application the economic loss doctrine under section 552 were claims made in particular circumstances such as defamation, intentionally caused harm, loss of consortium, and negligent misstatement about financial matters. The Court determined that in the context of commercial construction design professionals, negligent misrepresentation claims do not fall into such a category because "contract law is better suited for resolving such claims". The Court reasoned that "in commercial construction situations, the highly interconnected network of contracts delineates each party's risks and liability in case of negligence, with in turn exert significant financial pressures to avoid such negligence." The Court also noted that complex construction contracts generally include provision addressing economic losses. Finally, the Court concluded that requiring parties that are not in direct privity with one another, but involved in a network of interrelated contracts to rely upon that network of contracts ensures that all parties to a complex project have a remedy and maintains the important distinction between contract and tor law. Based on this reasoning and its prior analysis in *Terracon,* the Court held that there was no reason to limit its prior decision in *Terracon* to allow an exception for negligent misrepresentation as described in section 552 of the Second Restatement of Torts. In conclusion the Court further explained that "determining that design professionals have a separate and distinct duty, pursuant to section 552, to any subcontract that must rely on their plans would essentially allow any party to recast their barred negligence claim into a negligent misrepresentation claim." Allowing negligent misrepresentation claims would create a loophole in *Terracon's* objective of foreclosing professional negligence claims against commercial construction design professionals and would, essentially, cause the economic loss doctrine to be nullified by negligent misrepresentation claims. The Court directed the trial court to vacate its order allowing PCS and Century Steel to amend their complaints.

6. In *Vanguard Piping Systems, Inc. v. Eighth Judicial District Court,* 129 Nev. Adv. Rep. 63, 309 P.3d 1017 (2013), the Nevada Supreme Court denied a writ of mandamus seeking vacation of the trial court's order directing the defendant to produce all insurance agreements, regardless of whether the policy limits exceed the amount of potential liability or whether the policies provide secondary coverage. The Court held that NRCP 16.1(a)(1)(D) requires disclosure of ***any*** insurance agreement that may be liable to pay a portion of a judgment.

At the trial court level, the plaintiffs moved the discovery master to order the defendants, collectively identified as "Vanguard", to produce insurance policies held by their German parent companies, even though the policies previously produced by Vanguard had policy limits well in excess of any liability which might be incurred by Vanguard in the litigation. Vanguard argued that requiring it to produce the policies would violate an existing stay of proceedings against the parent companies and that the policies sought to be produced were irrelevant because the policies produced had limits well in excess of any liability that Vanguard might incur in the litigation. The discovery master ordered Vanguard to produce the insurance policies. The trial court judge affirmed the discovery master's order.

The Nevada Supreme Court first determined that requiring Vanguard's parent companies to produce the policies would not violate a stay of proceeding against the parent companies. The Court held that an order directing production is not a proceeding against that entity. Vanguard argued that it should not be required to produce the policies because it believed that the plaintiffs would use the discovery improperly to assess whether additional lawsuits should be brought against the parent companies and Vanguard. The Court responded to this argument holding that there is no prohibition against the use of discovery in later, unrelated ligation provided that

discovery is relevant to the current litigation. The Court held that the insurance policies were considered relevant to the litigation. In analyzing this issue, the Court looked at, NRCP 16.1(a)(1)(D), its federal counterpart, FRCP 26(a)(1)(A)(iv), and case law addressing the rules. The Court noted that NRCP 16.1(a)(1)(D) states that a party must disclose *any* policy which could afford coverage. Accordingly, the Court found the disclosure requirement of NRCP 16.1(a)(1)(D) to be mandatory and construed it broadly. In following federal precedent, the Court concluded that not broadly construing the rule to require production of all insurance policies would allow defendants "to determine which insurance agreement are relevant for disclosure and overlook the fact that it is impossible to foresee all possible circumstances in which the primary insurance policies will be subject to liability and potentially exhausted by other judgments."

7. In *Converse Professional Group v. Eighth Judicial District Court,* 129 Nev. Adv. Rep. 70, 310 P 3d. 574 (2013) the Nevada Supreme Court held that a third party testing service was a design professional and the economic loss doctrine barred claims for negligent misrepresentation. The Court also held that Nevada law requires an expert report and attorney affidavit regarding a lawsuit's reasonable basis to be filed at the time the claim is commenced against any design professional. This case arose out of the litigation on the City Center project in Las Vegas. Two of the subcontractors on the project, Century Steel and Pacific Coast Steel ("PCS") were named as third-party defendants in the City Center litigation. They filed a third- and fourth-party complaints against Converse Professional Group ("Converse"), the third party testing service for the project. Converse initially moved to dismiss the third-and fourth-party complaints filed against it by Century Steel and PCS based on the economic loss doctrine. The trial court dismissed the complaints, but allowed PCS and Century Steel to amend their complaint to allege negligent and intentional misrepresentation, contribution and equitable indemnity claims against Converse. PCS and Century Steel, alleged that Converse's misrepresentations made in connection with its inspections of PCS' and Century Steel's work subjected PCS and Century Steel to the claims brought against them in the City Center litigation. Converse filed a motion to dismiss the amended third- and fourth-party complaints pursuant to NRS 11.259(1) because PCS and Century Steel failed to file the attorney affidavit and expert report with the initial complaints as required by NRS 11.258 for actions against design professionals involving nonresidential construction. The trial court denied Converse's motion to dismiss and Converse appealed.

In addressing NRS 11.258, the Court referenced its prior decision, *Otak Nev., LLC v. Eight Judicial Dist. Court,* 127 Nev. Adv. Rep. 53, 260 P.3d 408 (2011), and reiterated that in actions related to design professionals "involving nonresidential construction" the statute requires the complainant's attorney to file, when the first pleading is served, an affidavit and expert report attesting to the reasonable basis for the action. If the attorney fails to do so, the district court "shall dismiss [the] action". Pleadings filed in contravention of NRS 11.258 are void from the beginning and of no legal effect. The Court continued explaining that an action "involving nonresidential construction" is defined in pertinent part by the NRS 11.2565(1) as an action "against a design professional" that pertains to the "design, construction, manufacture, repair or landscaping" of a nonresidential building". PCS and Century Steel claimed the statutes were inapplicable to its claims because Converse was not a design professional and the claims asserted against Converse did not involve the design, construction or manufacture of the project but rather involved Converse's deficient performance and representations about its inspections.

The Court held that NRS 11.2565's definition of an action involving nonresidential construction is expansive and that the claims asserted do not have to be directly based on the design, construction or manufacture of the project but merely "involve" those activities. Thus,

the Court determined that "an action involving nonresidential construction" includes **any** cause of action against a design professional that concerns the construction of a nonresidential building.

Next, the Court looked to NRS Chapter 623 to determine whether Converse was a "design professional". In analyzing these statutes, the Court noted that the practice of professional engineering includes, but is not limited to... "any professional service which involves the application of engineering principles and data, such as consultation, investigation, evaluation, planning and design, or responsible supervision of construction... wherein the public welfare of the safeguarding of life, health or property is concerned". NRS 625.050(1)(a). In examining the face of the PCS' and Century Steel's pleadings the Court determine that PCS and Century Steel pled facts sufficient to warrant a finding that Converse was in fact a "design professional". (PCS and Century Steel alleged that Converse was responsible for the sampling and testing of materials as they were being installed and the performance of tensile strength tests on the steel which involves engineering principles to determine how the steel response to various amounts of stress.) The Court held that by virtue of engaging in the practice of engineering, as gleaned from the services that were identified in PCS' and Century Steel's pleadings, Converse was a design professional and directed the trial court to dismiss PCS' and Century Steel's amended complaint.

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### Legislation:

In 2013 the Nevada Legislature convened for a Special Section but no bills were addressed which concerned construction law.

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## New Hampshire

### Case law:

1. In *Victor Virgin Construction Corp. v. N.H. Department of Transportation, No. 2012-162, 2013 WL 4446790 (N.H. 2013) (not yet released for publication)*, the New Hampshire Supreme Court reaffirmed that tort claims against the state are by statute limited to $475,000 per claimant and $3,750,000 per any single incident. RSA 541-B: 14, I. In *Victor*, a general contractor bid on a DOT project to replace a stone box culvert. After the initial plans did not satisfy the DOT, changes were made that resulted in an increase in the scale and scope of the work, adding almost a year to the project. After completion, DOT paid the contractor the originally agreed sum with only a minor upward adjustment. The contractor sued DOT for both breach of contract and negligent misrepresentation. At trial, the jury tried the negligent misrepresentation claim, but only served in an advisory role on the breach of contract claim because pursuant to RSA 491:8 (2010) breach of contract claims against the state are to be tried by the court without a jury. The jury awarded $1,520,635 to the general contractor on both claims. The DOT sought remittitur, which the trial court granted ruling that no reasonable jury

could award more than $779,078.80 given the paucity of evidence on the record. However, the trial court limited the judgment to the negligent misrepresentation claim and did not enter liability on the breach of contract claim, ruling that the award could be sustained fully on the negligent misrepresentation claim. On appeal, the New Hampshire Supreme Court ruled that the contractor's recovery for negligent misrepresentation claim is capped by RSA 541-B: 14, I, which states that "[a]ll claims arising out of any single incident against any agency for damages in tort actions shall be limited to an award not to exceed $475,000 per claimant and $3,750,000 per any single incident . . ." Therefore, the Vermont Supreme Court reduced the contractor's recovery on the negligent misrepresentation claim to $475,000 and remanded the case to the trial court for a determination as to liability on the breach of contract claim, which the court noted is not capped by RSA 541-B: 14.

2. In *Brown v. Concord Group, Inc., 44 A.3d 586 (N.H. 2012)*, the New Hampshire Supreme Court held that the "your work" exclusion does not apply to all work ever done by an insured contractor, where the previous work is a separate, distinct, and completed project. Here, the homeowner bought a house in 2005 that was built in 2003 by the insured contractor. In 2007, the homeowner discovered water leaking into the house near a sliding glass door. They contacted the original home construction contractor to repair the problem. The contractor removed the exterior siding, discovered mold, and completed some repairs for a charge of $1,000. In the summer of 2009, the homeowners again observed water leaking into the house. This time they contacted another contractor to resolve the problem at a cost of $16,205. The homeowner's made a claim against the original contractor, who at all relevant times was insured by the Concord Group. The Concord Group denied coverage claiming the contractor's defective work had not caused damage to property other than his own work product, which they claimed was the entire house, and therefore, coverage was excluded under the "your work" exclusion. The Supreme Court disagreed, holding that the "your work "exclusion does not apply to all work ever performed by the insured contractor, but rather excludes coverage on a job-by-job basis, with individual jobs being demarcated by their completion as explained in the "products completed operations hazard." Accordingly, the "your work "exclusion does not necessarily exclude coverage when the insured's work causes damage to something the insured contractor previously constructed and completed. Here, the home was constructed in 2003 and the defective work was the repair completed in 2007. Therefore, the "your work" exclusion was limited to the contractor's work completed in 2007, but the exclusion would not apply to the entire home, which was constructed four years earlier even though it was constructed by the same contractor.

3. In *Phaneuf Funeral Home v. Little Giant Pump Co., 48 A.3d 912 (N.H. 2012)*, the New Hampshire Supreme Court held that the eight-year statute of repose applicable to construction claims may apply to products liability claims, but only if the product is primarily manufactured or designed to become an "improvement to real property." Here, in 2007, a fire broke out at the plaintiff's funeral home allegedly due to a pre-assembled water fountain that was modified by the funeral home's contractor to be incorporated into the wall of the funeral home in 1998. In New Hampshire, the statute of repose for damages from construction related to "improvement[s] to real property" is eight years. RSA 508:4-b, I (2010). The court held that though not designed to do so, here, the water fountain was installed as a permanent fixture to improve the aesthetic of the funeral home and as such was an "improvement to real property" to which RSA 508:4-b applies. The court noted that the item at issue here was a product, but RSA 508:4-b does not by its terms exclude product liability claims. But, the court went on to hold that RSA 508:4-b only applies to products that are manufactured or designed to become

"improvement to real property." Therefore, here, the court overturned summary judgment in favor of the manufacturer holding that the water fountain is a generic product, meant to be hung on the wall, rather than become a permanent improvement as installed by the funeral home. Therefore, though RSA 508:4-b refers to materials, it does not apply to claims related to materials that were not manufactured or designed to become "improvement to real property."

**Legislation:**

1. **N.H. Rev. Stat. § 19-M:1, Commission on Housing Policy and Regulation.** Fully effective November 1, 2014, this statute establishes a commission on housing policy and regulation, the purpose of which shall be to identify and reduce legislative and administrative barriers to the creation of affordable housing and to encourage the development thereof, including possible incentives to build such housing. The commission shall identify unnecessary regulatory policies and provisions that create barriers to affordable housing and will recommend legislation and changes to administrative rules that will encourage the creation of affordable housing.

2. **N.H. Rev. Stat. § 21-I:80, Public Works Construction – Bids and Bidding.** As of August 18, 2013, projects of the New Hampshire adjunct general's department whose estimated cost is not more than $250,000 may be done on a force account basis, by contracts awarded by competing bidding, by short term rental of construction equipment, or any combination of these methods. This statute was already applicable to the department of fish and game and the department of resources and economic development.

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## New Jersey

**Case law:**

1. In *Hudson Tea Buildings Condo. Assoc., Inc. v. Block 268, LLC, 2013 N.J. Super. Unpub. LEXIS 978 (N.J. App. Div. April 29, 2013),* Hudson Tea Buildings Condominium Association ("Association") and over two hundred individually named unit owners ("Owners") brought a variety of statutory, tort and contract claims, related to alleged construction defects, against the condominium sponsor and developer. Plaintiffs alleged the defects affected both common elements and individual units. The issue in the case revolved around the enforceability and scope of an arbitration provision contained in the individual Owners' purchase agreements which required arbitration of "any and all disputes" with the seller. While the defendants moved to dismiss the complaint bought in court on the grounds that the dispute was subject to the arbitration provision in the owners' purchase agreements, the Owners argued that the arbitration clause pertained only to issues arising directly out of the Agreement.

The trial court denied defendants' motion on the basis that the arbitration clause was not "sufficiently clear and unambiguous for th[e] Court to dismiss this case and refer the plaintiffs to arbitration." *Id.* at *9. The court embraced plaintiffs' view that the "type of alleged endemic problem on a project-wide basis is the type of thing that should not be the subject of implementation of individual arbitration clauses and individual subscription agreements[.]" *Id.* at

*10. The court also expressed concern with the possibility of inconsistent results if some claims were referred to arbitration while others were litigated.

The case was appealed to New Jersey's Appellate Division and reversed. First, the Appellate Division disagreed with the trial court's narrow view of the scope of the arbitration clause in the purchase agreement and found the clauses to be broadly written to cover "any and all disputes with Seller[.]". *Id.* at *13. The arbitration clause specifically extended beyond the Agreement to claims "whether statutory, contractual or otherwise, including but not limited to personal injuries and/or illness ('Claims')[.]" *Id.* at *14. The court did, however, find that the clause did not apply to claims pertaining to common elements inasmuch as individual unit owners may not pursue such claims as they are generally within the exclusive right of the condominium association. As for what claims pertained to the individual units and were thus subject to arbitration and those pertaining to common elements and therefore claims of the condominium association and not subject to arbitration, the Appellate Division found that as an issue for the arbitrator, and not the court, to decide. The court also followed the United States Supreme Court and rejected the "doctrine of intertwining" pursuant to which some courts claimed they had discretion to deny arbitration of arbitrable claims "[w]hen arbitrable and nonarbitrable claims arise out of the same transaction, and are sufficiently intertwined factually and legally[.]" *Id.* at *19. Last, the court ordered that to reduce complexity and the possibility of conflicting results, the trial court could stay the non-arbitrated claims pending resolution of the arbitration.

2. In *TBI Unlimited, LLC v. Clear Cut Lawn Decisions, LLC, 2013 U.S. Dist. LEXIS 41206 (D.N.J. March 26, 2013),* the District Court considered whether New Jersey's Prompt Payment Act applied to a contract for lawn mowing services. New Jersey's Prompt Payment Act, N.J.S.A. § 2A:30A-1*et seq.*, allows contractors, subcontractors, sub-subcontractors and product suppliers that are due money on construction projects for an *improvement on real property* to recover interest on unpaid amounts at prime plus one percent (1%) if payment is not made within the time period provided. The Prompt Payment Act also contains a fee shifting provision and provides that a party who sues under the Act and prevails is entitled to an award of reasonable costs and attorneys fees for bringing the action. In order to reach its decision the court focused on the Act's definition of improvement, which included those things which permanently improve property as opposed to ordinary maintenance. As lawn mowing services involve maintenance work and upkeep of land and do not improve real property, the court found the claimant could not avail itself of the Prompt Payment Act.

**Legislation:**

1. No legislation relevant to the construction industry was amended or enacted in New Jersey in 2013.

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## New Mexico

### Case law:

1. No case law relevant to the construction industry was published in New Mexico in 2013.

### Legislation:

1. NMSA 1978, §§ 7-9-52 and 7-9-52.1. Commencing January 1, 2013, the first statutory section has been amended, and the second enacted, to limit the impact of gross receipts taxation on construction projects. Particular attention should be paid to both sections in bidding and negotiating any work in New Mexico as the revised statutory sections change how and when gross receipts tax is calculated and what goods and services may be issued certificates to avoid the imposition of gross receipts tax. The statute was intended to impose gross receipts tax only once, on the income to the general contractor from the owner. Accordingly, a contractor contracting directly with an owner can issue nontaxable transaction certificates for "construction-related services" and avoid paying gross receipts tax on the purchases from subcontractors and suppliers. For purposes of the statute, "construction-related services" includes a service directly contracted for or billed to a specific construction project, including design, engineering, consulting, and testing services. The only job specific costs that are specifically excluded from the definition of "construction-related services" are legal or accounting services, equipment maintenance and real estate commissions. For purposes of the statute, note should be taken in setting up any design-build projects that architects and engineers are excluded from these sections so an architect would have to pay gross receipts tax to its sub-consultants, while a general contractor hiring the same consultant would be able to issue a nontaxable transaction certificate. Section 7-9-52.1 extends the ability to issue nontaxable transaction certificates to leases of construction equipment, including trash containers, portable toilets, scaffolding and temporary fencing.

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## New York

### Case law:

1. *Town of Oyster Bay v. Lizza Industries, Inc.*, Dock. No. 214, 2013 N.Y. LEXIS 3477, 2013 NY Slip Op. 8370 (Dec. 17, 2013), involved ten related actions from a dispute arising out of the defendants' construction of a sewer system in areas under plaintiffs' jurisdiction. Plaintiffs' allege that following completion of defendants' work, the area surrounding the sewer lines settled resulting in damage to plaintiffs' adjacent roadways, sidewalks and curbs. Defendants were contracted by Nassau and Suffolk Counties (the "Counties") in the 1970's. The Counties included "protection clauses" in the contracts, which incorporated statutory language from County Law Section 263, requiring defendants to restore plaintiffs' roadways to their "usual condition" after the sewer construction was complete. Plaintiffs commenced these ten related actions in July of 2009 alleging a single cause of action and continuing public nuisance. The Supreme Court dismissed the Complaint in each action and

the Appellate Division affirmed in ten separate decisions. The Court of Appeals affirmed the decisions of the Appellate Division.Breach of contract cases against architects or contractors must be commenced within six years from the accrual of the cause of action; for statute of limitation purposes, accrual occurs upon completion of performance. *See*, CPLR 203(a), 213(2). This rule applies no matter how a claim is characterized in the complaint because all liability for defective construction has its genesis in the contractual relationship of the parties. The Court noted that even if the plaintiff is not a party to underlying construction contract, the claim may accrue upon completion where the plaintiff is not a "stranger to the contract," and the relationship between the plaintiff and the defendant is the "functional equivalent of privity" (*City School District of City of Newburgh v. Stubbins & Associates,* 85 N.Y.2d 535, 538-539 [1995]). In the instant matter, the Court held that the plaintiffs in this action were "intended beneficiary[ies]" of the counties' construction contracts (*id.*).

The Court further noted that pursuant to CPLR 214(4), an action to recover damages for injury to property must be commenced within three years of the date of injury. Injuries caused by a continuing nuisance involve a "continuous wrong" and, generally, give rise to successive causes of action that accrue each time a wrong is committed. The Court rejected Plaintiff's assertion that a continued presence of roadway defects caused by defendants' faulty construction constitutes a continuing public nuisance because defendants' tortuous conduct consisted of discreet acts, such as negligent excavation and backfilling, that ceased upon completion of the sewer construction over twenty years ago. Accordingly, defendants allege wrongs did not give rise to successive causes of action under the continuous wrong doctrine and plaintiffs' claims, interposed more than three years after defendants' substantially completed the construction work, were time barred.

2. In *De La Cruz v. Caddell Dry Dock & Repair Co.,* 21 N.Y.3d 530, 975 N.Y.S.2d 371 (2013), plaintiff employees appealed an order by the trial court's granting summary judgment to defendant employer in the employees' action for prevailing wages. The employer operated six floating dry docks where the employees repaired, refurbished and maintained vessels for various tug and barge companies and the City of New York. The Court of Appeals found, *inter alia*, that a municipal vessel was a public work within the meaning of N.Y. Labor Law § 220 and Article I, § 17 of the New York State Constitution, so that workers involved in its construction, maintenance or repair must be paid prevailing wages if the vessel's primary objective is to benefit the general public. The Court found that there was no doubt that the function of the vessels at issue was to serve the general public.

3. In *Altshuler Shaham Provident Funds, Ltd. v. GML Tower, LLC,* 21 N.Y.3d 352, 972 N.Y.S.2d 148 (2013), a mortgage foreclosure action arises from a failed redevelopment of the Hotel Syracuse complex in downtown Syracuse, New York. The complex consisted of several properties interconnected by pedestrian bridges including the hotel, its separate garage, a 15-story tower constructed as an additional hotel, and a building formerly housing a major department store. The lender for the redevelopment and numerous mechanics lienors dispute the priority of their respective claims to the foreclosure sale proceeds from the auction of the 15-story tower, a matter governed by New York Lien Law § 22. Defendant mechanic's lienors were granted a summary judgment in a foreclosure action, which subordinated plaintiff mortgagee's successor's lien to their mechanic's liens. The Appellate Court affirmed. The Trial Court issued a foreclosure judgment. Successor was granted leave to appeal to the Court of Appeals of New York.

The Court of Appeals found the prior judgment that plaintiff's entire $10 Million mortgage was subordinate to the subsequently filed mechanics liens was affirmed but modified. In September 2005, defendants purchased the property to make up a hotel complex as described above. The entities received a $7 Million loan for acquisition of the properties. In 2007, plaintiff's predecessor entered into a loan agreement with the defendants whereby plaintiff agreed to lend them $10 Million, divided into tranches of $5.5 and $4.5 Million. After the first tranche timely closed, the lender assigned a promissory note and mortgage to the plaintiff, which was recorded on May 3, 2007. The second tranche failed to close in accordance with a memorandum of understanding between the parties. It should be noted that the lender did not file a building loan agreement. Invariably, the lender declared default inasmuch as the mechanics liens were mounting and owner failed to pay property taxes. The mechanics lienors disputed priority as the building loan agreement had not been filed. Accordingly, the Court of Appeals held that when a mortgage secures both construction and acquisition loan financing and a building loan contract is not filed as required by Lien Law Section 22, the mortgage will be subordinated to mechanics liens filed against the property to the extent of loan proceeds intended to fund the making of improvements. (NY Lien Law § 2). The Court further held that the mortgage is not subordinated as to funds advanced to acquire the property. The decision of the Court of Appeals can also be interpreted as holding that a building loan contract is required when a mortgage loan is advanced by the lender into an escrow to be drawn upon when work is completed and contractors are to be paid.

4. Both the *Matter of Norse Energy USA v. Town of Dryden*, 964 N.Y.S.2d 714 (3d Dep't. 2013), and *Cooperstown Holstein v. Town of Middlefield*, 964 N.Y.S.2d 431 (3d Dep't. 2013), dealt with challenges to defendant towns' zoning ordinances that have a secondary effect on the issue of Marcellus Shale. Both cases dealt with zoning ordinances passed by the defendants prohibiting and banning all activities related to exploration, drilling, as well as the storage of natural gas and petroleum. Both zoning ordinances occurred in the midst of growing local concern over proposed use of high volume hydraulic fracturing, commonly known as "hydrofracking," to recover natural gas from underground shale deposits. Both plaintiffs argued that the zoning ordinances were preempted by the Oil, Gas and Solution Mining Law (hereinafter "OGSML") as well as the Environmental Conservation Law (see ECL 23-0301 *et seq.*). The Appellate Division's unanimous decisions found that while ECL 23-0303(2) prohibited municipalities from enacting laws or ordinances relating to the regulation of the oil, gas and solution mining industries, the zoning ordinances in these cases did not seek to regulate the details or procedure of those industries and did not conflict with the state's interest in establishing uniform procedures for the activities of those industries, but simply established permissible and prohibited land uses within the towns for the purposes of regulating land in general. In sum, the decisions of the Appellate Division ruled that New York's OGSML and Environmental Conservation Law provisions that govern mining and other energy extraction, do not preempt localities from establishing zoning ordinances banning hydrofracking.

It should be noted that in August 2013, the New York Court of Appeals granted leave to appeal on both cases without comment. It is anticipated that oral argument will occur sometime in May or June 2014.

**Legislation:**

1. **2013 N.Y. Assembly Bill 4835 (Jul. 11, 2013). -** On July 11, 2013, Governor Cuomo signed into law an act authorizing the reinstatement of prior approved work permits and

waiving the requirements of New York General City Law §§ 35 and 36(2) as said provisions relate to rebuilding and repairing homes devastated by Hurricane Sandy in New York City. Due to the vast amount of damage caused, and repairs required, as a result of Hurricane Sandy, this act will allow for repair and/or reconstruction to be done in a more expeditious manner by waiving the requirements of NY Gen. City §§ 35 and 36(2) that landowners must submit applications to the board of standards and appeals for construction subject to said provisions. This act is will expire and be deemed repealed one year from the effective date, or on July 11, 2014.

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## North Carolina

### Case law:

1. The North Carolina Court of Appeals' recent holding in *Christie v. Hartley Construction, Inc.* 745 S.E2d 60 (N.C. App. 2013) threatens to render many long-term express warranties ineffective in North Carolina. In a divided opinion, the court held that the 6-year North Carolina statute of repose for improvements to real property trumps the bargained-for durational terms of an express warranty. In other words, although you may think the new product you recently purchased is covered by an express 20-year warranty, the reality is that your warranty could effectively expire in only 6 years. This is essentially what happened to the plaintiffs in *Christie*.

The relevant facts in *Christie* are as follows: In 2004 the Christies contracted to have a house custom built in Chapel Hill. For the home's exterior, the builder applied a waterproof cladding system manufactured by GrailCoat WorldWide. GrailCoat's website provided a 20-year express warranty on the cladding system. In March 2005 the certificate of occupancy was issued and the Christies were able to move into their new home. Unfortunately, the GrailCoat system failed to waterproof the home's structural components effectively. In October 2011, the Christies sued GrailCoat seeking monetary damages for breach of express warranty among other causes of action, alleging that GrailCoat's waterproof cladding system was defective, causing extensive water damage to their home. Despite GrailCoat's 20-year express warranty on its cladding system, the court dismissed the Christies' suit for monetary damages on the grounds that the 6-year statute of repose had expired. While dismissing the Christies' suit for damages, the court suggested that the statute of repose would not preclude the Christies from seeking specific performance as a remedy.

Specific performance is an alternative remedy to monetary damages where a court will use its equitable powers to compel a party to take a specific action in accordance with its contractual obligations. For the Christies, specific performance would entail having GrailCoat come out and replace and repair the defective GrailCoat cladding that had allowed water to penetrate the home's structural supports. Unfortunately for the Christies, the reality of the situation was that specific performance was not a feasible option. First, the Christies alleged that GrailCoat's cladding system was inherently defective. Replacing a defective product with the same defective product would hardly solve the problem. Second, GrailCoat's cladding system is actually prohibited by the North Carolina Building Code. As a result, by holding that

the statute of repose barred their suit for damages, the Court of Appeals left the Christies without any feasible remedy at all.

A statute of repose and a statute of limitations are similar in that both statutory mechanisms denote a specific time period in which a plaintiff must file suit before the cause of action expires. However, they are very different in regards to what actually triggers the running of the statutory clock. A statute of limitations does not begin running until a person is injured or becomes aware that he has a claim. In contrast, a statute of repose commences as soon as a specific event occurs; for instance, substantial completion of a construction project. This distinction can have a harsh effect on parties that are unable to discover the existence of a claim until after the repose period expires. Absent extenuating circumstances, such as evidence of fraud, the injured party is forever barred from filing suit once the repose period has elapsed. In such instances, "[t]he harm that has been done is damnum absque injuria – a wrong for which the law affords no redress (Citing *romer v. Preferred Roofing*, 190 N.C. App 813, 817, 660 S.E. 2d 920, 923 (2008))

North Carolina has two different statutes of repose: (1) A product liability statute of repose, and (2), a real property statute of repose.The product liability statute of repose bars any action for the recovery of damages that accrue 12 years after the initial purchase of a product "for use or consumption." The real property statute of repose provides that "[n]o action to recover damages based upon . . . the defective or unsafe condition of an improvement to real property" is recoverable more than 6 years after "the specific last act or omission of the defendant . . . or substantial completion of the improvement."The statute at issue in *Christie* was the 6-year real property statute of repose. Although both statutes are worded similarly, they are not identical, and it is unclear whether the *Christie* holding extends to the product liability statute of repose as well. The sole focus of this article is the 6-year real property statute of repose.

Prior to *Christie*, several court decisions indicated that an express long-term warranty which permitted damages would be enforceable regardless of the expiration of the statute of repose.[1] Although a 2008 North Carolina Court of Appeals case, *Roemer v. Preferred Roofing,* 190 N.C. App. 813, 660 S.E.2d 920 (2008) created some uncertainty in this area, the prevailing view was that *Roemer* was limited to its facts. *See, e.g.*, John N. Hutson & Scott A. Miskimon, North Carolina Contract Law § 16-7 (2013 Cum. Supp). In *Roemer*, the plaintiffs sued for damages arising from breach of a lifetime warranty. The court held that the plaintiff's remedy for breach of warranty after the statute of repose had expired was limited to specific performance. Because the complaint did not demand specific performance, the court dismissed the lawsuit for failure to state a claim upon which relief could be granted.

Although the text of the *Roemer* decision indicates that it may have been based upon a literal interpretation of the phrase "[n]o action to recover damages" in the statute of repose, the holding fails to make this clear. In fact, several legal scholars, as well as the dissent in *Christie*, believe the basis of the *Roemer* holding was not the language of the statute, but rather, the

[1] *See, e.g.*, Coates v. Niblock Development Corp., 161 N.C. App. 515, 588 S.E.2d 492 (2003) (upholding an award for monetary damages after the statute of repose had run, but before the 10-year express structural warranty had expired); Jack H. Winslow Farms, Inc. v. Dedmon, 171 N.C. App. 754, 758, 615 S.E.2d 41, 45 (2005) (upholding the dismissal of a breach of warranty claim while noting that there was no evidence of an extended warranty that would have permitted the buyer to bring a claim against a grain silo manufacturer after the statute of repose had expired).

language of the warranty at issue in that case.[2] Specifically, they assume that the terms of the warranty in *Roemer* must have expressly provided that specific performance was the sole available remedy. It is worth emphasizing that the warranty at issue in *Chrsitie* expressly allowed for the recovery of monetary damages.

The ambiguity of the holding in *Roemer* contributes to an equally ambiguous holding in *Christie*. As was the case in *Roemer*, the *Christie* court fails to declare that its holding is based upon a literal interpretation of the language used in the statute of repose. Instead, the *Christie* court seems to indicate that its holding is based upon prior "instructive" precedent; namely, *Roemer*. *See Roemer*, 190 N.C. App. 813 at 816-17, 660 S.E.2d 920 at 923. If the *Christie* court in fact based its holding on the precedential effect of *Roemer*, then this means one of two things: (1) legal scholars were incorrect when they interpreted *Roemer* as being based upon the limiting language of the warranty at issue, rather than the statute of repose, or; (2) the *Christie* court incorrectly expanded *Roemer* beyond its facts. This question will only be answered if *Christie* is appealed to the North Carolina Supreme Court.

Although the basis of the *Christie* holding is unclear, the immediate legal implications are readily apparent: the statute of repose will trump the bargained-for terms of an express warranty that deliberately permits the recovery of monetary damages after the repose period expires. This development is alarming to many in the construction industry. Due to the multiplicity of things that can go wrong with any given construction project, as well as the enormous potential costs of remedying a defect, it is always wise for parties to enter into carefully drafted contractual agreements that reflect the risk tolerance of each party to the contract. By definition, a contract is a legally enforceable promise. When courts interpret contractual agreements, they seek to ascertain the parties' intent at the time they entered into the agreement by looking to the plain language of the contract itself. State v. Phillip Morris USA, Inc., 359 N.C. 763, 773, 618 S.E.2d 219, 225 (2005) As a general rule, the parties' intent controls, and courts should refrain from rewriting the terms of a contract. "Liberty to contract carries with it the right to exercise poor judgment as well as good judgment. It is the simple law of contracts that as a man consents to bind himself, so shall he be bound." Sylva Shops Ltd. P'ship v. Hibbard, 175 N.C. App. 423, 427, 623 S.E.2d 785, 789 (2006) (citations omitted).

An express warranty is a common contractual element in many sales contracts. The warranty typically sets forth guarantees concerning performance, longevity and quality for a specific duration of time. Warranties vary in their scope of coverage: some are confined to mere replacement of a defective product while others cover the consequential damages that can result if the warranty is breached. When a manufacturer expressly warrants that its product will last 20 years, the warranty is often built into the pricing of the product itself, and this long-term coverage is an important consideration in the purchaser's decision to use that specific product. In other words, the warranty is an essential component of the benefit of the bargain in a contractual agreement.

The ultimate effect that *Christie* will have on the enforceability of long-term express warranties in North Carolina is clear as mud. As mentioned above, the case may be appealed to

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[2] *Christie*, 745 S.E.2d 60 at 63-64 (Hunter, J., dissenting) (citing Hart v. Louisiana-Pacific Corp., No. 2:08-CV-47-BO (E.D.N.C. November 17, 2009), and; John N. Hutson & Scott A. Miskimon, North Carolina Contract Law § 16-7 (2009 Cum. Supp.)).

the North Carolina Supreme Court where it could be reversed. If not, the Legislature could step in and amend the statute of repose to provide specifically that it does not apply to express warranties. These are both possibilities, but don't count on either of them happening. The best practice at this point is to assume that *Christie* will remain good law and to plan accordingly. The following suggestions may prove helpful.

First, keep an eye on the calendar and don't let your claim lapse. If you purchased an improvement to real property that is covered by a long-term express warranty, understand that this warranty may only be effective for 6 years. Equipped with this realization, you should pay special attention to that improvement during the 6-year period following the later of the vendor/contractor's last act or omission, or substantial completion of the improvement. On the other hand, if you think you have a valid breach of warranty claim and less than 6 years have elapsed since the date of the warrantor's last act or omission, it would be wise to investigate further and file a complaint before the 6-year statutory deadline.

Second, bargain accordingly. Do not overpay for hollow extended warranty coverage. If a vendor offers a long-term express warranty on its product, be aware that any promises of coverage 6 years after the date of substantial completion may be illusory. Although the *Christie* court implicitly held that the expiration of the statute of repose would not bar a claim seeking specific performance, this remedy is often inadequate, and as was the case in *Christie*, sometimes impossible. Specific performance is most likely inadequate in situations where the breach of warranty results from a design flaw in a product that is used in an improvement to real property. In such situations, the last thing a property owner wants to do is to replace a shoddy product with the exact same product. Although the replacement product may provide a temporary fix, the owner would most likely prefer to purchase a different product that will better protect against structural damages and will not have to be replaced multiple times throughout the warranty period. If limited to specific performance as a remedy, the cost of purchasing a substitute product may ultimately come out of the owner's pocket. Therefore, if you purchase a particular product where you know that specific performance will be an inadequate or impossible remedy, do not pay for more than 6 years of express warranty coverage.

Third, if you are currently covered by a long-term express warranty and more than 6 years have elapsed, understand the limitations of your coverage. If the warranty is breached and specific performance is not a suitable remedy, don't waste your money filing suit for breach of warranty. On the other hand, if specific performance will suffice, be sure to get your lawyer to plead for specific performance. The last thing you want to happen is for your suit to get dismissed for failure to state a claim upon which relief can be granted, as was the case in *Roemer*, 190 N.C. App. 813 at 817, 660 S.E.2d 920 at 924

Fourth, be mindful of jurisdiction. If your project is in North Carolina and the party providing the express warranty is also based in North Carolina, North Carolina is probably the only jurisdiction where you can bring suit for breach of warranty. Accordingly, North Carolina law, and its statute of repose, will apply in such a situation. On the other hand, if your project is in North Carolina, but the party providing the express warranty is based in South Carolina, or vice versa, you may be in luck. You will probably be able to bring your claim in a South Carolina court. Assuming the relevant contract does not contain a choice of law provision, your success will hinge upon whether the South Carolina court would apply South Carolina law. Although courts generally disfavor forum shopping, if your project has more than minimal ties to South Carolina, South Carolina law may apply.

There are good reasons that you would want South Carolina law, rather than North Carolina law to apply. First, the South Carolina statute of repose does not expire until 8 years after the date of substantial completion for an improvement to real property S.C. CODE ANN. § 15-3-640 (West 2013). As a result, South Carolina generally provides a longer duration of protection against damages arising out of the defective or unsafe condition of an improvement to real property. Second, and most importantly, when it comes to long-term express warranties, these are not trumped by the South Carolina statute of repose. The South Carolina statute of repose expressly provides that:

> Nothing in this section prohibits a person from entering into a contractual agreement prior to the substantial completion of the improvement which extends any guarantee of a structure or component being free from defective or unsafe conditions beyond eight years after substantial completion of the improvement or component.

Thus, unlike North Carolina law, South Carolina law respects the parties' right to contract freely for greater protection. In essence, if you want to be certain that your long-term express warranty will be honored, take steps to ensure that South Carolina, rather than North Carolina law will apply.

In the aftermath of *Christie*, the law in North Carolina will remain uncertain for quite some time. Until additional case law or legislation emerges, the best advice is to proceed with caution when dealing with extended warranty contracts in North Carolina. As matters now stand, a company likely faces no repercussions for advertising a long-term warranty against consequential damages that extends beyond the 6-year statute of repose period; even if the company is fully aware that such a warranty may only be legally enforceable in North Carolina for 6 years. Such long-term warranty offerings will remain ubiquitous. Just realize that many of the extended warranty provisions may be smoke and mirrors, and nothing more.

**Legislation:**

1. No legislation relevant to the construction industry was amended or enacted in North Carolina in 2013.

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## North Dakota

**Case law:**

1. In *Specialized Contracting Inc v. St Paul Fire & Marine Ins Company, 2012 ND 259,825 N.W.2d 872*, the North Dakota Supreme Court overturned an award of attorney fees where an indemnity clause in a contract between an engineer and the City of Valley City expressly limited indemnity to liability damages. A subcontractor sued a contractor and the City for the cost of redoing work that was rejected by the engineer. A jury found the subcontractor did not prove it was owed money for redoing the work. The contract between the engineer and the City contained an indemnity clause which required the engineer to indemnify the City from "liability, including all costs, expenses, and reasonable attorneys' fees." The Supreme Court

found that the agreement to indemnify for "liability" was an expression of an intention to exclude a duty to defend, pursuant to N.D.C.C. § 22-02-07.

2. In *K & L Homes Inc v. American Family Mutual Insurance Company, 2013 ND 57, 829 N.W.2d 724*, the North Dakota Supreme Court concluded a subcontractor's faulty work constituted an occurrence covered by the contractor's commercial general liability insurance policy. In an underlying action, K&L, acting as the general contractor who built a home for the Lenos, was found liable for damages to the home which were caused by faulty footings and foundation. The faulty footings and foundation were installed by K&L's subcontractor, Dakota Ready Mix. American Family, K&L's CGL insurer, defended the action under a reservation of rights, but refused to pay the $254,000 award to the homeowner based on the exclusion of "Damage to Your Work." K&L sued American Family, requesting a determination coverage existed.

The North Dakota Supreme Court determined the definition of "occurrence" contained in the policy included "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The Court agreed with other jurisdictions that defective work performed by a subcontractor is neither expected nor intended by the insured, and therefore qualifies as an occurrence. Because the occurrence resulted in property damage, the subcontractor exception to the "Damage to Your work" exclusion applies.

**Legislation:**

1. **North Dakota Century Code §§ 28-05-09 & 35-27-25 (H.B. 2166), An Act Relating to Actions for Construction Liens and Miner's Liens.** The North Dakota Legislature amended § 28-05-09, which used to allow an action for foreclosures of mortgages, construction liens or miner's liens to be commenced without the requirement of filing a notice of pendency of action (lis pendens). Now, only actions for mortgages are exempt from filing a lis pendens. N.D.C.C. § 35-27-25 was amended to reflect the requirement that a lis pendens be filed when a party commences an action for foreclosure of a construction lien. When the property owner makes written demand upon the lienor that a suit must be commenced, the demand must inform the lienor that if suit is not commenced and a lis pendens recorded within 30 days after delivery of the demand, the lien is forfeited. Failure to file a lis pendens will deem the lien satisfied.

2. **North Dakota Century Code § 57-39.2-04.11 (H.B. 1413), An Act Exempting Sales Tax for Materials Used to Construct a Facility for Coal Gasification Byproducts.** The North Dakota Legislature enacted a statute which exempts owners of facilities used to extract or process byproducts associated with coal gasification from paying sales tax on materials used in the construction of such facilities. To receive the exemption, the owner of the facility must apply for a certificate from the tax commissioner prior to the purchase, or it may pay the taxes at the time of purchase and apply for a refund. If the facility owner hires a contractor to supply the materials, the owner may apply for a refund of the allowed exemption.

3. **North Dakota Century Code §§ 48-12-01 – 48-12-05 (H.B. 1270), An Act Providing for Open and Fair Competition in Governmental Construction.** The North Dakota Legislature enacted laws prohibiting governmental units from prejudicing contractors based on their involvement or lack of involvement with labor organizations. A governmental unit

may not consider a contractor's involvement with a labor organization in awarding contracts, grants, tax abatements or tax credits.

4. **North Dakota Century Code § 35-13-01 (H.B. 1251), An Act Amending Laws Relating to Repairman's Liens.** The North Dakota Legislature amended laws relating to repairman's liens to specifically allow a construction equipment dealer to place a lien on construction equipment it repairs and which is used for construction purposes, rather than equipment used only for agricultural purposes.

5. **North Dakota Century Code § 58-03-19 (S.B. 2180), An Act Requiring Townships to Act on Building Permit Applications Within 60 Days.** The North Dakota Legislature enacted new statutes requiring townships to act on building permits within 60 days of receiving the application by either approving the application or rejecting the application and providing grounds for rejection. If a building or structure for which a permit is requested meets all zoning regulations, and the township fails to respond within 60 days, the application is deemed approved and the township must return any permit fee paid by the applicant.

6. **North Dakota Century Code § 54-21.3-04.1 (S.B. 2129), An Act Requiring Automatic Doors in Certain Buildings.** The North Dakota Legislature amended accessibility standards to require, as of August 1, 2013, newly designed and constructed buildings in excess of 7,500 square feet for the purpose of education, assembly, business, institutional or mercantile occupancy, and which are required by the state building code to be accessible, to include an automatic or power-assisted manual door as the primary exterior public entrance.

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## Ohio

### Case law:

1. In *Trucco Construction Co., Inc. v. Fremont*, No. S-12-007, 2013 Ohio 415, 2013 WL 494353 (Sandusky Ct. App. February 8, 2013)

The Court held that an engineering firm engaged by a city was not protected by the city's sovereign immunity.

The City of Fremont ("Fremont") and Trucco Construction Co., Inc. ("Trucco") entered into a contract for the construction of reservoir. By separate "standard engineering contract," ARCADIS ("ARCADIS") served as Fremont's engineer for the project. Trucco filed suit against both Fremont and ARCADIS under both contract and tort theories for nearly $5 Million in additional costs. ARCADIS filed a motion to dismiss arguing that it was immune from liability in tort under Section 2744.03 of the Ohio Revised Code ("RC") as an employee of Fremont.

> In general, RC 2744.02 provides that a political subdivision is immune from losses caused in connection with a governmental or proprietary function. RC 2744.03 extends that immunity to employees of the political subdivision.
>
> RC 2744.01(B) defines employee to mean:

> an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of the officer's, agent's, employee's, or servant's employment for a political subdivision. "Employee" does not include an independent contractor . . .

To decide whether ARCADIS was an employee or an independent contractor, the Court considered (1) the relationship between Fremont and ARCADIS, particularly as defined in the contract between them, and (2) the ability of Fremont to control the work performed. The Court ultimately concluded that ARCADIS was not an employee of Fremont.

In reaching its conclusion, the Court determined that while the contract provided that ARCADIS was to be the City's representative, no agency or employment relationship was created. Instead, the Court found that the contract simply provided that ARCADIS was to be Fremont's liaison with Trucco because Fremont relied upon ARCADIS' professional skills to ensure that the plans and specification were met. The requirement that ARCADIS was to be neutral in interpreting contract provisions was seen as supporting this analysis. In addition, the Court noted that no evidence had been presented that Fremont controlled any aspect of the work of the individual engineers.

2. In *Keybank National Association v. Columbus Campus, LLC*, Nos. 11AP-920, 11AP-952, 11AP-955, 11AP-958, 11AP-959, 11AP-963 & 11AP-964, 2013 Ohio 1243, 2013 WL 1305334 (Franklin Ct. App. March 29, 2013)

The Court held that subcontracts incorporated subordination provisions of the contract between the owner and the general contractor through the flow down provision and that a mechanics lien holders did not have equitable liens on the undistributed portion of a mortgage loan.

On March 10, 2008, the owner of a retirement community project recorded a Notice of Commencement. Typically, mechanics liens relate back to the date of recording of the Notice of Commencement for purposes of establishing priority.

On April 22, 2008, a group of lenders (the "Lenders") recorded an open-end mortgage for the project. In March 2009, the Lenders decided not to advance further funds for the project. Subcontractors were not given notice of this decision and continued to work on the project until the work was suspended on May 11, 2009. On June 29, 2009, approximately $9 Million in mechanics liens were filed for labor and materials provided after February 28, 2009. The project was not completed.

The contract (the "Prime Contract") between the project owner and the general contractor consisted of an American Institute of Architects Standard Form of Agreement Between the Owner and Contractor A111-1997 and General Conditions of the Contract for Construction A201-1997. The General Conditions included provisions subordinating liens of the general contractor and subcontractors to any lender for the project.

The subcontracts contained the following "flow down" provision:

> Subcontractor shall be bound by the terms of the Prime Contract and all documents incorporated therein, including without limitation, the General and

> Supplementary Conditions, and assumes toward the Contractor, with respect to the Work, all of the obligations and responsibilities that the Contractor, by the Prime Contract, has assumed to the Owner.

The initial issue was whether the subordination provisions of the Prime Contract were incorporated into the subcontracts by the "flow down" provision.

The Court determined that the "flow down" provision consisted of two clauses, one which bound the subcontractors to the provisions of the Prime Contract and a second by which the subcontractors assumed the general contractor's obligations regarding the work the subcontractors were to perform. As a result, the Court held that the "flow down" provision was effective to incorporate the subordination provisions into the subcontracts. In support of its holding, the Court noted that Ohio courts have previously construed "flow down" provisions broadly, and that "[p]ursuant to Ohio law, nothing prevents a subcontractor from waiving (or, as relevant here, subordinating) lien rights."

The Court also rejected the subcontractors' argument that equity required that they be paid for the labor and materials provided after February 28, 2009. The Court stated that other courts have limited both the constructive trust theory and the equitable lien theory for such recoveries to situations where the project has been completed.

> . . . where a lender forecloses on a completed project, but does not disburse all funds, it has more security than it bargained for and should be accountable for the balance. In contrast where the project is not completed, the partially constructed building may be worth substantially less than the total cost of the labor and materials which have already been incorporated into the project.

Consequently, when a project has not been completed, the lender has not been unjustly enriched and no equitable lien arises.

**Legislation:**

1. Amended Substitute House Bill No. 59 is the State's biennial operating budget. Most of its provisions will be effective on September 29, 2013. Among the construction-related changes made to the Ohio Revised Code ("RC") are:

- RC 126.14 - Director of Budget and Management may approve release of unencumbered capital balances for a project to repair, remove or prevent a public exigency declared by the executive director of the Ohio Facilities Construction Commission

- RC 133.06 - Report for a school district "HB 264" project must include a baseline analysis with the utility baseline based on only the actual energy consumption data for the preceding twelve months

- RC 153.696 - Criteria architect or engineer for a design-build project may by an employee of the public authority by notifying the Ohio Facilities Construction Commission

- RC 1501.011 - Certain construction contracts for the Department of Natural Resources to be made by the Ohio Facilities Construction Commission

- RC 3318.31 - Executive Director of the Ohio Facilities Construction Commission to serve as Executive Director of the Ohio School Facilities Commission

- RC 4115.034 - Biennial adjustments of prevailing wage thresholds to be based on the construction cost index published by the engineering news-record of similar index

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## Oklahoma

### Case law:

1. In *Silver Creek Invs., Inc. v. Whitten Constr. Mgmt, Inc.*, 307 P.3d 360, 2013 CIV APP 49 (*Silver Creek II*), the appellate court, on its second review of the trial court's decision held that the trial court miscalculated the attorney fees awarded to the owner against the general contractor for construction defects. In the original appeal, *Silver Creek I*, Case No. 103823 (March 11, 2009), the appellate court held that the trial court overcompensated the plaintiff for its attorney fees; however, when remanded, the district court still did not reduce the fees by an amount deemed sufficient to the *Silver Creek II* court.

At issue in *Silver Creek I* and *Silver Creek II* was whether the attorney fees submitted by the plaintiff for the multi-count complaint were recoverable and, if so, were properly calculated. The trial court originally awarded the plaintiff the full amount of attorney fees and added an enhancement based on the attorney's hourly rate. The court in *Silver Creek II*, however, determined that, not only was the enhancement improper, a reduction in the fees awarded was appropriate due to the attorneys' "block billing." The *Silver Creek II* court noted the importance of separating hours for fee-bearing and non-fee bearing claims, but ultimately stated that, when dealing with certain claims, such separation is not required or possible. Further, the court noted that it was appropriate to reduce the attorney fees by 15% for the "block bills" capturing tasks that took over one hour. In recalculating the attorneys' fees attributable to the breach of warranty claim, the court found that nothing in Oklahoma case law required an enhancement and that the lodestar calculation was sufficient. As such, the *Silver Creek II* court awarded plaintiff attorney fees based on the original lodestar calculation, taking into account the "block billing" reduction.

### Legislation:

1. **H.B. 1087, Liens.** Amending 42 O.S. §141, 143. Provides that lien amount available to a lien claimant includes all sums owed to the person at the time of the lien filing, including, without limitation, applicable profit and overhead costs.

2. **H.B. 1081, Change Orders to Public Construction Contracts.** Amending 61 O.S. §121. Modifies approval requirements for certain change orders, raising not-to-exceed threshold from $10,000 to $20,000 for use of unit price change order computation, rather than cost itemization as otherwise required. Establishes that unit price change that exceeds $20,000 may be based on unit price, rather than cost itemization as otherwise required.

3. **S.B. 788, Contractors Required Documentation.** Amending 68 O.S. §1701.1, 1704; 35 O.S.L. § 1. Requires that, in addition to providing employer identification numbers to state and federal agencies, all contractors must provide a workers' compensation policy that complies with Oklahoma statutes. All contractors are also required to provide proof of an executed bond to the agency administering the contract. Contractors who fail to provide required information will be subject to a fine of 10% of the contractor's total bid.

4. **H.B. 1686, Construction Industries Board.** Amending 59 O.S. §1000.2. Re-creates the Construction Industries Board to continue until July 1, 2017.

5. **S.B. 1022, Construction Industries Board.** Amending 59 O.S. §1000.1-1000.5b, 1000.9. The Construction Industries Board, which regulates the plumbing, electrical and mechanical trades, and the building and construction inspectors has been expanded to regulate roofing contractors. The bill also modifies small aspects of the board's membership and how the Board operates.

6. **S.B. 630, Competitive Bidding Procedures.** Amending 74 O.S. § 85.22. Prohibiting sole source specifications on all public construction projects: The certification for competitive bids submitted to the State for goods or services over $5,000 has been modified to include an additional certification that the bidder has not been a party to any efforts or offers with state agency or political subdivision officials or others for improper purposes.

7. **S.B. 461, State Purchasing Procedures.** Amending 61 O.S. §121. Prohibiting purchasing cooperatives and affiliated contractors from bidding on, and public agencies from awarding to such contractors affiliated with a purchasing cooperative, contracts exceeding $50,000 if the cooperative or a contractor has not complied with the Competitive Bidding Act of 1974. Defines "purchasing cooperative" as an association of public entities working together to maximize value and terms in contracts awarded through competitive bidding process.

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## Pennsylvania

### Case law:

1. In *B.N. Excavating, Inc. v. PBC Hollow*, 2013 PA Super. 120 (Superior Court 2013), the Superior Court finally brought clarity the issue of whether or not land is lienable based on groundwork performed incidental to a construction project where the ultimate structure is never erected.

PBC Hollow (PBC), the owner of the property at issue, contracted with Warihay Enterprises as general contractor to construct a large commercial structure on the property at

issue. Warihay Enterprises contracted with B.N. Excavating as a subcontractor to provide "labor and materials for excavation work, including but not limited to, a silt fence, temporary riser, emergency spillway, topsoil stripping, cut and fill, concrete pipe, sub-grading for building pad, storm water bed, rock ribbing and other site work." *B.N. Excavating*, 120.

PBC relied on the language of the Mechanics' Lien Law of 1963 which states that no mechanics lien can be instituted for work unconnected to the construction of a building. PBC asked the court to rely on the strict construction of the Mechanics' Lien Law of 1963 as the court did in *Sampson-Miller v. Landmark Realty*, 224 Pa. Super. 25 (Superior Court of Pennsylvania 1973) despite the fact that the Mechanics' Lien Law further states that "construction of a structure includes [work] performed incidental to construction of a structure."

The court stated that it abrogated the strict construction interpretations of the Mechanic's Lien Law of 1963 in *Bricklayers of Western Pennsylvania Combined Funds, Inc. v. Scott's Development Co.*, 2012 Pa. Super. 4 (Superior Court of Pennsylvania 2012) however, regardless of the interpretive lens placed on the Mechanics' Lien Law, the outcome is the same.

Despite the bright line rule established in *Sampson-Miller* requiring the presence of an erected structure in order for the attachment of a mechanics lien, no physical structure is actually required, especially in the case where the work was clearly performed in preparation for planned construction. The court stated that the Mechanics' Lien Law of 1963 follows the common law principle that a mechanics lien attaches to a building primarily and only encumbers the land as a consequence of the building's placement or location. Thus, a mechanics lien cannot attach to land unrelated to the construction of a structure. As long as the work performed was incidental to a construction plan or part of a continuous construction scheme, a lien can attach to the project regardless of whether or not the structure is actually erected. The work performed by B.N. Excavating was clearly not independent of the construction project, and as such, B.N. Excavating is entitled to a mechanics lien.

2. In *Conestoga Ceramic Tile Distributors, Inc. v. Travelers Casualty and Surety Company of America,* 2013 WL 4508887 (Superior Court of Pa. 2013), the Commonwealth Court reaffirmed the gravity with which the court will treat releases signed by third-party subcontractors barring any claim against the project owner or the general contractor.

In 2009, the Pennsylvania College of Technology (Penn College) contracted with IMC Construction Inc.(IMC) after a round of competitive bidding to construct a new campus in Williamsport, Pennsylvania. IMC provided Penn College with a payment bond issued by Travelers Casualty & Surety Company of America (Travelers). Pursuant to the bond, Travelers agreed to accept liability should IMC default on any of its obligations to Penn College or IMC's suppliers or subcontractors.

IMC subsequently contracted with ProFast Commercial Flooring, Inc. (ProFast). ProFast then contracted with Conestoga Ceramic Tile Distributors, Inc. (Conestoga) to provide tile.

Pursuant to an agreement amongst the involved parties, Conestoga signed a "Lower Tier Vendor Final Waiver and Release," which stated in relevant part, "Conestoga forever releases and discharges [IMC], [ProFast], and [Penn College] from all claims, demands, and causes of action, arising from or relating to Conestoga's labor, materials, and/or services provided to [the project].

Conestoga subsequently sent ProFast documentation of $170,000 in unpaid invoices. The letter also stated that Conestoga intended to file a claim under the payment bond. During this process, two joint check agreements involving Conestoga and ProFast were made, with each requiring another signed "Lower Tier Vendor Final Waiver and Release" and an affirmation that no contractual relationship existed between Conestoga and IMC. Payment in full was still not made and Conestoga made a claim on the bond held by Travelers on the remaining balance.

Travelers denied the claim, prompting Conestoga to institute a 5-count cause of action against Penn College, Travelers, IMC, and ProFast (the Appellees). Subsequently, IMC, Travelers, and Penn College instituted a cross-claim stating that ProFast was the only potentially liable party with respect to Conestoga's claims.

A judgment on the pleadings was granted in favor of the Appellees on all counts of the complaint. The trial court held as to Count I that a breach of contract claim against Travelers for failure to honor the payment bond could not proceed because IMC had made payment in full to ProFast which discharged Travelers' obligations under the bond. The trial court also held that no contractual relationship existed between Conestoga and IMC and thus Conestoga's claims against IMC were barred. The trial court also dismissed appellant's unjust enrichment claim against IMC, ProFast, and Penn College because IMC paid ProFast in full.

On appeal, the Commonwealth Court affirmed dismissal of all claims against IMC, ProFast, and Penn College due primarily to the fact that Conestoga signed the "Lower Tier Vendor Final Waiver and Release." The court held that a release is a contract and if the language of the contractual release is clear, the court will look no further, even if the language is broad or general and no matter how "improvident" the agreement may later prove to be for one of the involved parties.

Following that analysis, the court next dismissed all claims against Travelers. The court stated that the surety is responsible for any obligation due to the obligee at the time of default. The court stated clearly that if the principal has no obligation, neither does the surety, unless the surety consents to ongoing liability or the obligee has reserved its rights against the surety. The agreement signed by Conestoga did not provide for ongoing liability and did not allow Conestoga to reserve its rights against Travelers. Thus, Conestoga had no claim against Travelers, given that IMC had no obligation to Conestoga.

3. In *Shafer Electric & Construction v. Mantia*, the Commonwealth Court clarified an interpretation of certain registration requirements under the Pennsylvania Home Improvement Consumer Protection Act.

The appellant, Shafer Electric and Construction ("Shafer"), contracted with the appellee, Raymond and Donna Mantia, husband and wife, to construct a sizeable addition above their garage. Shafer was a licensed contractor with its principal place of business in West Virginia, but was not licensed in the state of Pennsylvania under the Home Improvement Consumer Protection Act (HICPA).

Shafer alleged that it completed the work on Mantia's home and was not paid in the amount of $38,000. Shafer then brought suit alleging breach of contract and/or relief under a theory of *quantum meruit*, and also filed a mechanics lien. Mantia filed preliminary objections,

including a demurrer, and argued that the contract on which Shafer relied was unenforceable under HICPA, which requires all contractors and builders operating in Pennsylvania and performing work in the Commonwealth in an amount exceeding $5,000 per year to be registered pursuant to section § 517.7(a). The trial court agreed, granted Mantia's demurrer, and dismissed the mechanic's lien.

On appeal, Shafer raised two issues. The first was that the trial court erred in barring recovery under a theory of *quantum meruit* solely on the grounds that the contract is not in compliance with HICPA § 517.7(a). Section § 517.7(a) sets forth various prerequisites for enforceable building contracts, including the requirement that builders and contractors be registered in the Commonwealth. However, section § 517.7(g) creates equitable rights of *quantum meruit* as long as the contractor complies with the requirements of § 517.7(a). In pertinent part, § 517.7(g) states, "Nothing in this section shall preclude a contractor who has complied with subsection (a) from the recovery of payment for work performed based on the reasonable value of services which were requested by the owner if a court determines that it would be inequitable to deny such recovery."

The court viewed § 517.7(g) as a quasi-contractual provision created to allow recovery on a quasi-contractual theory in situations where no valid contract exists otherwise under § 517.7(a). The court held that to interpret the statute as to allow recovery under § 517.7(g) only if all requirements of § 517.7(a) are met subverts the intent of the General Assembly. The General Assembly's intent in § 517.7(g) was clearly to provide an equitable remedy where there is no valid enforceable contract under § 517.7(a). To not allow an equitable remedy would be "absurd." The court held that § 517.7(g) is in place to create equitable relief outside the requirements of § 517.7(a).

4. In *Reginella Construction Co., Ltd. v. Travelers Casualty and Surety Company of America*, 2013 U.S. Dist. LEXIS 76353 (W.D.Pa. 2013), the court examined the extent to which a surety owes a "fiduciary-like" duty to its principal.

Reginella is a Pittsburg-based construction company whose primary business is in public construction. From June 2009 to June 2011, Travelers was Reginella's surety. This dispute arose out of three surety bonds issued for two multi-million dollar construction projects. The first two bonds related to Reginella's contract with the Moon Area School District in Moon, Pennsylvania. The third bond related to Reginella's contract with the Ohio Turnpike Commission for the re-construction of two service plazas.

On the Moon Area School District project, Reginella's contract required Reginella to obtain a surety bond guaranteeing Reginella's performance of the work and the payment of its subcontractors and suppliers. Travelers issued a performance bond and a payment bond for the full contract price. The relationship between Reginella and the Moon Area School District began to deteriorate after Reginella's completion of the work. Travelers wrote a letter to the Moon Area School District demanding payment on the project for any funds remaining in the School District's custody.

In response to the letter, the School District informed Reginella that it would not make any more payments to Reginella, and then denied an invoice for $500,000 on the project. Reginella informed the School District that without payment, the project would come to a halt, and proposed payment procedures that would ensure all subcontractors were paid and keep the

project from shutting down. During this time, Reginella alleged that Travelers met with the subcontractors and warned them that the project was going to be shut down. Reginella alleged that this cause the subcontractors to slow down, stop working, and submit inflated and premature claims against Reginella. The project was eventually shut down on June 11, 2012.

In its Complaint, Reginella alleged that Travelers breached its fiduciary duty to Reginella as its surety on the School District project, that Travelers intentionally interfered with Reginella's business relationships with the School District and with Reginella's subcontractors, and that Travelers acted in bad faith in refusing to pay Reginella's subcontractors as required under the terms of the payment bond issued for the School District project. Travelers asserted that as a matter of law it had no fiduciary duty to Reginella, that its alleged interference with the School District and Reginella's subcontractors was privileged, and that Pennsylvania law does not recognize a tort-based bad faith claim by a principal against a surety.

When this litigation was commenced, Reginella was still working on the Ohio Turnpike Commission (OTC) project. Reginella terminated one of its subcontractors on that project, and the subcontractor subsequently filed a lien on the project which, under Ohio law, enabled OTC to refuse payment to Reginella until Reginella obtained a lien-over bond to guarantee payment of the subcontractor's claim. Travelers refused Reginella's request for a lien-over bond, and advised Reginella to seek a bond from a new surety. OTC maintained to its position that payment could not be released until a lien-over bond was issued. During this time, other subcontractors began to file liens on the project, many of which Reginella disputed. Reginella eventually added these issues to its claim of breach of fiduciary duty and bad-faith against Travelers.

The ultimate issue was whether or not Pennsylvania recognized the existence of a fiduciary duty between a surety and its principal. Given that the Pennsylvania Supreme Court has not yet ruled on this issue, the court was forced to predict how the Court would rule on this matter. The court predicted that the Supreme Court of Pennsylvania would not find the existence of a fiduciary relationship between a surety and principal. The court stated that a surety's obligations to its principal are not the same "as the heightened obligations that insurers owe to their insured." *Reginella*, at 28, 29. In a fiduciary relationship, the fiduciary (e.g. an insurer) must act with the utmost fairness and refrain from using his or her position to the other's detriment. However, surety relationships are ordinary arms-length commercial contracts where each party owes the other a less protected duty of good-faith and fair dealing.

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5. In *Conway v. Cutler Group, Inc*., 57 A.3d 155 (Pa. Super. Ct. 2012), the Superior Court, for the first time, permitted a homeowner, who was not the initial purchaser of the home, to maintain a claim against the home builder for breach of the implied warranty of habitability (the "Implied Warranty"). In Pennsylvania, the Implied Warranty guarantees that (i) the home was built in a workmanlike manner and (ii) the home is suitable for living. In enacting this change, the Court examined the history of the Implied Warranty and the policy behind its development, and ultimately found that shifting the risk to the builder was appropriate because (i) many defects go undetected even after a thorough inspection and (ii) the builder is in the best position to repair the defects and spread the cost of the repair.

With these policies in mind, the Court expressed several reasons why the Implied Warranty should be expanded to future buyers. First, the Court noted that the Implied Warranty was intended to even the playing field for a home purchaser lacking the expertise of a builder. The Court reasoned that in the case of a second purchaser, neither party possesses the expertise of a builder. Second, the Court explained that the Implied Warranty targets defects that are impossible for an ordinary home purchaser and its inspector to detect. Therefore, the Court concluded that ownership of the home is irrelevant to the applicability of the Implied Warranty because the consequences of a latent defect may not manifest for several years, at a time when title of the home has changed hands.

However, the Court still explained limitations on the Implied Warranty, namely that 1.) all homeowners must file claims for breach of the Implied Warranty within the twelve-year statute of repose,; and 2) the homeowner must still prove in litigation that (a) the builder's design or construction caused the defect, and (b) that the defect affects the habitability of the home.

On October 15, 2013, the Supreme Court granted defendant's Petition for Allowance of an Appeal on the issue of whether the Superior Court wrongly decided "an important question of first impression in Pennsylvania when it held that any subsequent purchaser of a used residence may recover contract damages for breach of the builder's implied warranty of habitability to new home purchasers." The parties have almost completed their briefing, which has included Amicus Curiae briefs from the Homebuilders Association of Chester and Delaware Counties, the Pennsylvania Builders Association and the Pennsylvania Association for Justice. A decision is expected in 2014.

6. In *Berks Products Corp. v. Arch Insurance Co.*, 72 A.3d 315 (Pa.Com. July 11, 2013), the plaintiff, a supplier to a bankrupt subcontractor on a public school construction project, filed suit against its payment bond surety. By way of defense, the surety claimed that the "safe harbor" provision of the Commonwealth Procurement Code, 62 Pa.C.S. §3939(b), barred the bond claim because the prime contractor asserted that it had paid the subcontractor for the claimant's materials. The "safe harbor" provision provides that "[o]nce a contractor has made payment to the subcontractor according to the provisions of this subchapter, future claims for payment against the contractor or the contractor's surety by parties owed payment from the subcontractor which has been paid shall be barred." The Commonwealth Court determined, however, that the language of the Arch payment bond waived the statutory safe harbor reasoning that such language was conditioned upon the principal/general contractor and any subcontractor of the principal making payment for labor and material to the plaintiff and stated "otherwise the Bond shall be and remain in force and effect." The surety argued that the language of the bond merely recited the requirements of the bond law applicable to all public works and that the safe harbor provision is applicable to public projects. The Court affirmed judgment for the plaintiff , holding that the specific language of the bond waived the safe harbor defense by providing that the bond would remain in force and effect until the bankrupt subcontractor made payment for labor and material. A petition for allowance of appeal has been filed with the Supreme Court of Pennsylvania.

7. In *Scientific Games International, Inc. v. Commonwealth of Pennsylvania*, 66 A.3d 740 (Pa. 2013), the Supreme Court provided more guidance on the sovereign immunity held by the Commonwealth in regards to its ability to cancel contracts prior to full execution. The Commonwealth solicited bids for the design, installation, and maintenance of a statewide computer system related to slot machines and awarded a contract to the plaintiff. The plainitff

signed the contract, but before the Commonwealth executed the contract, the Commonwealth cancelled the award to the plaintiff because it was "in the best interests of the Commonwealth." The plaintiff sued the Commonwealth in the Commonwealth Court of Pennsylvania seeking an order from the court declaring the contract enforceable and preventing the Commonwealth from canceling the contract. The Supreme Court dismissed the plaintiff's claims, holding that since the plaintiff was not a "contractor," due to the fact that the contract was not fully executed, under Section 521 of the Procurement Code, the Commonwealth had sovereign immunity from the plaintiff's claims. Moreover, the court further clarified that once a party is a "contractor" under the Procurement Code, any challenge to the termination of a contract must be brought in the Board of Claims, which has exclusive original jurisdiction over such claims.

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**Legislation:**

1. **Pennsylvania H.B. 473, entitled "An Act Amending the Act of August 24, 1963, known as the Mechanics' Lien Law of 1963, Further Providing for Definitions; and Providing for State Construction Notices Directory and for Notice of Commencement and Furnishing Requirements."** While this bill is still in committee within the General Assembly, if it passes, it will have significant impact on the construction industry in Pennsylvania. HB 473 would amend the current Mechanics' Lien Law to mandate the creation of a State Construction Notices Directory, which would serve as a detailed online directory of every registered project in the Commonwealth. An owner would have the option to register the project on the database and as a result, subcontractors and suppliers would be required to file notices of furnishing of services within 20 days of commencement in order to preserve their lien rights. HB 473 would place no additional burdens on project owners, but would place a burden on subcontractors, suppliers, and lower-tiered contractors to file 20-day notices in order to avoid forfeiting their lien rights under the law.

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2. **S.B. 196, P.L. 51, No. 16, Pennsylvania Infrastructure Investment Authority Act – Definitions, Financial Assistance and Annual Report.** Expands the "definitions" section of the statute governing the Pennsylvania Infrastructure Investment Authority (PENNVEST) to include projects related to the control of storm water runoff and/or intended to promote compliance with the Clean Streams Law or Federal Water Pollution Control Act.

3. **H.B. 784, P.L. 362, No. 54, Development Permit Extension Act.** Suspends until July 2, 2016 the expiration date for "any government agency approval, agreement, permit, including a building permit or construction permit, or other authorization or decision allowing a development or construction project to proceed," as well as permits issued for development projects pursuant to one of 33 enumerated statutes.

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## South Carolina

### Case law:

1. In *ESAB Group, Inc. v. Zurich Ins. PLC*, 685 F.3d 376 (4th Cir. 2012) the Fourth Circuit Court of Appeals held that the McCarran-Ferguson Act did not apply to South Carolina law invalidating arbitration agreements in insurance policies. A South Carolina based welding material Manufacturer was named in various product liability suits in numerous jurisdictions. Manufacturer's Insurer refused to defend and indemnify Manufacturer in the products liability suits so Manufacturer brought an action against Insurer in South Carolina state court. Insurer removed the case to federal court. Manufacturer argued that the district court did not have jurisdiction over the suit pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[3], 21 U.S.T. 2517 ("the Convention") which implemented the Convention Act[4] within the FAA making the Convention "judicially enforceable only as incorporated into the act" and that the McCarran-Ferguson Act, which provides for reverse preemption of federal laws by state laws enacted for the regulation of insurance reverse preempted the Convention Act. Insurer argued that the district court didn't have personal jurisdiction over it due to insufficient minimum contacts since Insurer's policies were negotiated and drafted in Sweden. The district court enforced the arbitration agreements within the products liability claims falling under Insurer's policies which were issued from 1989-1993 but remanded the nonarbitrable claims arising under Insurer's 1994-1995 policies to state court.

On appeal the Fourth Circuit upheld the decision of the district court holding that the district court had original jurisdiction to compel arbitration under the 1989-1993 policies and that the McCarran-Ferguson act did not apply because it only applies to domestic affairs.

2. In *Cape Romain Contractors, Inc. v. Wando E., LLC*, 2013 WL 4082353 (S.C. Sup. Ct. August 14, 2013) the South Carolina Supreme Court held that the construction of a marina involved interstate commerce for purposes of the Federal Arbitration Act. Owner hired General Contractor for the construction of a marina on the Wando River. General Contractor hired Subcontractor and both parties entered into a standard AIA form contract and chose to arbitrate any disputes under the contract. The contract provided that the Federal Arbitration Act (FAA) would govern the arbitration process. During the construction phase the project engineer refused to certify further payments to Subcontractor citing various deficiencies in Subcontractor's work. Subcontractor then filed a mechanic's lien against the property to secure the amount due and subsequently filed suit against General Contractor and Owner seeking foreclosure of its mechanic's lien against Owner and breach of contract against General Contractor.

Owner and General Contractor moved to dismiss and compel arbitration. Subcontractor opposed the motion and argued that because Owner wasn't a party to the contract, Owner was prevented from compelling arbitration and argued the transaction failed to impact interstate commerce. The trial court held that the contract did not implicate interstate commerce to "justify

[3] The Convention obligates signatories to recognize and enforce written agreements to submit disputes to foreign arbitration and enforce arbitral awards in foreign nations.

[4] The Convention Act falls within chapter 2 of the FAA and grants federal district courts original jurisdiction over actions falling under the Convention and allows for removal from state court to federal district court.

or trigger" application of the FAA. The trial court also held that Owner could not enforce the arbitration agreement "absent a showing of some special relationship to a contracting party."

On appeal the South Carolina Supreme Court held that the FAA applied because the "underlying marina construction transaction [fell] within the purview of Congress's commerce power" and due to the fact that several of the materials used in the construction of the dock were manufactured in Ohio and then transported to South Carolina as well as the fact that General Contractor used an out of state engineering and survey company on the project. The Court also focused on the fact that the construction site itself was located "within a channel of interstate commerce" and focused on General Contractor's use of barges to "transport materials and equipment through various navigable waterways and as construction platforms adjacent to the marina site." In regards to Subcontractor's mechanic's lien claim the Court held that the mechanic's lien filed by Subcontractor arose "directly from" the contract between General Contractor and Subcontractor and was subject to arbitration. The Court also held that under South Carolina law of contract interpretation Owner could be properly joined as a party to the arbitration proceedings because Owner "is an entity who is substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration."

3. In *Gladden v. Boykin*, 402 S.C. 140, 739 S.E.2d 882 (2013) the South Carolina Supreme Court upheld a limitation of liability clause within a residential home inspector's contract. A home buyer contracted with Home Inspector for a home inspection before purchasing a new house. Home Inspector's contract with Home Buyer contained a limitation of liability clause which limited the Home Inspector's liability to the home inspection fee paid by the Buyer. Buyer subsequently contacted Home Inspector regarding certain omissions from Home Inspector's report and Home Inspector refunded the inspection fee. Buyer brought claims against Home Inspector alleging breach of contract and failure to conduct the inspection in a thorough and workmanlike manner and failure to report defective conditions within the home. Both parties filed motions for summary judgment as to the enforceability of the limitation of liability clause and the trial court granted Home Inspector's motion holding that the clause was enforceable.

On appeal the South Carolina Supreme Court held that Home Inspector's limitation of liability clause was enforceable and did not contravene public policy. The Court held that under S.C. Code Ann. § 40-59-500 et seq. "purchasers are protected from unqualified home inspectors by licensure requirements" but that the "General Assembly did not require home inspectors to carry errors and omissions liability insurance." The Court further emphasized that under The Residential Property Condition Disclosure Act home buyers were already afforded a remedy for this situation. *See* S.C. Code Ann. 27-50-10 et seq. (2007 & Supp. 2011). The Court also held that the limitation of liability clause was not unconscionable because it was not so oppressive that "a reasonable person would make it and no fair and honest person would accept it."

4. *Cincinnati Ins. Co. v. Crossman Cmtys. of N.A., Inc.*, C.A. No.: 4:09-CV-1379-RBH (D.S.C. March 27, 2013) the district court held that an insurer was under a duty to defend a developer based on a prior corporate merger agreement. Insurer filed declaratory judgment action against Developer seeking a declaration that Insurer did not owe Developer a duty to defend in a construction defect suit and Insurer did not have to indemnify Developer for costs and expenses incurred in defending the suit. Insurer issued a CGL policy to Developer's prior

parent corporation which listed the parent corporation as the named insured. Developer merged with the parent corporation subsequent to the issuance of the policy. Developer was named in a large construction defect suit but the Developer's parent corporation was not named as a defendant in the suit. Insurer filed a motion for summary judgment and argued that (1) Developer was not a named insured under the CGL policies nullifying Insurer's obligation to defend, (2) Insurer's policies contained an anti-assignment clause and Insurer never agreed to assign the policies to Developer after the merger, (3) there were no allegations of "property damage" caused by an "occurrence" during the policy period and the "impaired property" provision barred coverage, (4) in the alternative Insurer only had a duty to defend Developer for thirteen buildings involved in the suit because those were the only buildings which were constructed and sold during Insurer's policy period (5) Insurer had already discharged its duty to defend by virtue of its hiring of another law firm to defend against claims involving the thirteen buildings in the suit and (6) the defense costs should be allocated pro-rata amongst all of the insurers who have a duty to defend Developer on a time-on-risk methodology.

Developer argued that (1) the allegations in the suit allowed for potential coverage under Insurer's policy, (2) South Carolina law required Insurer to defend the suit, (3) Insurer's obligations were "personal", "indivisible" and "severable", (4) Insurer had no right of contribution from other insurers that may also have a duty to defend and (5) Insurer breached its duty to defend by limiting its defense to only thirteen buildings involved in the suit.

The district court found that Developer was covered under the Insurer's policy due to the fact that the corporate merger agreement, which was governed by Tennessee and North Carolina law provided for a merger of the Developer's rights with the prior insured's. The court also held that Insurer had a duty to defend Developer due to the fact that the complaint in the construction defect suit alleged repetitive and continuous water damage to the buildings involved at the project. In addressing the impaired property exclusion the court held that because the suit had not yet been tried it was premature to rule on this issue for purposes of indemnification but that the exclusion did not deny coverage for the resulting property damage only potentially for the cost to repair the negligently constructed work itself. The district court also found that the Insurer's duty to defend applied to the entire lawsuit and not simply to the thirteen buildings which weren't covered by the Insurer's policy and focused on the fact that Insurer's policy stated that it was obligated to defend the named insured against "any suit" which alleged covered claims. Finally, the district court ruled that the Insurer had breached its duty to defend under South Carolina law.

5. In *Harleyville Mut. Ins. Co. v. State*, 401 S.C. 15, 736 S.E.2d 651 (2012) the South Carolina Supreme Court held that the retroactivity clause of the commercial general liability occurrence statute was unconstitutional. An insurer filed petition in the South Carolina Supreme Court challenging the constitutionality of Act No. 26 of the South Carolina Acts and Joint Resolutions (Act), codified in S.C. Code Ann. § 38-61-70 which defines an "occurrence" within the context of a commercial general liability policy covering construction related work. In part the statute provides that:

> (B) Commercial general liability insurance policies shall contain or be deemed to contain a definition of "occurrence" that includes:
>
> > (1) an accident, including continuous or repeated exposure to substantially the same general harmful conditions; and

> (2) property damage or bodily injury resulting from faulty workmanship, exclusive of the faulty workmanship itself.
>
> . . .
>
> (E) This section applies to any pending or future dispute over coverage that would otherwise be affected by this section as to all commercial general liability insurance policies issued in the past, currently in existence, or issued in the future.

*Id.*

Insurer presented three arguments for the unconstitutionality of the statute arguing (1) the Act violated the separation of powers doctrine by virtue of the general assembly's attempt to overturn the South Carolina Supreme Court's decision in Crossman II[5], (2) the Act violated the Equal Protection Clause of the U.S. Constitution by "classifying and treating issuers of CGL policies differently than issuers of other types of insurance policies that make an occurrence a prerequisite to coverage" and the Act was "narrowly drafted to favor only a small section of one particular industry", and (3) the Act violated the state and federal constitution's Contract Clauses. In addressing the first argument the Court held that the General Assembly did not violate the separation of powers doctrine because it was "clear the General Assembly wrote and ratified [the Act] in direct response to this Court's decision in Crossman I[6]," but because the Court revised its decision in Crossman II, the General Assembly did not "retroactively [overrule the Supreme Court's] interpretation of a statute." As to Insurer's equal protection argument, the Court applied the rational basis standard in its analysis, holding that the General Assembly "had a logical reason and sound basis for enacting [the Act]" and that by ratifying the Act, the General Assembly had attempted to provide some clarity to the highly litigated issue of whether construction defects constitute an occurrence within a CGL policy. The Court held the Act violated both the South Carolina and U.S. Constitution's Contract Clauses, stating that the Act (1) "substantially impairs the contractual relationship by mandating that all CGL policies be legislatively amended to include a new statutory definition of occurrence and by applying this mandate retroactively", which in turn "substantially impairs pre-existing contracts by materially changing their terms" and (2) the retroactivity provision was neither "necessary or reasonable." The Court severed the retroactivity provision from the statute, holding that the Act "may only apply prospectively to contracts executed on or after its effective date of May 17, 2011."

6. In *Williams Carpet Contractors, Inc. v. Skelly, 400 S.C. 320, 734 S.E.2d 177 (Ct.App. 2012)*the South Carolina Court of Appeals held that a material supplier could recover the costs of its materials supplied to a developer absent a formal contract and absent filing a mechanic's lien. Material Supplier installed and supplied carpet to Developer for condominium project without a formal contract. Material Supplier had entered into prior agreements with

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[5] *See Crossman Cmtys. of N.C., Inc. v. Harleyville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011) (holding that negligent or defective construction resulting in damage to otherwise non-defective components may constitute property damage but defective construction would not.)

[6] *See Crossman Cmtys. of N.C., Inc. v. Harleyville Mut. Ins. Co.*, Op. No. 26909 (S.C.Sup.Ct. filed Jan. 7, 2011) (holding where an occurrence is defined as an accident, including continuous or repeated exposure to substantially the same general harmful conditions, the term is unambiguous and retains its fortuity requirement.)

Developer based simply upon handshakes and oral agreements. Both parties verbally agreed on the price of materials and shook hands. Developer hired one general contractor who built three buildings and then replaced the general contractor with New General Contractor (New GC) without Material Supplier's knowledge. New GC and Developer entered into a contract for the construction of six buildings. Material Supplier began installing carpet at the Project and Developer asked that all invoices be sent to New GC. Material Supplier was alarmed by this request and was assured by Developer that it would be paid for its work on the Project. After Material Supplier was not paid for work completed on five out of six buildings it threatened to file a mechanic's lien and refused to complete any more work. Developer assured Material Supplier that it would be paid and to send Developer its invoices as opposed to the New GC.

After Material Supplier was not paid for the outstanding invoices it brought an action against New GC, Developer individually (Developer) and Developer's Company for breach of contract, quantum meruit, negligent misrepresentation, and violations of the S.C. Unfair Trade Practices Act. Material Supplier dismissed Developer's Company and New GC prior to the case being submitted to the jury. Developer won a directed verdict motion as to Material Supplier's Unfair Trade Practices claim. The jury found in favor of Developer on the negligent misrepresentation claim and in favor of Material Supplier for the quantum meruit claim. Developer moved for a JNOV arguing that awarding quantum meruit to Material Supplier would result in Developer paying Material Supplier twice because Developer had already paid New GC the full contract price per building. Material Supplier argued that it had presented evidence that Developer's Company had not paid New GC in full. The trial court granted Developer's motion ruling that Developer had already paid Material Supplier by virtue of having made payment to New GC.

On appeal the Court of Appeals reversed the trial court's granting of the JNOV motion due to the fact that Material Supplier presented evidence that New GC was not paid in full for its work on the Project. The court also held that Material Supplier's failure to file a mechanic's lien did not prevent recovery for quantum meruit because Material Supplier abandoned its breach of contract claim allowing recovery under *quantum meruit*.

**Legislation:**

1. S.C. Code § 40-29-5 et seq. was amended by adding § 40-29-95 which requires the Manufactured Housing Board to consider the financial responsibility of an applicant in the licensing process and allows the Board to restrict or modify the activities of the licensee if he/she fails to meet the financial requirements. The act also requires licensed manufactured housing dealers to include their license number on any advertising material for the sale of a manufactured home in South Carolina. A retail dealer must now provide a financial statement reviewed by a certified CPA. The Act does not require a lienholder who sells, exchanges, or transfers by lease-purchase a repossessed manufactured home if the sale, exchange or transfer is through a licensed manufactured retail dealer. The Act also requires that a licensee who has been subject to a violation or is unable to meet the financial guidelines may be required by the Board to increase the amount of a surety bond or other approved security.

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## South Dakota

### Case law:

1. In *Michael and Maggie Smith v. Rustic Homebuilders, LLC and Jay Driesen, individually*, 2013 SD 9, 826 N.W.2d 357, the South Dakota Supreme Court determined that an LLC must be represented by a licensed attorney in any legal proceedings and cannot represent itself on a *pro se* basis. While this does not directly impact the construction industry, the holding may be of interest for those entities operating within the State.

2. In *Swenson and Stewart v. Auto Owners Insurance Company*, 2013 SD 38, 831 N.W.2d 402, the South Dakota Supreme Court addressed insurance coverage issues arising in connection with claims of property damage resulting from construction deficiencies.

3. In *Rupert v. City of Rapid City*, 2013 SD 13, 827 N.W.2d 55, the South Dakota Supreme Court considered the appropriate measure of damages to a land owner. For permanent damage to property, the proper measure is the diminution in the fair market value of the property.

### Legislation:

1. No legislation relevant to the construction industry was amended or enacted in South Dakota in 2013.

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## Tennessee

### Case law:

1. In *RCR Building Corp. v. Pinnacle Hospitality Partners*, 2012 Tenn. App. LEXIS 787 (Tenn. Ct. App. Nov. 15, 2012), the Tennessee Court of Appeals held that an owner of a hotel project was barred from recovering liquidated damages for late completion from a contractor because the owner failed to comply with the notice of claims procedure in a modified AIA contract.

The owner refused to make final payment to the contractor, claiming, in part, it was entitled to withhold $237,000 in liquidated damages because the project was not completed on time. The contractor argued that the owner was not entitled to liquidated damages because, among other reasons, the owner had failed to make a timely claim for liquidated damages under the contract. There was no dispute that the owner did not make its first claim for liquidated damages until months after the project was completed and the parties had agreed to final payment of an amount that did not include a deduction for liquidated damages.

In its motion for partial summary judgment, the owner claimed it was entitled to liquidated damages as a matter of law under the clear and unambiguous terms of the contract, which set forth a specific claims procedure by which the contractor was permitted to request

extensions of time, but the contractor did not do so. The contract, which contained a modified A201-1997 general conditions document, defined a "Claim" as "a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, adjustment of the Contract Sum and/or Guaranteed Maximum Price, extension of time or other relief with respect to the terms of the Contract." The contract also required "Claims" to be initiated in writing within 21 days after occurrence or recognition of the event giving rise to the claim, and stated that strict compliance with the requirements of the claims procedure was "a condition precedent to the commencement of a dispute resolution proceeding concerning any Claim."

The owner argued that, because the contractor had not complied with this claims procedure in requesting an extension of time, the owner automatically was entitled to liquidated damages. During the hearing on the motion, the contractor orally argued that the owner was not entitled to recover liquidated damages because it, too, had failed to follow the claims procedure outlined in the contract. Following additional briefing on this issue, the trial court sided with the owner, holding that the contractor was required to "automatically pay" liquidated damages to the owner if it missed the substantial completion deadline without having been granted an extension of time.

The court of appeals began its analysis by determining that a claim for liquidated damages was, in fact, a "Claim" as defined in the contract. The court cited a Minnesota opinion that reached the same conclusion under a similar provision. A. Hedenberg & Co. v. St. Luke's Hospital of Duluth, 1996 Minn. App. LEXIS 379 (Minn. Ct. App. Apr. 2, 1996). As such, the court went on to find that the owner's claim for liquidated damages was subject to the claims procedure and was barred due to the owner's failure to comply with the procedure.

**Legislation:**

1. **S.B. 835/H.B. 328, Underlicensed Contractors/No Lien Rights/ Attachment of Mechanics' Liens.** A bill clarifies that it is unlawful for any person to bid on or contract for any project in Tennessee unless that person has a sufficient monetary limitation on its license for the project. This codifies a requirement previously set forth in an administrative regulation. The same bill amends the licensing and mechanics' lien statutes to clarify that contractors and subcontractors are not entitled to a lien if they have not complied with the contractor licensing laws, including any monetary limitation. The bill also amends the definition of "visible commencement" (which establishes the date on which a mechanics' lien attaches to real property) to exclude placement of above-ground utility lines. As originally presented, the bill also would have rendered "pay if paid" provisions unenforceable in Tennessee, but that portion of the bill was removed by amendment. The bill has been sent to the governor for signature.

2. **S.B. 631/H.B. 480, Roofing Contractors.** Another change in the licensing laws requires all roofing contractors to have a roofer's contracting license from the Board for Licensing Contractors before bidding upon or beginning roofing work where the roofing portion of the project is $25,000 or more.

3. **S.B. 200/H.B. 194, Workers' Compensation Reform.** A new law completely reforms the workers' compensation system in Tennessee. Claims by injured workers now will be handled as part of an administrative process in the newly created Court of Workers' Compensation Claims within the Division of Workers' Compensation. The law also creates a

new ombudsman program within the Division to assist unrepresented employees and employers, narrows the definition of work-related injury and establishes medical treatment guidelines.

4 **S.B. 1209/H.B. 850, Prevailing Wage Act.** A new law repeals the prevailing wage requirements for all state funded, vertical building construction projects in Tennessee. It also eliminates mandatory certified payrolls and other paperwork required to be submitted to the state on those projects. The new law does not affect highway (TDOT) projects. The changes take effect January 1, 2014.

5. **S.B. 647/H.B. 219, Bonds on Public Works.** A new law requires that bonds on public projects by any city, county or state authority be "good and solvent," and requires building or bidding authorities to reject bonds that do not meet the requirements. A "good and solvent" bond means, among other things, a bond written by a surety or insurance company listed on the U.S. Treasury Department's list of approved bonding companies.

6. **S.B. 591/H.B. 841, Project Labor Agreements.** A new law prohibits certain practices in public contracting and purchasing, including requiring a bidder, contractor or subcontractor to enter into or comply with an agreement with a labor organization, and creates cause of action to challenge a public works contract in violation of the statute. This prohibits a municipality from implementing a Project Labor Agreement on a construction project.

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## Texas

### Case law:

1. In *El Paso Field Servs., L.P. v. MasTec North Am., Inc*., 389 S.W.3d 802 (Tex., 2012), the Texas Supreme Court held that a risk-allocation clause pertaining to site conditions in a pipeline construction case prevailed over a due diligence clause because the assumption of risk was made "notwithstanding" any other provision in the contract documents.

El Paso hired MasTec to replace a section of pipeline. The contract documents included a survey—made specifically for the bidding process—identifying 280 foreign crossings along the pipeline. In reality, there were between 274 and 514 additional crossings (the exact number is disputed).

The contract required El Paso to exercise due diligence in locating foreign pipelines and MasTec to confirm the locations of all such crossings. The Court rejected MasTec's argument that El Paso failed to exercise due diligence in locating the crossings. Instead, the Court looked to the risk allocation provision by which MasTec represented and warranted that it was fully acquainted with the site conditions and assumed responsibility therefore. The Court held that because MasTec's obligations were made "notwithstanding" anything else in the contract documents, El Paso's due diligence obligations did not alter MasTec's assumption of the risk of unidentified crossings.

2. In *Port of Houston Authority of Harris Cty., v. Zachry Const. Corp.,* 377 S.W.3d 841 (Tex. App.—Houston [14th Dist.], August 9, 2012, pet. filed), the Court strictly construed a no damage for delay clause and refused to apply any of the previously recognized exceptions to no damage for delay because the clause at issue expressly excluded delay damages that arose from "the negligence, breach of contract or other fault of the Port Authority." The court found that the clause applied because the delay damages arose from a breach of contract. Additionally, the court found that the "other fault" language indicated that the parties contemplated conduct that went beyond mere negligence, and therefore even a specific finding of "arbitrary and capricious conduct, active interference, bad faith, or fraud" would not have saved the contractor from the no damage for delay clause.

Next, the court reversed an award of liquidated damages to the contractor, holding that the contractor had released any claims to the liquidated damages when it executed lien release affidavits. While the project was ongoing, the owner began withholding liquidated damages from the contractor's pay applications. The contractor executed lien release affidavits stating that it had no further claims against the owner for the portion of the work listed in the pay applications. The court strictly construed the releases, holding that it released all "claims for breach of contract predicated upon a failure to make payment for work accomplished, billed, and paid—in whole or in part—on a particular payment estimate."

The Texas Supreme Court granted a petition for review and oral arguments were heard in November 2013. As of this writing the Court has not ruled. Texas Supreme Court Docket No. 12-0772.

3. In *Jaster v. Comet II Construction, Inc.*, 382 S.W.3d 554 (Tex. App.—Austin 2012, pet. filed), the court held that the 2005 version of Tex. Civ. Prac. & Rem. Code § 150.002 does not require cross-claimants and third-party plaintiffs to file certificates of merit because the plain language of the statute requires only “the plaintiff” to file a certificate of merit with the “complaint.”

The Texas Supreme Court granted a petition for review and oral arguments were heard in October 2013. As of this writing the Court has not ruled. Texas Supreme Court Docket No. 12-0804.

4. In *Tricon Energy Ltd. v. Vinmar Int’l, Ltd*., 718 F.3d 448 (5th Cir. 2013), the court found a binding agreement to arbitrate even though the final agreement, which contained blank signature lines, was not signed, based upon the parties’ past practice, industry practice, and because the parties already had a binding agreement regarding the essential terms of the contract. After the essential terms were agreed upon, Tricon sent Vinmar a contract with blank signature lines that included an arbitration clause and language stating “[i]n the event we do not receive your reply as requested, then this contract shall be the governing instrument.” Vinmar marked-up the contract without altering the arbitration clause and returned the unsigned document to Tricon. Tricon replied that it accepted all but one of the changes, and neither party signed the final document. The court found that where the parties have unconditionally assented to terms contained in an unsigned document, the document is binding regardless of whether it is signed unless the parties provide that the signature of each party is a prerequisite to a binding agreement.

Next the court determined that an award by arbitrators of "postaward interest" was not the same as "postjudgment interest," holding that "postjudgment interest" must be expressly awarded.

5. In *U.S. ex rel. J-Crew Management, Inc. v. Atlantic Marine Const. Co., Inc.,* No. A-12-CV-228-LY, 2012 WL 8499879 (W.D. Tex. Aug, 6, 2012), the district court held that TEX. BUS. & COMM. CODE § 272.001 does not apply where a construction project is contained entirely within a "federal enclave." Section 272.001 provides that a contract provision making conflicts subject to "another state's law, litigation in the courts of another state, or arbitration in another state" is voidable in a contract that is "principally for the construction or repair of an improvement to real property" located in Texas. The construction project at issue was located at Fort Hood, a military base in Texas, which the court found to be a "federal enclave" to which Texas had ceded exclusive jurisdiction to the United States.

After deciding that § 272.001 did not apply and that the forum-selection clause was not void, the district court considered whether the action should be dismissed or transferred to the jurisdiction set forth in the forum selection clause. The district court found that FED. R. CIV. P. 12(b)(3) and 28 U.S.C. 1406 did not apply because the lawsuit was filed in a "proper" forum because the contract at issue was to be performed within the district in which the lawsuit was filed. *Id*. at *5. Therefore, the district court analyzed whether the case should be transferred to a more convenient forum pursuant to 28 U.S.C. 1404(a), and concluded that transferring the case would not be "in the interest of justice or increase to the convenience to the parties and their witnesses" and denied the motion to transfer.

The defendant sought a writ of mandamus from the Fifth Circuit, which was denied. *In re Atlantic Marine Const. Co., Inc.,* 701 F.3d 736 (2012). The Fifth Circuit opinion did not address whether § 272.001 applied to construction projects located on federal government property within Texas.

The defendant then petitioned the United States Supreme Court, which reversed and remanded. *Atl. Marine Const. Co., Inc. v. U.S. Dist. Court for the W. Dist. of Texas*, 134 S.Ct. 568 (2013). The Court confirmed the lower court's analysis that a forum-selection did not render otherwise proper venue "wrong" or "improper" within the meaning of § 1406(a) and Rule 12(b)(3) and that § 1404(a) was the proper mechanism to enforce a forum-selection clause. However, the Court found that in performing § 1404(a) analysis, the forum selection clause should be "given controlling weight in all but the most exceptional cases." *Id. quoting Stewart Organization, Inc. v. Ricoh Corp*, 487 U.S. 22, 108 S.Ct. 2239 (1988). The Court reasoned that the forum-selection clause "represents the parties' agreement as to the most proper forum." Therefore, courts must adjust traditional 1404(a) analysis by giving no weight to the plaintiff's chosen forum, deeming private-interest factors to weigh in favor of the preselected forum, and by not transferring the original venue's choice-of-law rules.

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6. In *Ewing Const. Co., Inc. v. Amerisure Ins. Co.*, 2014 WL 185035 (Tex. Jan. 17, 2014), the Texas Supreme Court held that contractual liability exclusions in a commercial general liability insurance contract do not preclude coverage when a contractor agrees to perform its work in a good and workmanlike manner, without assumption of additional liability.

In its decision, the court distinguished *Ewing* from *Gilbert Texas Const., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118 (Tex. 2010), which involved a contractor building a light rail system through Dallas undertaking both an express contractual obligation to protect surrounding property belonging to third parties and a contractual agreement to perform its work in a good and workmanlike fashion. In *Gilbert*, the court held that the contractor was not entitled to coverage under its CGL policy because the contractor assumed liability beyond general common law duties by including in its contract an agreement to repair or replace third-party property affected by its work. Conversely, in *Ewing*, the court found the contractor's agreement to perform in a "good and workmanlike manner" was not an "assumption of liability beyond common law duties" and did not trigger the contractual liability exclusion.

Although the court noted it was not necessary to its answer, it addressed Amerisure's allegation that allowing coverage for defects to the policyholders' work transforms CGL policies into performance bonds. The court rejected this argument, pointing out that the ability to exclude coverage for some claims for faulty workmanship or damage to a policyholder's work through policy exclusions distinguishes a CGL policy from a surety bond.

7. In *In re Renaissance Hosp. Grand Prairie Inc.*, 713 F.3d 285 (5th Cir. 2013), the Fifth Circuit analyzed the inception of priority liens on a Chapter 7 debtor's hospital renovation. The court examined Section 53.124 of the Texas Property Code to find that four companies did not deliver materials or commence work that was "visible from inspection" until after lender MetroBank NA filed a deed of trust. As such, the Fifth Circuit affirmed the district court's holding that the lender's deed had priority over the companies' mechanic's liens.

In order to determine when substantial work was initiated, the court relied on stipulations made by the companies. One such stipulation was made by an attorney who was not formally counsel of record for the contractor she claimed to represent. However, the court found that the contractor was bound by the stipulation because the contractor did not object, was not represented by its own counsel, and the contractor's interests were aligned to those of the attorney's client.

8. In *MRSW Mgmt. LLC v. Texas Dep't of Pub. Safety*, 403 S.W.3d 503 (Tex. App. 2013), the San Antonio Court of Appeals found that the State Office of Administrative Hearing lacked jurisdiction to consider appellee's breach of contract claim against the State Administrative Agency because appellee did not enter into a contract directly with the state government; therefore, appellee did not qualify as a "contractor" within the meaning of Texas Government Code Chapter 2260 and could not avail itself of the administrative remedies therein.

Appellee argued that it was entitled to the Government Code's dispute-resolution procedure because it acted as an agent for one of the parties who contracted directly with the state. The court rejected this argument, stating that, while Texas Government Code 2260 provides an administrative process for breach of contract claims brought against the state, this process is only available to those contractors who are named parties to a written contract with the State.

9. In *Lennar Corp. v. Markel American Insurance Co.,* 2013 WL 4492800 (Tex. Aug. 23, 2013), the Texas Supreme court addressed certain key insurance coverage issues, including once and for all determining that Texas is an "all sums" state. In the 1990's, Lennar

Corp., a home construction company, installed synthetic stucco ("EIFS") on its homes. The company later learned that EIFS could trap water in the homes' walls, which caused severe structural damage. After putting its general liability carrier, Markel American Insurance Co., on notice, Lennar undertook a voluntary remediation program to replace all EIFS it installed, repair any damage, and compensate homeowners for any loss. Lennar offered and solicited their remediation program to over 800 homeowners, whether their homes suffered damage or not. Markel denied coverage for the remediation program.

Lennar filed a declaratory judgment action contesting coverage. At trial, Lennar presented evidence of the remediation costs for all homes, even those without any structural damage. The jury found for Lennar and awarded damages for each home in the amount "incurred in payment of property damage," which the trial court defined, in part, as "the cost to remove and replace the EIFS in order to access and repair underlying water damage or in order to determine the areas of underlying water damage."

On appeal, Markel argued that Lennar failed to obtain Markel's consent, as required by the policy, before voluntarily settling claims and incurring expenses in replacing the EIFS and repairing the homes. The Texas Supreme Court held that for an insurer must show prejudice to contest coverage based on an insured's failure to obtain consent before settling a matter. Markel was not prejudiced because Lennar's settlements prevented further damages and higher remediation costs that would have been incurred if the synthetic stucco was not removed.

Also, the Court held that the trial court's definition of "property damage" in the jury instruction was proper under the policy's coverage of costs incurred "because of" property damage. The Court went on the state that "under no reasonable construction of the phrase can the cost of finding EIFS property damage in order to repair it not be considered to 'because of the damage.'"

Finally, the Court rejected Markel's argument that the damages occurred outside of the policy's coverage time frame. The property damage occurred before, during, and after the period of the Markel policy. The Court found sufficient evidence that the damage triggered multiple policies covering Lennar, including Markel's policy, and Lennar was free to choose which of its insurers was required to respond. The Court rejected Markel's argument that coverage should apportioned among the insurers on a pro rata basis.

10. In *PPI Technology Services, L.P. v. Liberty Mutual Insurance Co.,* 701 F.3d 1070 (5th Cir. 2012) *as substituted*, 515 F. App’s 310 (5th Cir. 2013) found the allegations of property damage to be insufficient to support a “property damages” for insurance coverage purposes in a liability insurance coverage action. Liberty Mutual Insurance Co. insured PPI Technology Services, L.P (PPI). PPI was retained by several third parties to assist in planning well-drilling operations. After PPI directed a well to be drilled in the wrong area, the third parties sued PPI. PPI then sought defense and indemnification from Liberty Mutual under the policy. Liberty Mutual refused and PPI brought suit against Liberty Mutual.

Cross motions for partial summary judgment were filed on the issue of Liberty Mutual's duty to defend PPI. The trial court granted Liberty Mutual's motion and found that the underlying suits against PPI did not include factual allegations of "property damage" caused by an "occurrence", as required by the policy.

The Fifth Circuit affirmed on appeal, holding that, while the underlying suits included the term "property damage", they did not allege facts supporting actual damage to or loss of tangible property. Instead, the underlying complaints were either for economic damages, and thus not covered, or were legal conclusions. Thus, Liberty Mutual had no duty to defend PPI under the policy terms and definitions.

**Legislation:**

1. No legislation relevant to the construction industry was amended or enacted in Texas in 2013.

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## Utah

**Case law:**

1. In *Hughes General Contractors, Inc. v. Utah Labor Comm.,* 2014 UT 3 (2014), in a significant break from federal rulings, the Utah Supreme Court recently rejected the multi-employer worksite doctrine as incompatible with the Utah Occupational Safety and Health Act (UOSH Act). Generally, the multi-employer worksite doctrine makes a general contractor responsible for the safety of all workers on a worksite, including the safety of employees of subcontractors and other third parties. In rejecting the legal doctrine (which has developed under the federal Occupational Safety and Health Act (OSH Act)), the Utah Supreme Court held that Utah's state occupational safety and health law regulates conduct between employers and employees and does not permit a general contractor to be held liable for the safety violations of a subcontractor.

The Utah Supreme Court analyzed the structure of the federal OSH Act and found that it sets forth the duty to comply with certain safety standards in separate sub-sections of the statute. By contrast, the Court held that Utah law requires "each employer" to provide a safe workplace and to comply with promulgated standards in a single provision of the statute. In addition, the Utah Supreme Court distinguished its decision because of the lack of administrative deference that applied in interpreting Utah law. The Court noted that when federal courts resolve ambiguity in a statute, the courts look to the interpretation of the statute provided by the relevant federal agency and defer to the agency's viewpoint as long as it is based on a permissible construction of the statute. The Court wrote that federal courts typically have not rendered an independent assessment of the meaning of the relevant OSH Act provision and instead have deferred to the federal agency's regulation that construes the statute to allow for the multi-employer worksite doctrine. However, Utah has not adopted a similar standard of judicial deference to an agency's resolution of a statutory ambiguity so the Court conducted its own independent determination to find that the Utah law did not allow for the multi-employer worksite doctrine.

2. In *VCS, Inc. v. La Salle Development, LLC*, 2012 UT 89 (2013), the Utah Supreme Court determined that a mechanic's lien foreclosure action was not valid as to a lender because the claimaint failed to either (a) file a lis pendens within 180 days of its lien notifying the

world of its pending action or (b) join the lender as a party to the action. Further, the Court determined the contract was not entitled to equitable unjust enrichment against the lender because it failed to exhaust its legal remedies by timely pursuing its mechanic's lien action.

3. In *Lane Myers Constr., LLC v. Countrywide Home Loans, Inc.*, 2012 UT App 269 (2013), the Utah Court of Appeals determined that a lender's form of waiver and release of lien with progress payment was not enforceable because it was "not substantially in the form" proscribed in Utah Code Ann 3801039 and, thus, failed to comply with the requirements set by the mechanic's lien act for a valid and enforceable waiver and release of liens. Based on this determination, the court reversed a grant of summary judgment granted by the trial court in favor of the lender and remanded for additional proceedings.

**Legislation:**

1. **H.B. 42, Mechanic's Lien Revisions.** Background. In the 2011 General Session of the Utah Legislature, lending institutions and title companies won a major victory concerning the laws governing the mechanic's lien laws in the State of Utah in HB 260. All potential lien claimants, including general contractors, became subject to preliminary notice requirements, and all preliminary notices were required to identify the tax i.d. numbers of the parcels of real property that are subject to a preliminary notice. Under HB 260, priority of mechanic's liens is established by the first filed preliminary notice (and not by first visible work on the ground). Further, trust deeds securing payment on loans were allowed to gain super priority over mechanic's liens that pre-dated the recording of the trust deed by paying for all work performed by contractors and subcontractors before the trust deed was recorded. Lenders' trust deeds gained priority by having all preliminary notices that pre-dated the trust deed removed from the Utah State Construction Registry (SCR), an online preliminary notice filing system sponsored by the State of Utah. Preliminary notices are then re-filed, moving their priority back behind the date of the trust deed.

HB 260 achieved its objectives, but created at least three major problems. First, where multiple projects were being performed on a single parcel or where a single project is built on multiple parcels, confusion has existed concerning the project to which a subcontractor or supplier supplied services, materials or equipment. Second, the process of granting lenders super priority by getting payment to all parties that filed preliminary notices and having them remove those notices is extremely cumbersome. Third, the priority of all mechanic's lien claimants moved forward in time to the date the trust deed was recorded, allowing third parties to gain priority over mechanic's liens through the process of removing and refiling preliminary notices of lien claimants.

HB 42 Provisions. Many of these problems are rectified or limited under HB 42 that was passed by the Utah Legislature and should be signed by Governor Gary Herbert. HB 42 gives subcontractors and suppliers incentives to identify the proper project on which they perform work. The bill provides that a preliminary notice of a subcontractor or supplier that is tied to the preliminary notice of the general contractor on the project through the SCR substantially complies with the preliminary notice filing requirements, increasing the likelihood that a lien claimant's mechanic's lien will be enforced. During negotiations over HB 42, Utah Interactive, the company that hosts and maintains the SCR, changed the system to allow subcontractors and suppliers to more readily identify the preliminary notice of the general contractor on the project. Second, the process for gaining super priority for a lender's trust deed over mechanic's

liens was simplified. Rather than requiring the removal of all preliminary notices that are filed on the SCR before the trust deed was recorded, HB 42 deems the trust deed of a lender that pays for all work performed before the trust deed is recorded to have been recorded immediately preceding the first-filed preliminary notice. This provision also rectifies the problem of moving the date of priority of mechanic's liens into the future, to the date of recording of the trust deed. Now, the trust deed simply gains super priority back to the date of the first-filed preliminary notice. Thus, third parties are not allowed to gain priority over mechanic's liens by virtue of the process of removing and re-fling of preliminary notices.

HB 42 was the result of the collaborative process gained by a year's work led by the Associated General Contractors of Utah, attorneys for general contractors, subcontractors and suppliers, title companies, lending institutions, the Utah Division of Professional Licensing, and others.

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## Vermont

### Case law:

1. In *Birchwood Land Co., Inc. v. Ormond Bushey & Sons Inc.*, *2013 VT 60, A.3d*, the Vermont Supreme Court held that a Court can grant a contractor prejudgment interest under its general law, while denying the contractor attorney's fees and penalties under the state's Prompt Payment Act. Here, a developer sued its contractor for breach of contract, claiming the contractor removed excavated sand without permission. The contractor counterclaimed under the state's Prompt Payment Act for amounts withheld by the developer for work under the contract. After a trial, the contractor's recovery of $23,511.28 was offset by the developer's damages of $11,144. The court granted the contractor prejudgment interest but denied the contractor penalties and attorney's fees, holding that the contractor was not the substantially prevailing party under the state's Prompt Payment Act.

On appeal, the Vermont Supreme Court upheld the grant of prejudgment interest based on the state's general prejudgment interest law, rather than the Prompt Payment Act; Vermont Common law grants prejudgment interest as a matter of right for damages that are reasonably certain. Here, the contractor's invoices established its damages under the contract to a reasonable certainty and entitling the contractor to prejudgment interest under the common law, independent of the state's Prompt Payment Act.

The Vermont Supreme Court also upheld the trial court's denial of punitive damages in favor of the contractor, holding that the developer's withholding of double the amount it recovered was reasonable because the amount withheld was reasonably related to the damages claimed, the developer had a difficult time ascertaining exactly how much sand the contractor had removed, and the developer reasonably believed that it was also entitled to trucking and spreading cost for the sand removed. Even though the contractor made the greater net recovery, whether a party is the substantially prevailing party is not a mathematical calculation based on the number of claims won or the amount of money awarded. Here, the contractor's failure to admit the conversion of the sand caused the trial to extend for four days

and therefore, it was not an abuse of discretion for the court to conclude that although the contractor received a net victory, it was not entitled to additional recovery as the substantially prevailing party.

Finally, the Vermont Supreme Court noted that once separated from the land, the sand removed by the contractor became personal property and therefor the contractor's action should be likened to conversion, for which the proper measure of damage is the fair market value of the sand at the time it was converted by the contractor.

2. In *Long Trail House Condominium Association v. Engelberth Construction, Inc., 2012 VT 80, 59 A.3d 752*, the Vermont Supreme Court reaffirmed that theeconomic loss rule bars tort claims purely economic losses governed by contract. In *Long Trail*, a condominium association sued its general contractor claiming a breach of its duty of professional care in performing contractor services and constructing the project. On appeal, the Vermont Supreme Court upheld the trial court's ruling that the economic loss rule bars torts claim for the association's purely economic losses, reiterating that the economic loss rule serves to maintain a distinction between contract and tort law.

Here, the association sought economic damages under a negligence claim for damages that consisted almost entirely of the cost to repair alleged faulty construction. The court rejected the association's attempt to fall within an exception of the economic loss doctrine for professional services and/or special relationships because the exception only applies when a special duty of care exists separate and independent of the contractual duty. Here, the court noted that the defendant was a contractor and operated as a contractor, not as a provider of a specialized professional service, such as an architect or engineer, though the court noted that even one's status as an architect or engineer would not be determinative. The court also rejected the association's claim that a "threat of imminent harm" is an exception to the economic loss rule. To allow the association to recover damages based on a theory that the defects "could have" caused an accident or personal-injury would subvert the actual injury requirement for a tort claim and provide an end run around the economic loss rule. The great weight of authority does not yet permit tort recovery in the absence of physical injury to a person or dramatic incident such as a collapse or explosion.

As to the association's claim for an implied warranty, the Supreme Court found no case law that shows that implied warranties of good workmanship and habitability pass from a general contractor to a subsequent purchaser not in privity with the general contractor. Vermont case law plainly contemplates the existence of contractual privity before an implied warranty claim can be raised. Here, there was no sale between the general contractor and the association and the court refuses to create an infinite implied warranty through this case. The association's warranty remedy lies against the entity that sold the condominium units and implicitly warranted through the sales that the units were built in a good and workmanlike manner and that they were suitable for habitation.

**Legislation:**

1. No legislation relevant to the construction industry was amended or enacted in Vermont in 2013.

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## Washington

### Case law:

1. In *Berschauer Phillips Constr. Co. v. Mut. Of Enumclaw Ins. Co.*, 175 Wash. App. 222, 308 P.3d 681 (Div. 1 2013), the appellate court held that the plaintiff's direct action against the insurer of the subcontractor from whom it obtained a default judgment for defective workmanship was barred. In *Berschauer Phillips*, the plaintiff, a general contractor, instituted a direct action, separate from its suit against the subcontractor, to recover for the subcontractor's defective workmanship. The *Berschauer Phillips* court held that the general contractor could have, and should have, raised its direct action claim against the insurer in its initial action against the subcontractor because such claim involved the identical subject matter and claim and included the same parties acting in the same capacities. In affirming the trial court's decision, the appellate court found that res judicata barred the general contactor's subsequent lawsuit against the insurer.

2. In *Scott's Excavating Vancouver, LLC v. Winlock Props., LLC*, 176 Wash. App. 335, 308 P.3d 791 (Div. 2 2013), the court interpreted Washington Statute, RCW 60.04.021, to determine whether the mechanic's lien, held by an unpaid engineering company, held priority over the deed of trust for the same property. In *Scott's Excavating*, G&O and Winlock entered into a contract, which was amended several times, for engineering and surveying services on Winlock's new housing and commercial development. Winlock provided G&O's engineering work to support its loan application from Venture (First-Citizen's predecessor), which secured the loan by recording a deed of trust against the property. Before the project concluded, Winlock stopped paying G&O, who recorded a lien claim on the property and subsequently sued to foreclose the lien in July 2008. Winlock also defaulted on its loan to Venture/First-Citizens, who foreclosed on its deed of trust and filed its trustee's deed in August 2009.

In addressing First Citizen's appeal regarding priority, the court concluded that G&O's mechanics' lien had priority over First-Citizens' recorded deed of trust because it had knowledge that G&O started work on the property before it granted to loan secured by the deed for trust. In reaching its decision, the court reasoned that First-Citizens failed to adequately protect itself by getting a subordination agreement. In making its determination, the court found that, despite the numerous amendments, there was a single contract between G&O and Winlock and that such contract dated back to the first commencement of services.

3. In *Canal Station N. Condo. Ass'n v. Ballard Leary Phase II, LP*, --P.3d ---, 2013 WL 7219269 (Wash. App. Div. 1) the appellate court affirmed the trial court's denial of the engineer's motion for summary judgment on negligence and negligent misrepresentation claims based on the economic loss rule. In *Canal Station*, one of the defendant's appealed the trial court's decision that it impliedly waived arbitration by its conduct of filing Rule 12(b)(6) motions to dismiss, referencing jury confusion, and waiting until after the court's decision on the motion to dismiss to seek arbitration. In reversing the trial court's decision, the appellate court considered whether the defendant's actions and arguments, including referencing jury confusion rose to the level of voluntarily and intentionally relinquishing its known right. In making its decision, the court considered, but was not convinced that the defendant's action of seeking to compel arbitration after losing on bifurcation was the type of forum shopping sought to be deterred. Ultimately, the appellate court determined that the arguments made in its briefing and

the timing of its demand for arbitration did not evince intent to waive the defendant's right to arbitrate under the applicable Washington statute.

4. In *Donatelli v. D.R. Strong Consulting Engineers, Ind.*, 179 Wash. 2d 84, 312 P.3d 620 (2013), the Washington Supreme Court affirmed the trial and appellate courts' refusal to dismiss the plaintiffs' claims for negligence and negligent misrepresentation. *Donatelli* arose out of an agreement between the Donatellis (property owners) and the defendant, DR Engineers, for the development of the owners' property into two short plats. Before the development of the property could be completed, the Donatellis lost the property in foreclosure. The Donatellis then sued DR Engineers for breach of contract, violation of the Consumer Protection Act, negligence, and negligent misrepresentation. The Donatellis' negligent misrepresentation argument was based on DR Engineers' representation that it would be able to finish the project within one and half years for an amount not to exceed $150,000. In fact, DR Engineers allegedly charged the Donatellis almost $120,000 and the project lasted over five years. According to the Donatellis, the extended costs and duration of the project, combined with the Donatellis' financial losses caused them to lose the property in foreclosure. Despite the contract's provision limiting DR Engineers' liability to the greater of $2,500 or its professional fee, the Donatellis sued DR Engineers for $1.5 million. In response to the complaint, DR Engineers moved to dismiss the negligence claims under the "economic loss rule."

The trial court in *Donatelli* found that professional negligence claims could be stated even in the context of a contractual relationship and denied DR Engineers motion to dismiss. The court of appeals affirmed, holding that the "independent duty doctrine," previously known as the "economic loss rule," did not bar the Donatellis from bringing the negligence claims because professional engineers owe duties to their clients independent of any contractual relationship. The *Donatelli* Supreme Court, in a 5-4 decision, affirmed the lower courts' findings and agreed with the court of appeals' reasoning regarding the duty to avoid misrepresentations that induce a party to enter into a contract. The Supreme Court held that, to determine whether a duty arises independently of the contract, the court must first know what duties have been assumed by the parties within the contract and that the court, in this instance, could not say whether the engineering firm had an independent duty to avoid professional negligence but it did have a duty to avoid misrepresentation that arose independent of any contract. The dissenting opinion, however, concluded that summary judgment should have been granted because: (1) the tort claims should not go forward without personal injury or property damage; (2) the claims were contractual and only contractual remedies applied; and (3) the professional liability limitation in the written contract barred the negligence claims.

5. In *Hill v. Garda CL Nw., Inc.*, 179 Wash. 2d 47, 308 P.3d 635 (2013), the court invalidated an entire arbitration provision included in a labor agreement. The invalidated provision provided for a 14-day statute of limitations period, a two- and four-month limitation on back-pay, and a requirement that employees pay for half the cost of arbitration. In *Hill*, Garda's drivers, who were employed to carry out its business operations, were required to sign a labor agreement. The employees, after experiencing unfavorable work conditions filed suit for wage and hour violations. In response Garda raised the arbitration clause in the labor agreements. The defendant attempted to invoke the arbitration provision of the labor agreement. The employees argued, and the court agreed, that the arbitration provision was unenforceable because of certain unconscionable clauses. The *Hill* court ultimately found that the 14-day statute of limitations, the limitations on back pay, and the cost splitting provisions of the arbitration clause were all unconscionable. Further, instead of severing the unconscionable

portions of the provision, the court invalidated it in its entirety, finding that the entire provision was substantively unconscionable and unenforceable.

6. In *Bankston v. Pierce County*, 174 Wash. App. 932, 301 P.3d 495 (Div. 2 2013), the court of appeals held that a Pierce County public works contract with the son of the winning bidder was void. In *Bankston*, John Bankston, through his business, Aarohn Construction, submitted, and was awarded, a bid to replace trees on a small public works project in Pierce County. John's contractor's registration was later suspended, prohibiting the county from contracting with John's company. To circumvent this prohibition, John's son, Richard Bankston, who had no construction experience, registered as a business with the same name, Aarohn Construction, received a unique business identifier, and obtained a contractor's and performance bond in his name. The County later executed a written contract listing "Aarohn Construction," which was executed by John but listed Richard's business identification number. Richard had little to no involvement once the project commenced. When the project was not completed in the required time, the County terminated the contract, prompting Richard's suit against the County for breach of contract. The trial court held, and the appellate court affirmed, that the contract between Richard's proprietorship and the County was void and illegal because Richard never submitted a bid. Further, the court of appeals held that, when a public body makes a contract in violation of the competitive bidding laws, the contract is illegal and imposes no obligation on the public body. As such, the County's contract with Richard's Aarohn Construction proprietorship was illegal and void.

**Legislation:**

1. No legislation relevant to the construction industry was amended or enacted in Washington in 2013.

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## West Virginia

**Case law:**

1. In *Cherrington v. Erie Ins. Property & Cas. Co*., 2013 WL 3156003 (W.Va. June 18, 2013), the West Virginia Supreme Court of Appeals overturned the long-standing rule in West Virginia that defective workmanship that resulted in bodily injury or property damage did not constitute an "occurrence" under a policy of commercial general liability, such that an insurer had no obligation to defend or pay resulting damages. In Cherrington, the plaintiff sued her homebuilder alleging various defects within the house and generally alleging negligence in the construction by the homebuilder. The trial court granted summary judgment on the basis of the existing caselaw. However, the Supreme Court of Appeals reversed finding that "consistent with the decisions rendered by a majority of our sister jurisdictions," defective workmanship constitutes an occurrence under CGL insurance policies.

2. In *Dan Ryan Builders, Inc. v. Crystal Ridge Development, Inc*., 2013 WL 5352844 (N.D. W.Va. Sept. 24, 2013), plaintiff entered into a "Lot Purchase Agreement" with the defendant to purchase and build residential homes upon lots within a development owned and

developed by the defendant. After several homes were constructed on individual lots, numerous site-related problems arose, including differential settlement affecting the structural integrity of some of the homes and other storm water related issues. Ultimately the plaintiff brought an action to recover damages it sustained in connection with the site conditions and alleged causes of action in contract (based on breach of the Lot Purchase Agreement) and negligence. The Court found that West Virginia's version of the "gist of the action" doctrine barred the negligence based claims because the source of the defendant's duties originated in the Lot Purchase Agreement. The plaintiff prevailed on its breach of contract action. The Court denied as moot the defendants joinder complaint against certain engineers involved in the project – presumably because the source of the defendants ultimate liability to the plaintiff was based in contract and not in tort.

3. In *Hensel Phelps Construction Co. v. Davis & Burton Contractors, Inc. and St. Paul Guardian Ins. Co. v. Freeland & Kauffman, Inc., BRR Architecture, Inc., CBC Engineers and Associates, LTD., Mactec Engineering and Consulting, Inc. n/k/a AMEC, and Contech Construction Products*, Civ. Action No. 3:11-1020 (U.S.D.C. S.D. W.Va. Feb. 18, 2013), the plaintiff was the prime contractor in connection with the construction of a Wal-Mart. Defendant Davis & Burton was a subcontractor engaged to construct a storm drain system for the Project. When Wal-Mart indicated that the storm drain system did not satisfy the Project' specifications, the plaintiff Hensel Phelps demanded that Davis & Burton remediate the problem. When that demand was ignored Hensel Phelps terminated its contract with Davis & Burton, remediated the conditions on its own and filed suit to recover its damages. Davis & Burton joined Mactec Engineering alleging negligent design and breach of an implied warranty of plans and specifications. Mactec filed a Motion to Dismiss based on the statute of limitations and on a failure to state a claim for breach of the implied warranty.

As to the statute of limitations argument, Mactec argued that the two year statute expired even before Hensel Phelps commenced the underlying litigation. Davis & Burton argued that West Virginia Code Section 55-2-21 operated to "revive" its claims even if Mactec was correct in asserting the statute had run before any litigation was commenced. The Court denied the Motion to Dismiss finding that the language of 55-2-21 combined with the existing caselaw interpreting that statute operated to allow the assertion of a cross-claim in the litigation even if the claim would otherwise be time barred.

The Court also denied the Motion to Dismiss the implied warranty of plans and specifications claim, finding that such an implied warranty still exists in West Virginia and that Davis & Burton had alleged sufficient facts to sustain that cause of action.

4. In *Elk River Pipeline LLC v. Equitable Gathering, LLC*, 2013 WL 164151 (S.D.W.Va. Jan. 16, 2013), Equitable Gathering entered into a Master Services Agreement ("MSA") with Elk River Pipeline for work in West Virginia. The MSA provided that it must be construed and interpreted in accordance with the laws of the Commonwealth of Pennsylvania. After disputes arose, Elk River filed an action in West Virginia but argued that West Virginia law should apply because Pennsylvania had not substantial relationship to the project in West Virginia. The Court found that even though Equitable was based in Pennsylvania no substantial relationship to Pennsylvania could be established and so held that West Virginia law must apply.

5. In *Kirby v. Lion Enterprises, Inc. and t/a Bastian Homes*, 2014 WL 902542 (W.Va. March 7, 2014), the West Virginia Supreme Court of Appeals addressed the enforceability of an arbitration provision in a residential construction contract. The plaintiff-homeowner brought litigation in the Circuit Court of Marion County, West Virginia but the defendant-home builder sought to have that action dismissed based on the arbitration clause in the contract. While there was no question that the contract containing the arbitration clause was the operative contract and was supported by consideration, there plaintiff claimed that under the circumstances enforcing the arbitration provision was unconscionable. A motion to dismiss was filed and was granted, the Circuit Court finding that the arbitration provision was fairly negotiated and not unconscionable. On appeal the decision was affirmed in part, but reversed and remanded on the sole issue of whether the arbitration clause was unconscionable under the circumstances. The Court found that a determination as to whether the clause was not enforceable because it was unconscionable must be based on a factual inquiry, and here, no facts were developed prior the Motion to Dismiss.

**Legislation:**

1. No legislation relevant to the construction industry was amended or enacted in West Virginia in 2013.

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## Wisconsin

**Case law:**

1. In *Pamperin Rentals II, LLC v. R.G. Hendricks & Sons Construction, Inc.,* 344 Wis. 2d 669 (Ct. App. 2012), a commercial landowner ("Pamperin") brought an action against a contractor ("Hendricks"), who had been hired to prepare the site and supply and install concrete in the construction of several service stations. In its complaint, Pamperin alleged the concrete supplied and installed "was defective and/or the work performed was not done in a workmanlike manner and resulted in damages, including pitting and deterioration of the concrete, and will require replacement." Pamperin also alleged that as a result of the defective concrete, it suffered business interruptions, lost profits, and other incidental and consequential damages related to the defective concrete. Hendricks' commercial general liability insurer, Pekin, provided an initial defense, but reserved its right to later contest the coverage. During discovery, Pamperin disclosed that only the concrete itself had suffered physical damage and the alleged business interruption and physical damage to the asphalt were merely expected future harms to be incurred when the concrete was replaced or repaired. Pekin moved for summary judgment, arguing that it had no duty to further defend Hendricks because there was no policy coverage for Pamperin's alleged damage (specifically referencing a policy exclusion for damage to the insured's product and work).

The trial court granted Pekins' motion for summary judgment and Hendricks appealed. The Wisconsin Court of Appeals affirmed the grant of summary judgment and ruled that 1) Pamperin did not allege any property damage by the contractor that would trigger Pekin's duty to continue defense and 2) Hendricks' products and completed operations coverage was not

independent of business risks exclusions contained in commercial general liability ("CGL") coverage.

In making its decision, the Wisconsin Court of Appeals first established that the insurer's duty to continue to defend is contingent upon the court's determination that the insured has coverage if the plaintiff proves its case. (*quoting Estate of Sustache v. American Family Mut. Ins. Co*. 2008 WI 87, ¶29, 311 Wis. 2d 548, 751 N.W.2d 845). Here, as the action was based on alleged *future* harms to be incurred when the concrete itself was repaired or replaced, not damages incurred during the installation of the concrete itself. Therefore, there was no occurrence to trigger Pekin's duty to continue defense under the policy. Additionally, in determining that Hendricks' "products and completed operations" coverage was not independent of the business risks exclusion of the CGL coverage, the Court determined that under the plain language of policy coverage sections, "products and completed operations hazard" was simply a *component* of coverage for personal injury or property damage, rather than a separate grant with its own insuring agreement and set of exclusions.

2. In *Hoops Enterprises, III, LLC v. Super Western, Inc.,* 345 Wis. 2d 733 (Ct. App. 2012), a landowner ("Hoops") filed an action naming the State of Wisconsin as a defendant in an action regarding negligence in the approval of road construction plans that resulted in a flood of Hoops' property. Hoops did not name the Wisconsin Department of Transportation ("DOT") in the summons and complaint, although the complaint alleged that the DOT was the party that was negligent in the road construction plan approval. The complaint stated, "The State of Wisconsin is joined in this action because the actions or omissions of its employees, agents or representatives of one of its agencies, the Department of Transportation, make the State legally liable for the damages sustained by the plaintiff." The State of Wisconsin moved to dismiss the claims against it based on sovereign immunity.

The Circuit Court denied the State's motion to dismiss, finding that Hoops had stated a valid claim against the state under two statutes that set forth procedures under which property owners who were aggrieved by water problems created by the DOT's improper construction or maintenance of highway grades could bring suit. The statute (Wis. Stat. §88.87) provided that aggrieved parties "may bring an action in inverse condemnation under ch. 32 or sue for such other relief, other than damages, as may be just and equitable." Sources for relief under the statute included the DOT or "the appropriate governmental agency." Hoops interpreted "the appropriate governmental agency" to mean the State of Wisconsin, even though the State was not named in the statute.

In reversing the Circuit Court's decision, the Wisconsin Court of Appeals re-established the rules that 1) the State cannot be sued without its consent, 2) the State is a separate legal entity from its agencies and 3) a statute authorizing recovery from a State's agency requires an action against those named agencies, and not the unnamed state (*see PRN Assocs. V. DOA,*2009 WI 53, ¶51, 317 Wis. 2d 656, 76 N.W.2d 559) and *Konrad v. State*, 4 Wis. 2d 532, 39, 91 N.W.2d 203 (1958). Therefore, while claims against the DOT are permissible under Wis. Stat. §88.87, claims against the State are not.

3. In *State Farm Fire and Cas. Co. v. Hague Quality Water, Int'l.,* 345 Wis. 2d 741 (Ct. App. 2012), a consumer ("Krueger") purchased a water softener unit manufactured by Hague Quality Water, International ("Hague") that failed two years after its purchase and that caused nearly $45,000 in damage to the drywall, woodwork and flooring in Krueger's home.

Krueger's loss was covered by his property insurer, State Farm, and State Farm filed suit against Hague and its insurer alleging solely tort claims for the defective water softener unit. The Circuit Court dismissed State Farm's complaint stating that the economic loss doctrine barred recovery.

In reversing the Circuit Court's decision, the Wisconsin Court of Appeals determined that the economic loss doctrine does not bar tort claims when the loss is to "other property." In making its determination of whether the loss was to "other property", the Court applied the two-part analysis of the economic loss doctrine in which courts first must consider whether the defective product and damaged property are part of a larger "integrated system" that includes the damaged property and then, if no "integrated system" is determined, whether the purchaser should have foreseen that the product could cause the damage at issue ("disappointed-expectations"). The damaged property must survive both the "integrated-system" and "disappointed-expectations" tests to be considered "other property."

The Court first determined that the water softener and damaged drywall, flooring, and woodwork were not part of an integrated system. It then determined that application of the economic loss doctrine under the disappointed-expectations test could turn on 1) the purpose for purchasing the product, 2) the reasonableness of anticipating a risk of the product's failed performance, 3) the availability of warranties or risk-sharing mechanisms and 4) the extremity of the facts. The Court stated that although a foreseeable interaction between the purchased product and the damaged property is a factor that must be considered, without more, it is insufficient to bar tort recovery under the "disappointed-expectations" test of the economic loss doctrine.

4. In *Backus Electric, Inc. v. Petro Chemical Systems, Inc.,* 346 Wis. 2d 668 (Ct. App. 2013), a subcontractor ("Backus") brought an action against a general contractor ("PCS") and its surety ("Old Republic"), seeking payment for unpaid electrical work performed on a Manitowoc County Airport project. Old Republic failed to timely file an answer. In a letter filed minutes before a default judgment hearing, Old Republic asserted that default judgment could not be granted because its liability was "entirely derivative of the liability of PCS" and PCS had not yet been adjudged as liable. The trial court, after adjourning for several weeks, granted Backus' motion for default judgment and entered judgment against Old Republic. Old Republic appealed.

The Wisconsin Court of Appeals affirmed the trial court's ruling. It determined that as a result of Old Republic failing to timely answer Backus' complaint, it admitted the allegations in the complaint necessary for it to be held liable for the Backus' allegations, including PCS' liability for wrongfully terminating Backus' subcontract and PCS' denial of Backus' payment requests, regardless of whether PCS was found liable for not. Additionally, the Court of Appeals determined that the trial court's grant of default judgment against Old Republic was not an abuse of discretion.

5. *Paul Davis Restoration of S.E. Wisconsin, Inc. v. Paul Davis Restoration of Northeast Wisconsin,* 2013 WL 2401005 (Wis. 2013) arises from a territory-related dispute between two franchisees (here called "Southeast" and "Northeast"). Following an arbitration award, Southeast sought to enforce its judgment against Northeast via garnishment. Northeast is the name under which EA Green Bay, LLC does business and EA Green Bay, LLC opposed the garnishment action, stating that the judgment was only entered against the name it did

business under (Northeast) and not its incorporated name (EA Green Bay, LLC). The matter went before the Wisconsin Supreme Court and it decided that a judgment entered against the name under which a garnishment defendant does business is enforceable against the defendant itself. This is because the name under which the defendant does business (in this case, "Northeast") is not a distinct legal entity, but instead, merely another way for that defendant to refer to itself.

6. In *Wisconsin Central, Ltd., v. Gottlieb,* 832 N.W.2d 359 (Ct. App. 2013), the owner of railroad tracks ("WCL") brought an action against the Wisconsin Department of Transportation ("DOT"), alleging that taking soil samples on its property as part of an environmental due diligence for a road construction project constituted an unreasonable search and seizure. The matter arose out of a troublesome intersection in North Fond du Lac, Wisconsin (the "Village"), where WCL's railroad intersected with a main thoroughfare, thus causing safety issues and traffic delays. A proposal was made to build an overpass so that traffic could continue on the drive, even when the trains were in operation. After extensive negotiations between WCL, the Village, and the Office of the Commissioner of Railroads ("OCR"), the DOT began handling the project. As part of the design phase, WCL and the Village entered into a settlement agreement where both agreed to share in the cost of the construction and where each party would be fully compensated by the other for the fair market value of the property taken by the other for purposes of the project. WCL never objected to any of the designs or settlements and the design phase pushed forward.

As part of its geotechnical due diligence under the design phase, the DOT removed soil samples from WCL's land. Before doing so, it notified WCL and received no objections. A consultant thereafter prepared a Phase I Hazardous Materials Assessment that concluded that further testing needed to be conducted on WCL's property before the construction commenced. DOT sent another notice to WCL regarding the intended testing and received an objection and refusal from WCL.

Despite the objection and refusal, DOT went on to the property anyway to collect the soil samples and WCL soon after filed a lawsuit. The Circuit Court denied the request for injunction and dismissed the action. In affirming the Circuit Court's decision, the Wisconsin Court of Appeals first re-established the pretense that the Fourth Amendment to the federal constitution does not prohibit all state-initiated searches, just those that are unreasonable. Warrantless searches, however, are per se unreasonable. One of the well-established exceptions to the warrant requirement though is when a warrantless search is conducted pursuant to voluntary consent. The Court of Appeals concluded that no issue of unreasonable search or seizure was raised by the DOT conducting soil samples in the area of WCL's property. The Court pointed out that WCL consented to the limited sampling and never made previous objections, in addition to the fact that the testing was a necessary component to the design phase of the project that WCL voluntarily entered into with the Village.

7. *Bostco, LLC v. Milwaukee Metropolitan Sewerage District,* 2013 WL 3745999 (Wis. 2013) is a review of a published Wisconsin Court of Appeals opinion and raises claims from Bostco, LLC ("Bostco") alleging that Milwaukee Metropolitan Sewerage District's ("MMSD") negligent operation and maintenance of a sewerage tunnel (the "Deep Tunnel") beneath Bostco's property resulted in excessive groundwater seepage into the Deep Tunnel and thereby caused significant damage to Bostco's buildings.

Five issues were raised. First, MMSD claimed that it is immune for its construction of the Deep Tunnel under Wis. Stat. §893.80(4). The Supreme Court rejected MMSD's claim of immunity, stating that once MMSD had notice that the private nuisance it negligently maintained was causing significant harm, immunity under §893.80(4) was no longer available.

Second, if immunity was not accorded, Bostco claimed that the Court of Appeals erred when it reversed the Circuit Court's award of equitable relief for Bostco, ordering MMSD to abate the excessive seepage of groundwater into the Deep Tunnel. As immunity was not awarded to MMSD, the Supreme Court reversed the Court of Appeal's denial of equitable relief of abatement.

Third, Bostco claimed that the damage cap in §893.80(4), which caps the damages recoverable in an action against governmental entities at $50,000 violates equal protection, both facially and as applied to Bostco's specific claims. The Supreme Court determined that the monetary cap does not violate equal protection, either facially or as applied to Bostco. Additionally, the nature of Bostco's claims as a continuing nuisance does not render the statute inapplicable.

Fourth, Bostco claimed that MMSD's operation and maintenance of the Deep Tunnel constituted a taking of the groundwater beneath Bostco's property (inverse condemnation). The Supreme Court decided that Bostco forfeited this argument and it affirmed the Court of Appeals.

Fifth, MMSD argued that Bostco's claim was barred by the notice of claim provision of §893.80(1). On this matter, the Supreme Court ruled that Bostco substantially complied with the notice of claim provisions under the statute and therefore, MMSD had sufficient notice.

Overall, the Supreme Court affirmed the Circuit Court's decision that groundwater seepage abatement was required. It remanded the matter the Circuit Court, where a hearing could be held to establish whether an alternative method would suffice to abate the continuing private nuisance that MMSD maintains or whether lining the Deep Tunnel with concrete would be required for abatement.

**Legislation:**

1. **2013 Wisconsin Act 1 (2013 S.B. 1).** Act 1 was signed into law to address and regulate ferrous metallic mining in Wisconsin. Specifically, in Act 1:

   a. The legislature finds that attracting and aiding new mining enterprises and expand the mining industry in Wisconsin is part of Wisconsin public policy.

   b. The legislature finds that mining for nonferrous metallic minerals is different from mining for ferrous metallic minerals because in mining for nonferrous metallic minerals, sulfide minerals react when exposed to air and water, to form acid drainage.

   c. The permitting process for ferrous mineral mining (as compared to nonferrous metallic mining) is simplified and shortened to encourage

ferrous mineral mining, to create jobs in Wisconsin and to generate resources for the State.

d. There are numerous requirements that ferrous mineral mining operations are conducted in an environmentally sound manner.

e. The legislature finds that because of the fixed location of ferrous mineral deposits in Wisconsin, it is probable that mining those deposits will result in adverse impacts to wetlands, and therefore, the use of wetlands for bulk sampling and mining activities, including the disposal or storage of mining wastes or materials, or the use of other lands for mining activities that would have a significant impact on wetlands, is presumed to be necessary.

2. **2013 Wisconsin Act 4 (2013 A.B. 35).** Act 4 provides that any ordinance enacted by a municipality that relates to the licensure or certification of electrical contractors or electricians pursuant to the municipality's authority under §101.865, 2005 Wis. Stats., or §101.87, 2005 Wis. Stats., and that is in existence on March 19, 2008, shall remain in effect until April 1, 2014, but may not be amended or repealed during that time period. Beginning on April 1, 2014, any such ordinance is no longer in effect, and municipalities may no longer impose any registration, licensing, or certification requirements on electrical contractors, electricians, or electrical inspectors.

3. **2013 Wisconsin Act 20 (2013 A.B. 40).** The Wisconsin budget bill was signed into effect on June 30, 2013. Of specific application to the construction industry, the budget bill includes:

a. Investing in roads and bridge construction without an increase in gas tax or other fees.

b. Increases in the current 5% historic preservation tax credit to 10%.

c. Increases in the economic development tax credit program.

d. Erosion control laws for construction sites with a land disturbance area of one or more acres are transferred from DNR to Department of Safety and Professional Services.

e. A requirement for a statewide uniform standard regarding storm water discharge permits and erosion control standards.

f. Building Commission revenue bond limit increased on major highway projects and transportation administrative facilities.

4. **2013 Wisconsin Act 23 (2013 A.B. 77).** Act 23 provides:

a. The dwelling code council shall review the standards and rules for one- and two-family dwelling construction and recommend a uniform dwelling code for adoption which shall include rules providing for the conservation of energy in the construction and maintenance of dwellings and for costs

of specific code provisions to home buyers to be related to the benefits derived from such provisions.

b. The dwelling code council shall study the need and availability of one- and two-family dwellings that are accessible to persons with disabilities, as defined in Wis. Stat. §106.50(1m)(g), and shall make recommendations or any changes to the uniform dwelling code that may be needed to ensure an adequate supply of one- and two-family dwellings.

c. The dwelling code council shall consider and make recommendations to the department pertaining to rules and any other matters related to this subchapter. The dwelling code council shall recommend variances for different climate and soil conditions throughout the state.

d. The dwelling code council shall prepare a report regarding their recommendations under (a), (b) and (c) above within 365 days after July 5, 2013 and shall reissue a report regarding the same once every 6 years.

5. **2013 Wisconsin Act 24 (2013 A.B. 24).** Act 24 provides:

a. No residential contractor may, including in any advertisement, promise to pay or rebate, all or any portion of a property insurance deductible as an incentive to a consumer entering into a written or oral contract with the residential contractor to repair or replace a roof system or to perform any other exterior repair, replacement, construction, or reconstruction of residential real estate.

b. Before entering into a written contract with a consumer to repair or replace a roof system or to perform any other exterior repair, replacement, construction, or reconstruction of residential real estate, a residential contractor shall do all of the following:

i. Furnish the consumer with a statement in boldface type of a minimum size of 10 point in substantially the following form:

"Please indicate whether, to the best of your knowledge, the work contemplated by this contract is related to a claim under a property insurance policy:

YES, to the best of my knowledge, the work contemplated by this contract is related to a claim under a property insurance policy.

NO, to the best of my knowledge, the work contemplated by this contract is not related to a claim under a property insurance policy.

Date ....

Customer's signature ....

Residential contractor's signature ....

You may cancel this contract at any time before midnight on the third business day after you have received written notice from your insurer that the claim has been denied in whole or in part under the property insurance policy. See the attached notice of cancellation form for an explanation of this right."

ii. Furnish the consumer a completed form in duplicate that is attached to the contract, is easily detachable, and contains, in boldface type of a minimum size of 10 point, the following statement:

"NOTICE OF CANCELLATION

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

I CANCEL THIS CONTRACT

Date ....

Customer's signature ...."

c. Before a consumer enters into a written contract with a residential contractor to repair or replace a roof system or to perform any other exterior repair, replacement, construction, or reconstruction of residential real estate, the consumer shall indicate to the residential contractor whether, to the best of the consumer's knowledge, the work contemplated by the contract is related to a claim under a property insurance policy. If the consumer makes such an indication, the residential contractor shall retain the statement and provide the consumer with a copy of the statement.

d. A consumer who enters into a written contract with a residential contractor to repair or replace a roof system or to perform any other exterior repair, replacement, construction, or reconstruction of residential real estate all or part of which is to be paid under a property insurance policy may cancel that contract prior to the end of the 3rd business day after the insured receives written notice from the insurer that the claim under the property insurance policy is denied in whole or in part. The consumer shall give the residential contractor written notice of cancellation by personal delivery of the notice or by 1st class mail to the residential contractor's address stated in the contract.

e. A residential contractor must return any payments already made to the consumer within 10 days of receiving a cancellation notice.

f. Any provision in a written contract with a residential contractor to repair or replace a roof system or to perform any other exterior repair, replacement, construction, or reconstruction of residential real estate that requires the payment of any fee for anything except emergency services is not enforceable against the consumer who has cancelled the contract

g. No residential contractor may represent, or offer or advertise to represent a consumer, or negotiate or offer or advertise to negotiate, on behalf of a consumer with respect to any insurance claim related to the repair or replacement of a roof system or to the exterior repair, replacement, construction, or reconstruction of residential real estate. This subsection does not prohibit a residential contractor, with the express consent of an insured, from doing any of the following:

    i. Discussing damage to the insured's property with the insured or an insurance company's representative.

    ii. Providing the insured an estimate for repair, replacement, construction, or reconstruction of the insured's property, submitting the estimate to the insured's insurance company, and discussing options for the repair, replacement, construction, or reconstruction with the insured or an insurance company's representative.

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