Construction Law Update:

Case Law & Legislation Affecting the Construction Industry

Presented by

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INTRODUCTION

In 2005, under the leadership of Denise Farris, Division 10 Chair, one of the primary goals of the *Division 10—Legislation and Environment* committee was to redefine its purpose and role within the Forum and to increase its membership. Currently acting as the "Server to the Forum," Division 10 has taken great steps over the past year to create, update and maintain three key list-serves. These list-serves—"Fifty State Forum Member Contacts," "Fifty State Construction Law Committee Contacts," and currently in development "Industry Liaison List Serve"—enable Division 10 and all Forum members to immediately contact representatives from all 50 states for national input and trend identification, in a cost and time efficient manner. It is also through these list serves that Division 10 has been able to attract volunteers throughout the country to track legislative and case law developments in the various states which impact the construction industry.

Submissions and/or brief summaries from our many "Fifty-State" volunteers have been regularly posted on the Division 10 web page and passed along to the Forum's publications committees for potential inclusion in upcoming publication articles. This year, Division 10 has decided to expand its breadth of readership by editing the submissions and compiling the summaries in one, easy-to-reference guide. It is with great pleasure that Division 10 releases the inaugural issue of ***Construction Law Update: Case Law & Legislation Affecting the Construction Industry.***

We give special thanks to Denise Farris, the 2005-2007 Division 10 Chair, for the leadership and guidance that she has provided to the "small but mighty" group of Division 10. We also thank Angela Stephens for the countless hours she has volunteered over the past year in soliciting contributors, reviewing updates, and helping to maintain our Fifty-State Updates on the website. Finally, this publication could not have been possible without the contribution of the Forum members throughout the country and specific contributions have been noted wherever possible.

The **Construction Law Update** is not an exhaustive list of every case or piece of legislation that affects our practice in each of the states, but is based upon the submissions of our Forum members. It is written by you and for you. Please feel free to contact us with your comments and suggestions for future updates.

Christopher D. Montez
Division 10 Publications Liaison
& Incoming Chair, 2007 - 2009

Matthew J. DeVries
Editor, Construction Law Update

THE FIFTY-STATE UPDATE

Alabama

Case law:

1. *B.L. Harbert Int'l, Inc. v. Hercules Steel Co.,* 441 F.3d 905 (11th Cir. 2006) was an appeal from an action filed in federal district court in Alabama by the losing general contractor after an AAA arbitration against its steel erection subcontractor. The essential dispute involved delays and resulting costs, and the primary issue in contention between the parties was which of two schedules produced by the general contractor was binding on the subcontractor. After seven days of hearings, the experienced arbitrator resolved the matter in favor of the subcontractor, and the general contractor filed suit seeking to have the award vacated, arguing that the arbitrator's ruling reflected a manifest disregard of the applicable law. When the motion was denied, the contractor appealed. The Eleventh Circuit Court of Appeals, referring to the case as an example of the "poor loser problem," rejected the contractor's arguments decisively, holding the facts at bar did not "come within shouting distance" of the standard established by binding precedent for vacation of an award, and rejecting the "unconvincing" argument that misinterpretation of the parties' contract is a misapplication of the law. More significantly, the court issued a warning to future litigants, stating that it was giving notice "even to the least astute reader," that it "is exasperated by those who attempt to salvage arbitration losses through litigation that has no sound basis in the law applicable to arbitration awards" and is "ready, willing, and able to consider imposing sanctions in appropriate cases." *Id.* at 914.

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Arizona

Case law:

1. In *Harrington v. Pulte Homes,* 119 P.3d 1044 (Ariz. Ct. App. 2005), the court held that Arizona's "strong public policy both federal and state, favoring arbitration" means that these provisions are almost always enforceable. *Harrington* involved the enforceability of an arbitration provision that a home builder put into its sales contract. The trial court found the provision unenforceable because the purchase contracts were pre-drafted and non-negotiable and the purchasers did not get the chance to negotiate whether they wanted to arbitrate. The Appeals Court reversed, holding that the arbitration provision was enforceable because the builder has no "reason to believe the other party would not have accepted the agreement if he had known that the agreement contained the particular term." In other words, the court found that if an arbitration clause is in a contract, it does not matter if one party is unaware the clause exists or if that party was forced to accept it, if the party trying to enforce the provision did not know that the party challenging the provision would not have entered the contract if they had known about it.

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Colorado

Case law:

1. In *Compass Bank v. Brickman Group, LTD*, 107 P.3d 955 (Colo. 2005) the Court determined that filing a lien for the full contract amount against fewer than all the properties covered by the contract does not render the lien invalid. Rather, it merely affects recovery, which is limited to the amount by which each property actually benefited from the work performed.

2. In *A.C. Excavating v. Yacht Club II*, 114 P.3d 862 (Colo. 2005) the Court determined that, in actions by homeowners against subcontractors for negligence in the construction of their homes, subcontractors owe homeowners a duty of care independent of any contractual obligation, to act without negligence in the construction of a home. As a result, the Court also ruled that the economic loss rule does not bar such action.

3. In *CLPF-Parkridge One v. Harwell Investments, Inc*. 105 P.3d 658 (Colo. 2005) the Colorado Supreme Court clarified the Colorado Court of Appeals confusion on the application and affect of the Colorado statute governing when actions accrue for indemnification and contribution cases. The Court explained that Section 13-80-104(1)(b)(II), C.R.S. (2005) is a tolling provision, not a ripeness provision. Accordingly, it does not bar cross-claims and third-party claims for indemnity or contribution prior to the entry of an underlying judgment in construction defect lawsuits. Likewise, the Court clarified that the statute also allows indemnity or contribution claims to be brought by a separate lawsuit after judgment is entered; however, a party must bring its indemnity or contribution claim no later than ninety days after termination of the construction defect lawsuit.

4. In *Hoang v. Monterra Homes,* 129 P.3d 1025, 2005 WL 427936 (Colo. App. 2005) the Court determined that a judgment against a home builder in favor of home owners for damages arising out of soil issues is covered by the home builder's general liability policy because the situation fits the definition of "accident." Although the homebuilder may have known about the soil conditions, it did not intend or expect the soil conditions would cause the damage. The Court also ruled, however, that the insurance policy did not cover non-economic damages.

5. In *Mountain Ranch Corp. v. Amalgam Enterprises, Inc*., 2005 WL 3434629 (Colo. App. 2005) the court clarified the issue that an action on a debt is distinct from an action on the security for the debt (lien), and that, therefore, filing claims for breach of contract and fraud did not stay statute of limitation for foreclosure on the lien.

6. In *Pat's Construction Service, Inc. v. Insurance Co. of the West*, 2005 WL 3211681 (Colo. App. 2005), the court determined that the public works statute of limitations prevailed over the general breach of contract statute of limitations where action was filed against surety on a bond. The court held that Plaintiff could only receive prejudgment interest starting from the time a demand for payment is submitted to the surety.

7. In *Tuscany, LLC v. Western States Excavating Pipe & Boring, LLC*, 1287 P.3d 274 (Colo. App. 2005) the court determined that mechanic's liens are excluded from Colorado's Spurious Liens and Documents statute (§ 38-35-201, C.R.S. (2005)). The Court held that a mechanics' lien cannot be claimed a "spurious lien" because Section 38-35-201 excludes from the definition of "spurious lien" any lien provided for by a specific Colorado statute, and mechanics' liens are governed by the General Mechanics' Lien statute, Section 38-22-101, C.R.S. (2006). A spokesperson for the legal community testified during Senate Judiciary Committee meetings, stated that the purpose of the Spurious Liens and Documents statute's purpose was to address the "very serious problem" of groups "who are disgruntled with the present-American system of government" filing "phony documents and liens against public officials' property." *Tuscany* at 278.

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Legislation:

1. Employment verification legislation

On July 31, 2006, Colorado's governor signed into law, HB1017, a new employment verification statute that will impact every business that employs workers and transacts business in Colorado. Beginning January 1, 2007, Colorado employers (regardless of size or headcount) will be required to comply with the Colorado state employment verification scheme, which will be enforced by the Colorado Department of Labor and Employment.

It is important to note, that like the Fair Labor Standards Act (FLSA), the statute defines "employer" as "a person or entity" who "has control of the payment of wages for such services, or is the officer, agent, or employee of the person or entity having control of the payment of wages." The law, unlike the Colorado Wage Claim Act, Section 8-4-101, et. seq. of the Colorado Revised Statutes, contemplates personal liability for violation of its provisions.

Pursuant to the statute, within 20 days after hiring a new employee, each employer will be required to affirm in writing:

a. that it has examined the legal work status of such newly hired employee and has retained file copies of the documents evidencing the employee's identity and work eligibility;

b. that it has not altered or falsified the employee's identification documents; and

c. that the employer has not knowingly hired an unauthorized alien.

The employer must retain a written or electronic copy of the affirmation and of the verification documents so long as the employee is employed by the employer. The Colorado Department of Labor and Industry is authorized to demand inspection of the affirmation and verification documents either on a random basis or based on cause. An

employer who, with reckless disregard, fails to submit the documentation required, or who, with reckless disregard, submits false or fraudulent documentation, can be fined up to $5,000 per worker for a first offense and up to $25,000 per worker in subsequent prosecutions. It is not clear whether the State intends to assert jurisdiction over persons employed outside the State of Colorado in its enforcement actions.

2. Public procurement legislation

Colorado has also adopted new public procurement legislation requiring state and local contractors to participate in the federal Basic Pilot verification program as a condition of obtaining and retaining public contracts in Colorado, effective for contracts entered into on and after August 7, 2006. The Basic Pilot Program is administered by the Immigration and Customs Enforcement (ICE) branch of the Department of Homeland Security. Participating employers are required to enter into a written agreement with ICE promising to comply with the regulations governing the program and to refrain from using the program to screen applicants for employment. Participating employers are required to complete and retain written or electronic copies of I-9 forms.

Colorado contractors also will be responsible for obtaining certification from their subcontractors that said subcontractors will not knowingly employ or contract with an illegal alien to perform work under the public contract. If a contractor discovers that a subcontractor is employing an unauthorized worker, then the contractor must notify the state or local agency of the discovery and terminate its relationship with the subcontractor within 3 days unless the subcontractor provides the contractor with information sufficient to establish that the subcontractor had not knowingly employed or contracted with an illegal alien.

Finally, members of the public have the right to file complaints against contractors suspected of employing unauthorized workers. If, as a result of an investigation by the Director of the Department of Labor and Industry, it is determined that a contractor has violated its obligations with respect to employment verification, its public contracts may be terminated and it can be held liable for actual and compensatory damages resulting from the termination.

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Connecticut

Case law:

1. In *Aronne Bldg. & Remodeling, LLC v. Ksiazek*, 2006 Conn. Super. LEXIS 2596 (Conn. Super. Ct. Aug. 31, 2006), a plaintiff builder who signed a valid mechanic's lien waiver could not foreclose upon a mechanic's lien he filed against the defendants' property despite the execution of the waiver. As the plaintiff builder did not claim that the defendant property owners prevented him from reading the waiver, he signed it with full knowledge of its import, not as a result of any inducement by the defendants.

2. In *D'Angelo Dev. & Constr. Co. v. Cordovano*, 278 Conn. 237 (2006), the court considered whether the contractor's failure to obtain a certificate of registration prior to the time of contracting, but within three days thereafter, rendered the contract

unenforceable under the New Home Construction Contractors Act (Conn. Gen. Stat. § 20-417a et seq.). The court resolved a trial court split of opinion, holding that the legislature did not intend to render noncompliant contracts unenforceable under the Act. Furthermore, the court concluded that the existing statutory scheme of multiple, cumulative and qualitatively different penalties—which adequately deter noncompliance with the Act—well serves the underlying public policy of the Act to protect consumers against unscrupulous new home construction contractors.

3. In *Diversified Tech. Consultants, Inc. v. Sentinel Equities Corp.*, 2006 Conn. Super. LEXIS 2485 (Conn. Super. Ct. Aug. 11, 2006), the court held that the economic loss doctrine bars claims between sophisticated parties whose dispute arises from allegedly defective performance under a contract for the sale of goods, not claims of negligence and negligent misrepresentation against a professional engineering and landscape architectural consulting corporation arising out of a contract for services.

4. In *Intercity Dev., LLC v. Andrade*, 96 Conn. App. 608 (2006), the court held that the difference between the cost to complete a contract and the balance due on that contract may only be used as a calculation of damages in an action to foreclose on a mechanic's lien where a contractor has proved substantial performance of the contract. With no contractual or statutory provision for attorney's fees, an award of such fees is not permitted to a prevailing party. A contractor may amend a complaint after trial to include a breach of contract count in an action to foreclose upon a mechanic's lien because the competing claims arising from a construction contract and a mechanic's lien were fully heard by the court. The amendment to the complaint did not prejudice the homeowners defending the foreclosure action.

5. *Lichtman v. Beni*, 280 Conn. 25 (2006) held that a contractor's appeal of a trial court's discharge of a mechanic's lien on a homeowner's property was moot because the contractor, who timely filed the appeal, did not apply for a stay of the effect of the trial court's order pending appeal. An automatic stay of an order discharging a mechanic's lien only remains in place for the 7-day window during which an appeal of this order may be filed. An appellant must apply for a further stay in order to extend this window until the court renders its decision on the application. The party requesting the stay must persuade the court to grant its request or post a sufficient bond, or both. Any order of discharge, reduction or stay shall take effect upon the recording of a certified copy thereof in the appropriate land records.

6. In *MD Drilling & Blasting, Inc. v. MLS Constr., LLC*, 96 Conn. App. 798 (2006), the court held that the mechanic's lien statute is not an exclusive remedy, and a party may obtain judgment on other claims, such as breach of contract and unjust enrichment, at the same time it obtains a judgment of strict foreclosure, particularly when defendants are defaulted for failure to plead. While a defendant may be liable on multiple judgments, a plaintiff may recover only a single measure of damages. When a plaintiff obtains a judgment of strict foreclosure of a mechanic's lien and a judgment or judgments on other claims, that plaintiff may pursue the damages to which it is entitled through either the judgment of strict foreclosure or the judgment or judgments on the other claims. A plaintiff who obtains a default judgment still maintains the burden of establishing damages.

7. In *Riggs-Brewer Indus., Inc. v. Shelton Senior Housing, Inc.*, 2006 Conn. Super. LEXIS 1741 (Conn. Super. Ct. June 6, 2006), the trial court held that a contractor sufficiently pled a cause of action for breach of contract against an architect, even though the architect and contractor did not enter into a contract themselves. The contractor could maintain a breach of contract action by alleging that the architect owed a contractual duty to a town to inspect work on a construction project, to approve the requisitions of the contractor on a monthly basis so that the contractor would be paid, to order extra work when warranted or ordered by the town and to approve change orders so that the contractor would be paid for additional or extra work. In other words, the contractor was a third-party beneficiary of the contract between the architect and Town and could maintain an action against the architect for a breach of that contract. It should be noted that the contractor's allegations that the architect negligently performed its duties survived a motion to strike. The economic loss doctrine did not bar the contractor's claims of negligence brought against the architect as the dispute between the parties, although both sophisticated commercial entities, arises out of a contract for services, not a contract for the sale of goods.

8. In *Rouleau v. Walter D. Sullivan Co.*, 2006 Conn. Super. LEXIS 183 (Conn. Super. Ct. Jan. 17, 2006), a subcontractor breached an agreement by failing to defend and provide insurance coverage to general contractor in a case involving injuries sustained by a worker who fell on a concrete floor. The worker's allegations of negligence were almost wholly based on alleged facts or failures to act arising from the work performed by the subcontractor under the contract with the general contractor, triggering the subcontractor's duty to defend the general contractor regardless of the merits of any claim by the general contractor for indemnification. Subcontractor's insurer refused to defend general contractor, claiming that its policy did not provide primary coverage, which amounted to a breach of the subcontractor's contractual duty to procure insurance for the general contractor. Regardless of the reason for the insurer's refusal of coverage, the bargained-for insurance was not present. The subcontractor's duty to indemnify the general contractor required the trier-of-fact to determine if the worker's fall arose from the subcontractor's work, so the court could not grant summary judgment to the general contractor on the claim for indemnification.

9. In *Royal Indem. Co. v. Terra Firma*, 2006 Conn. Super. LEXIS 2290 (Conn. Super. Ct. July 24, 2006), the employees of a subcontractor successfully obtained a judgment against the general contractor for injuries sustained at job site. Subcontractor's insurer disclaimed duties to defend and indemnify general contractor, claiming that the trial involved the general contractor's sole negligence, which allegedly would not be covered under the subcontractor's insurance policy naming the general contractor as an additional insured. Subcontractor successfully moved for summary judgment in underlying trial as the exclusivity of workers' compensation precluded the employees' from maintaining their actions against the subcontractor. Subcontractor's insurer sought a declaratory judgment that the general contractor was not an additional insured under the circumstances of this case. The court entered declaratory judgment that general contractor was an additional insured under subcontractor's insurance policy because general contractor's liability arose out of subcontractor's work. Spreading risk to an insurer by requiring the inclusion of a general contractor as an additional insured under a subcontractor's policy, especially where the insurer's risk is limited to losses arising from the named insured's work, does not violate public policy.

10. *Patt v. Metro. Dist. Comm'n*, 2006 Conn. Super. LEXIS 3788 (Conn. Super. Ct. Dec. 20, 2006) involved a contract between a putative indemnitor and indemnitee to perform work with due care. Here, the court held that the 2001 amendment to Connecticut's anti-indemnification statute (Conn. Gen. Stat. § 52-572k) prohibits contractual indemnification in the construction context where the indemnitee's negligence is a substantial factor in causing in causing injury to a plaintiff. Previously, the statute only prohibited indemnification for injuries caused by an indemnitee's sole negligence. The anti-indemnification statute specifically provides that it does not affect the validity of insurance contracts, so its prohibition of certain indemnification agreements does not extend to an obligation to include a person as an additional insured on an insurance contract. Agreeing to include another as an insured and paying the associated premium is not the same obligation as an agreement to indemnify. The former is a predictable fixed cost, which may be included in the contractor's bid, and the latter is an unknown and perhaps catastrophic cost.

11. In *Stone-Krete Constr., Inc. v. Eder*, 2006 Conn. LEXIS 466 (Conn. Dec. 19, 2006), the court held that the "subscribed and sworn to" provision of Connecticut's mechanic's lien statute requires a person to sign a mechanic's lien at the end and take part in an oath ceremony in which the person swears to the truth of the facts set forth in the lien. The provision further requires that there be evidence in the lien, such as a jurat, confirming the administration of the oath by a notary public or a commissioner of the Superior Court of Connecticut. A mechanic's lien need not include a signed, written oath or an affidavit or similar writing in order to be valid.

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Hawaii

Case law:

1. In 808 Development, LLC v. Murakami, 111 Haw. 349, 141 P.3d 996 (2006), a developer initiated a mechanic's lien action against property owners and their lender. The trial court dismissed developer's mechanic's lien application because developer failed to include written notices and disclosures regarding lien and bond issues as required by Haw. Rev. Stat. 444-25.5. Finding that the express statutory provisions of the statute were mandatory, rather than directory, and that the developer failed to comply with the statutory notice requirements for mechanic's liens, the Supreme Court affirmed the trial court's dismissal.

2. In Pulawa v. GTE Hawaiian Tel., 112 Haw. 3, 143 P.3d 1205 (2006), a construction foreman sued telephone company and excavation contractor to recover for personal injuries sustained when the foreman was injured by hardened bag of cement that had been buried by defendants years earlier during a telephone line construction project. The trial court held that the defendants did not owe the foreman a duty of care. Affirming, the Supreme Court held that the risk of a buried cement bag becoming a projectile was not clearly foreseeable. Thus, defendants did not owe a duty to the foreman.

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Legislation:

The following is a list of construction-related legislation passed by the Hawaii Legislature, in the 2006 session:

1. HB 3036/SB 3004 - Provides for prompt payment to subcontractor or materialman upon completion of the work or provision of the materials required under the contract for government projects.

2. SB 602 - Amends the Procurement Code by providing a preference for qualified bids submitted for repair and maintenance services on the premises of public education facilities, if the project will provide students with experiential learning opportunities.

3. SB 2909 - Prior to this enactment of this law, permits, including development-related permits, were automatically approved if government agencies failed to take timely action to grant or deny an application. The legislature found that automatic approval was poor public policy. Therefore, this provision allows a county to opt out of the automatic permit approval law by adopting an ordinance to exempt the county as a whole or any county agency from the law.

4. SB 2913 - Clarifies the contractors' law by specifying that at least half of all individuals performing electrical or plumbing work employed on a construction job site by an electrical or plumbing contractor shall be licensed in accordance with chapter 448E, which addresses licensing requirements.

5. SB 3090 - Requires the director of labor and industrial relations, with input form interested stakeholders in the workers' compensation system, to establish standardized forms for medical service providers to use when reporting on and billing for injuries compensable under the State's workers' compensation law.

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Idaho

Legislation:

1. Idaho Contractor Registration Act

The Idaho Contractor Registration Act, Idaho Code §§ 54-520 to -5219, requires all “contractors” to register with the Idaho Bureau of Occupational Licenses. Contractor is broadly defined to include virtually anyone involved in construction. The Act does exempt several categories of persons including most suppliers, homeowners, commercial owners, and employees.

To register, a contractor must submit an application, pay a nominal registration fee, and provide certain insurance information. Generally, unregistered contractors and those who contract with unregistered contractors can no longer file mechanic’s liens. Unregistered contractors are barred from bringing any legal action to recover compensation for their work.

2. Idaho Public Works Procurement Act

The Idaho Public Works Procurement Act, Idaho Code § 67-2805, standardizes the competitive bidding process for public works projects in the State of Idaho. The Act provides three distinct settings for the competitive procurement of public work.

The first applies only to public works projects valued at less than $50,000 wherein licensed contractors are not available. The Act allows public entities to contract with unlicensed contractors when they are unable to obtain bids from any licensed contractors.

The second applies to all other public works projects valued between $25,000 and $100,000. The Act requires public entities to solicit bids from at least three owner-designated licensed public works contractors. If it is impractical to obtain three bids, the Act allows public entities to acquire work from the lowest bidding qualified contractor.

The third setting applies to all public works projects exceeding $100,000 in value and grants the public entity two distinct options. Category A bidding requires public entities to solicit bids by publication and to award contracts to the lowest responsive bidders. In Category B bidding, public entities first determine whether interested licensed contractors meet prequalification standards. Only those deemed qualified are allowed to submit bids.

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Indiana

Case law:

1. In *Murdock & Sons Construction, Inc. v. Goheen General Construction, Inc.* , 461 F.3d 837 (7th Cir. 2006), the United States Court of Appeals for the Seventh Circuit addressed the issue of constructive acceleration and whether unexpected difficulties that arose in a subcontractor's performance of a masonry construction contract were sufficient to constitute an "excusable delay" that would relieve the subcontractor of his duty to perform under the contract. During project performance, the masonry subcontractor determined that its union worker were laying 100 blocks less per day than was estimated, resulting in the project completion falling behind schedule. The subcontractor tried to increase productivity by firing slow workers, providing more equipment, modifying the construction process and temporarily hiring additional masons. The district court denied the subcontractor's acceleration claim and the Seventh Circuit affirmed. The Seventh Circuit concluded that although a labor dispute or a cause beyond the subcontractor's control would constitute excusable delay under the parties' contract, the subcontractor could not establish that the slower-than-anticipated pace of the masons was due to either a labor dispute or a cause beyond its control.

2. In *Electrical Specialties, Inc. v. Siemens Bldg. Tech., Inc.*, 837 N.E.2d 1052 (Ind. Ct. App. 2005), the Indiana Court of Appeals clarified the time limitations to file a claim on contract proceeds and/or payment bonds. By statute, the deadlines for filing a claim differ depending upon the type of public project upon which the work was

performed. For example, Title 4 governs State projects administered through the Indiana Department of Administration (INDOA) and Title 5 governs State projects other than those administered through INDOA. Under the relevant provisions, a claim for payment must be made by a subcontractor or supplier "within sixty (60) days from the last labor performed, last material furnished, or last service rendered." On the other hand, Title 36 governs local government projects and the claim must be made within 60 days of work performed "by them." The *Electrical Specialties* court observed this distinction in time limitations and held that the subcontractor did not have to file its verified statement of claim within 60 days of its own last day of work because it was a State and not a local project.

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Legislation:

1. Indiana False Claims Act

Indiana has joined several other states in enacting a False Claim Act (Ind. Code § 5-11-5.5-1, *et seq*.), which could profoundly affect construction on State funded projects. This new Indiana statute, which is patterned after the Federal Civil False Claims Act, exposes recipients of state funds to the same scrutiny and potential liability which recipients of federal funds on federal projects have faced. Indiana's statute prohibits the submission of a "false claim" for payment or approval and imposes liability on contractors, and others, who "knowingly or intentionally" submit a "request or demand for money or property" using false information. The statute provides that for each false claim submitted, the violator is potentially liable for a penalty of at least $5,000 and for up to three times the amount of damages suffered by the State as a result of the "false claims."

An important point to note at the onset is that the False Claims Act only extends to projects where the State "provides any part of the money or property that is requested or demanded" or "will reimburse the contractor for any part of the money or property that is requested or demanded." State funded projects typically include Title 4 and Title 5 projects, as well as Indiana Department of Transportation (INDOT) projects. Title 4 governs State projects administered through the Indiana Department of Administration (INDOA); Title 5 governs State projects other than INDOA projects. However, the new statute will not likely apply to Title 36 projects solely funded by political subdivisions, such as counties, cities, or towns.

Under the False Claims Act, both the Attorney General and the Inspector General have authority to investigate allegations of "false claims" on State projects. If the Attorney General or Inspector General discovers what he considers a "false claim" made by a contractor, a lawsuit may be initiated on behalf of the State against the contractor. In addition, the new law allows a private person to bring a civil action on behalf of the State against a person who has violated Indiana's False Claims Act. The False Claims Act allows such a person who initiates a lawsuit on behalf of the State to receive up to 25 percent of the amount of any judgment or settlement obtained through the litigation if the Attorney General or Inspector General intervenes or up to 30 percent if the private person proceeds alone. Reasonable attorneys' fees and an amount to cover the expenses and costs of bringing the action also may be recovered by the

person initiating the action. This "private attorney general" provision creates an incentive for private individuals to pursue potential violations of the False Claims Act.

Indiana's False Claims Act also creates new investigative tools for the Attorney General and the Inspector General.While contractors on State funded projects should be prepared to open their books and supply information specifically requested by a proper civil investigative demand, the new statute affords contractors protections from having to disclose certain information. Such a demand may not require the disclosure or production of information that is otherwise protected as privileged, such as attorney-client communications. The statute requires that responses to civil investigative demands be made in accordance with the requirements of the Rules of Trial Procedure.

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Iowa

Legislation:

1. Iowa Construction Bidding Procedures Act

During the 2006 legislative session, HF2713 was signed into law by the Governor. The Act creates a new chapter of the Iowa Code known as the "Iowa Construction Bidding Procedures Act." While not explicitly stated in the Act, the purpose of the Act was to create uniform bidding procedures for government entities in Iowa. Previously, each entity had its own statutory bidding procedures (*e.g.*, counties, school districts, etc.). The Act became effective in its entirety on January 1, 2007. Section 13 of the Act creates a new procedure for the "early release of retained funds" on public jobs (which impacts both the public owner and the surety). While not explicitly changing the terms of Chapter 573, it must now be read in tandem with new Code section 38.13.

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Kentucky

Legislation:

1. Kentucky's 2005 Anti-Indemnification Provisions

In 2005, the Kentucky General Assembly enacted an anti-indemnification provision related to construction service contracts. The Act, codified under KRS 371.180 renders unenforceable any provision in a construction contract "purporting to indemnify or hold harmless a contractor from the contractor's own negligence or from the negligence of his or her agents, or employee." In other words, indemnification clauses in construction contracts can no longer indemnify against the contractor's own negligence. It should be noted that the provision does not affect contracts entered into before the Act's effective date, June 20, 2005.

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Louisiana

Case law:

1. In *Broadmoor, L.L.C. v. Ernest N. Morial New Orleans Exhibition Hall Authority*, 04-0211 (La. 2004); 867 So. 2d 651, an unsuccessful bidder sought to restrain a public authority from awarding a contract to a joint venture which had been designated as the lowest responsive bidder. The joint venture had failed, in response to the bid, to attend mandatory pre-bid conferences and to submit a certificate of builders' risk insurance, a statement of insurability regarding builders' risk coverage, and a resolution of the joint venture identifying the individuals authorized to act on behalf of the joint venture. The Louisiana Supreme Court determined that the bid specifications required attendance at the pre-bid conference and the submissions concerning insurance and authorized individuals, and held that the Public Works Act prohibited the public body from waiving those requirements. *Id*. at 661-63. The court held further that the public body was required to reject as non-responsive the joint venture's bid. *Id*. at 663-64.

2. The decision of *In re Whitaker Construction Company, Inc.*, 411 F.3d 197 (5th Cir. 2005), dealt with the attempt by a group of subcontractors and suppliers to recover for renovation work performed at Independence Stadium in Shreveport, Louisiana. The public body and the general contractor executed and filed on January 10, 2002, a certificate of substantial competition or acceptance of the work in the public records, but work continued on the project until April 25, 2002. The first date upon which statements of claim were filed by some members of the claimant group was June 21, 2002. The court was called upon to decide whether the claimants had timely filed their statements of claim. *Id*. at 202. The issue turned upon the interpretation of Louisiana Revised Statute 38:2241.1, which concerns when an acceptance must be filed in the public records to trigger the deadline for filing statements of claim. *Id*. at 202-07. The court held that the acceptance was prematurely filed because Louisiana Revised Statute 38:2241.1 "require[s] that completion follow within 30 days of substantial completion in order for the recorded acceptance to be valid . . . ." *Id*. at 206. The court held further that the premature acceptance was not null and void [*Id*. at 209], and stated that "in order to determine when the recorded acceptance became operative we would have to determine if and when substantial completion occurred within 30 days of completion, or when the project was complete." *Id*. at 210. The court decided not to make a determination of when the project was substantially complete -- a date that the parties hotly contested -- and ruled that the premature acceptance became effective on the date of the project's final completion, which the court found to have been by April 25, 2002. *Id*. at 211. Because none of the claimants' statements of claim were filed within forty-five days of the project's final completion, the statements of claim were untimely under the Public Works Act. *Id*.

3. In *Shaw Constructors v. ICF Kaiser Engineers, Inc.*, 395 F.3d 533 (5th Cir. 2004), a subcontractor waived in its subcontract the right to file claims or liens against the premises on which the project work was performed. The subcontractor completed its work on the $38 million project, but the general contractor materially breached the subcontract by failing to pay the subcontractor the $5.3 million balance due for its work. Despite the waiver provision in the subcontract, the subcontractor filed a statement of claim or privilege under the Private Works Act against the owner's property and brought suit against the owner. The court found that the owner was a third-party beneficiary to the waiver provision in the subcontract, but that the subcontractor could raise against the

owner/third party beneficiary the defenses it could have raised against the general contractor. *Id*. at 541. The court held that the general contractor's material breach of the subcontract entitled the subcontractor to regard the subcontract as dissolved, and restored the parties to their pre-subcontract positions. *Id*. at 543-44. As a result, the subcontract's lien waiver provision was rescinded. *Id*. at 545. The court also found that, although a subcontractor could prospectively waive its right to dissolve its subcontract under these circumstances, the lien waiver provision of the subcontract did not constitute such an express waiver. *Id*. at 545 (internal citations omitted).

4. In *Cajun Constructors, Inc. v. Fleming Construction Co., Inc.*, 2005-2003 (La. App. 1st Cir. 11/15/06); 2006 La. App. LEXIS 2600, a government contractor entered into a lump sum subcontract for pipeline canal work, including certain dewatering work set out in the project specifications. The government later directed that the dewatering work be replaced with the construction of earthen dikes. A written change order, however, was not executed to delete the dewatering work from the subcontractor's scope of work. (The subcontractor was paid on a time and material basis for driving sheet piles to shore up the earthen dikes.) At the conclusion of the project, the contractor withheld from the subcontractor its previously quoted price for the dewatering work. The subcontractor then filed suit against the contractor for the subcontract balance, relying on the changes clause that required a written change order for deductions of work. The parties disputed that there was ever an oral agreement to delete the dewatering work, although it was clear the subcontractor had not performed such work. The Louisiana First Circuit Court of Appeal found that the contractor failed to offer evidence that the subcontract was amended orally or by implication. *Id*. at 21. Despite the contractor's argument that the subcontractor was only entitled to anticipated profits on the dewatering work, the court held that the subcontractor was due the remaining subcontract balance. *Id*. at 22-23. Further, the court upheld the award of penalties and attorney's fees to the subcontractor based on a finding that the government contractor did not have reasonable cause to withhold the subcontract balance. *Id*. at 27.

5. In *Touro Infirmary v. Sizeler Architects*, 2004-0634 (La. App. 4th Cir. 03/23/05); 900 So. 2d 200, *writ denied*, 901 So. 2d 1093 (2005), an owner sought damages related to mold and mildew problems on a construction project and asserted a redhibition, *i.e.*, hidden defects, claim against the manufacturer/distributor of vinyl wall coverings. The manufacturer claimed that the damages sustained by the owner were caused by the acts of others, raising the defense of comparative fault in its answer. The Fourth Circuit Court of Appeal held that comparative fault does not apply to claims in redhibition. *Id*. at 206. The court also held that privity of contract is not required for a redhibition claim, stating that "[t]he proper inquiry is whether the duty to protect the buyer or consumer is assumed by contract or one *assumed as a general obligation owed to all persons*." *Id*. (emphasis in original). Judge Murray, in dissent, reasoned that the language of Article 2323(B) of the Louisiana Civil Code supports the conclusion that comparative fault applies broadly regardless of the basis for liability. *Id*. at 207.

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Legislation:

1. State Uniform Construction Code.

In response to Hurricanes Katrina and Rita, the Louisiana Legislature in the 2005 First Extraordinary Session enacted Louisiana Revised Statutes 40:1730.21 through 1730.39. These statutes provide for, among other matters, the promulgation of a uniform construction code. The International Building Code and International Residential Code are large components of this uniform code for Louisiana.

2. Mold Liability.

Louisiana Revised Statute 9:2800.14, enacted in 2004, provides that absent a written agreement to the contrary, no commercial or marine contractor, architect or engineer licensed under Louisiana law is liable for any personal injuries, property damage or any other damages, losses or claims whatsoever related to mold or mold damage not caused by defects in workmanship or design. *See* 2004 La. Acts No. 844.

3. Licensure.

As of June 30, 2004, persons performing mold remediation services that affect indoor air quality must be licensed by the State Licensing Board for Contractors. *See* La. R.S. 37:2181-2192. Louisiana Revised Statutes 37:2175.1-2175.5 were enacted in 2003. *See* 2003 La. Acts No. 1146. Under these statutes, unlicensed contractors undertaking, offering to undertake, or agreeing to perform "home improvement contracting" services be registered with and approved as a home improvement contractor by the Residential Building Contractors Subcommittee of the State Licensing Board for Contractors. *See* La. R.S. 37:2175.2.

4. Preemption.

Effective as of July 1, 2003, suits arising out of construction projects or related work must be brought within five years of either: (1) the date of registry in the mortgage office of the owner's acceptance of the work; or (2) occupancy of the improvement by the owner when the owner's acceptance is not recorded within six months from the owner's occupation or possession of the improvement. *See* 2003 La. Acts No. 919; La. R.S. 9:2772.

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Maine

Legislation:

Though Maine has no "False Claims Act" per se, there are several statutory provisions designed to dissuade various types of unfair trade practices, including the submission of false claims to both State entities and private parties. These statutes are discussed briefly in turn:

1. Claims and Accounts Against the State and its Municipalities (5 M.R.S.A. Sec. 1548)

Pursuant to the above-referenced statute, a person presenting any claim for payment against "any town, village, corporation, city, county or the State for services rendered, articles furnished or expenses incurred" must verify the account by oath if required pursuant to a duly authorized audit. The statute further provides that the claim of any individual or entity refusing to verify under oath shall be rejected

2. Maine Unfair Trade Practices Act (10 M.R.S.A. Sec. 205-A to 214)

Pursuant to the Unfair Trade Practices Act (hereinafter "UPTA"), "unfair methods of competition and unfair or deceptive acts of practices in the conduct of any trade or commerce are declared unlawful." Though the making of a false claim is not specifically referred to in the statute, its language is certainly broad enough to encompass the making of a false claim as a type of "unfair or deceptive act" covered under the Act.

In enacting the UTPA, the Maine Legislature sought to bring into Maine law the federal interpretations of "unfair methods of competition and unfair or deceptive acts of practices" and envisioned the Maine Attorney General as being in the position comparable to that of the Federal Trade Commission with respect to implementing the Act by regulation and enforcing it.

Determination as to whether an act or practice is "unfair or deceptive" within the meaning of the UTPA must be made by a fact finder on a case-by-case basis. *See Binette v. Dyer Library Ass'n*, 688 A.2d 898 (Me. 1996). Furthermore, an act may be deemed "unfair or deceptive" even when unknowingly perpetrated. When there is a duty to disclose, lack of awareness is no shield against the UTPA liability. Accordingly, a business in Maine would face liability under the UTPA for submission of a false claim for payment, whether the payment request is made to a private or governmental entity in the State.

A suit may be brought by the Attorney General or any aggrieved person. "Person" is broadly defined under the statute to include all natural persons, corporations, trust, partnerships, incorporated and unincorporated associations and any other legal entity. The UTPA claims are subject to Maine's general six-year statute of limitations period for civil actions.

Remedies for violations of the UTPA may include injunctive or other equitable relief, actual damages, restitution, costs and fees. However, to be entitled to remedial measure authorized by the UTPA, the plaintiff must show a loss of money or property as a result of UTPA violation. *See Tungage v. MacLean-Stevens Studios, Inc.*, 714 A.2d 792 (Me. 1998). In any case where the Attorney General has authority to institute an action or proceeding based of application of the UTPA, the State may, in lieu thereof, accept an assurance of discontinuance of any method, act or practice in violation of statute. Such assurance may include a stipulation for the voluntary payment of such person of the costs of investigation, or of an amount to be paid as restitution to an aggrieved party, or both.

3. Maine Construction Contract Prompt Payment Statute (10 M.R.S.A. Sec. 1118)

The purpose of this statute is to provide deadlines for the prompt payment of amounts invoiced in construction contract situations and to provide motivation, in the form of noncompliance penalties, for parties to make timely payments. *See Jenkins v. Walsh Bros., Inc.*, 776 A.2d 1229 (Me. 2001). This statute applies broadly to any agreement, written or oral, entered into between contractors and owners, including "the State of Maine and its instrumentalities" except for the Department of Transportation, regarding work to be performed and/or materials to be supplied for work on any real property in the State. The statute applies with equal force to types of reverse false claims of contractors who wrongfully withhold payments due to subcontractors.

Sec. 1118 explicitly provides that if arbitration or litigation is commenced to recover payments and its determined that an owner, contractor and/or subcontractor has failed to comply with the payment terms of this statute, "the arbitrator or court shall award an amount equal to 1% per month of all sums for which payment has wrongfully been withheld, in addition to all other damages due and as a penalty." The substantially prevailing party in such an action is also entitled to attorney's fees. The remedies provided for in the statute are intended to augment damages that are traditionally available for contract of quantum meruit claims.

The statute goes on to clarify that a payment is not deemed to be "wrongfully withheld" if it bears a reasonable relation to the value of any claim held in good faith against an invoicing contractor, subcontractor or material supplier seeking payment.

4. Uniform Deceptive Trade Practices Act (10 M.R.S.A. Sec. 1212)

Pursuant to the Uniform Deceptive Trade Practices Act (hereinafter "UDTPA"), a person engages in a deceptive trade practice when, in the course of his business, vocation or occupation, he/she makes, among other representations, the following types of false claims: (1) causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services; (2) causes likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by, another; or (3) engages in any other conduct which similarly creates a likelihood of confusion or misunderstanding.

A "person' is defined under the statute as "an individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, unincorporated association, 2 or more of the foregoing having a joint or common interest, or any other legal or commercial entity."

This statute is not intended to circumvent or preclude common law remedies for deceptive trade practices, but rather incorporates equity principles including the common law concept of "secondary meaning." *See Sebago Lake Camps, Inc. v. Simpson*, 434 A.2d 519 (Me. 1981). The ultimate test for secondary meaning is whether a significant portion of the consuming public interprets a name as referring exclusively to the appropriate party. *Id.* Business use of a misleading name to advance false claim submissions to unsuspecting parties would presumably fall within the scope of this statute.

The UDPTA provides for equitable relief only. A person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it under principles of equity and on terms the court considers reasonable. Proof of monetary damage, loss of profits or intent to deceive is *not* required. However, costs or attorney's fees may be assessed against a defendant only if the court finds that the defendant willfully engaged in a deceptive trade practice.

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Maryland

Case law:

1. In *Cottage City Mennonite Church, Inc. v. JAS Trucking, Inc.*, 167 Md. App. 694, 894 A.2d 609 (2006), a dispute arose between a hauling and grading subcontractor and the prime contractor on the construction of a new church building. The subcontractor filed a mechanic's lien action seeking damages for amounts owed. The owner successfully moved to compel arbitration of the dispute between the general contractor and the subcontractor. Following an arbitration award in favor of the subcontractor and confirmation by the trial court, the owner appealed. The appellate court affirmed, explaining that under Maryland's lien statute once the subcontractor established a prima facie case for the lien, the burden shifted to the owner to provide some evidence that the subcontractor was not entitled to a lien. The church owner had its opportunity to present independent defenses in response to the Show Cause Order and again in response to the subcontractor's motion for entry if Final Lien Order, but failed to do so.

2. In *RLI Insurance Co. v. John H. Hampshire, Inc.,* LEXIS 83418 (D. Md. Sept. 7, 2006), a performance bond surety sought monetary damages from the owner's architect based upon allegations that the architect was negligent in its inspection and acceptance of the work duties. The architect moved to dismiss, arguing that it owed no duty to the surety and, thus, could not be liable in negligence. Under the economic loss rule, where only economic loss is alleged, no tort duty will be found absent contractual privity or an equivalent relationship between the parties. The surety argued that it was entitled to rely on the architect's inspections under the totality of the circumstances and that such was a sufficient equivalent relationship. The court rejected this argument, finding that the architect's duty of due care in inspecting the work extended only "to those persons forseeably subjected to the risk of personal injury," and that the surety was not among that group. Thus, the court concluded, no relationship existed on which a tort duty for monetary damages could arise and the architect could not be liable in negligence.

3. *Montgomery Mutual Insurance Co. v. Chesson*, 170 Md. App. 551, 907 A.2d 873 (2006) involved extensive litigation over the health impacts of toxic mold discovered in conjunction with "sick building syndrome." The Court of Special Appeals of Maryland considered the application of the *Frye-Reed* doctrine to a doctor's diagnosis. The Court drew a distinction between the doctor's methodology in reaching a conclusion and the conclusion itself. "[E]ven unpopular conclusions are admissible so long as they are based upon generally accepted methodologies." Observing other cases that concluded expert opinions concerning the cause or origin of an individual's condition were not

subject to *Frye–Reed* analysis, the Court found no error in denial of the motion to exclude.

4. *Brendsel v. Winchester Constr. Co.,* 392 Md. 601, 898 A.2d 472 (2006) involved a dispute between a contractor and an owner in a cost-plus contract utilizing the "AIA A117-1987 Abbreviated Form of Agreement Between Owner and Contractor," along with the "A201 General Conditions." Aware that the statutory time limit for filing a mechanic's lien action was approaching, the contractor filed suit as settlement negotiations between the parties occurred. When no settlement was reached, the contractor moved to compel arbitration as contemplated in the contract documents. The owner opposed the petition to compel arbitration, arguing that by seeking a mechanics' lien and by failing to make a timely demand for arbitration after work was completed the contractor had waived its right to arbitration. On appeal, the Court held that the right to arbitrate, like other contractual rights, may be waived by clear and unequivocal acts. Invocation of the mechanics' lien statutes may, in certain circumstances, be sufficient to demonstrate waiver. However, the Court concluded that the construction contract, the consent motion and the contractor's pleadings consistently maintained that the matter was subject to arbitration from which the Court concluded no intent to waive the right to arbitration could be inferred.

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Legislation:

1. Maryland's Mechanic's Lien Laws

House Bill 1060 passed both houses of the Maryland General Assembly and was signed into law modifying MD Code Ann., Real Prop. § 9-102 to explicitly include among the work entitled to protection under Maryland's Mechanics' Lien statute professional services for the design and construction of land improvements. The bill specifically adds "the provision of building or landscape architectural services, engineering services, or land surveying services" to the language of the statute delineating those entitled to its protections. This codifies judicial interpretation of the law which had previously extended protection to architectural services in *Caton Ridge v. Bonnett,* 245 Md. 268 (1967), and engineering and land surveying in *Peerless v. Prince George's County*, 248 Md. 439 (1968).

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Michigan

Case law:

1. In *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36, 38; 709 N.W.2d 589 (2006), the Michigan Supreme Court altered the landscape for periods of limitation in connection with negligence claims brought against design professionals and contractors. The Court was asked to decide whether MCL 600.5839 was: (1) only a statute of repose, in which case a shorter statute of limitations period applied; or (2) both a statute of repose and a statute of limitations. The *Ostroth* Court determined that MCL

600.5839 was both a statute of repose and a statute of limitations, and that a professional negligence action may be maintained six years after the occupancy, use or acceptance of the improvement against licensed architects. The decision has essentially lengthened the statute of limitations period during which professional and ordinary negligence claims may be brought against design professionals and contractors. Prior to the *Ostroth* decision, architects and design professionals enjoyed a two-year statute of limitations period for professional negligence claims and contractors enjoyed a three-year statute of limitations period for ordinary negligence claims, while MCL 600.5839 was only viewed as a statute of repose, or cut off period, for claims against design professionals and contractors. *See*, *e.g.*, *Witherspoon v. Guilford*, 203 Mich. App. 240 (1994).

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Legislation:

Minnesota

Legislation:

1. Minnesota Public Contracting Amendments

In 2005, a coalition of industry groups and public agencies in Minnesota changed the rules of public procurement in the state. They successfully lobbied for legislation allowing the Department of Administration, Minnesota State Colleges and Universities and the University of Minnesota to use design-build, construction management at-risk, and a new creation called *Purchase Order Contracting* as delivery systems for public projects. The basis for award under these new systems is not low bid, but "best value." A full discussion of the amendments is beyond the scope of this summary, but the entire article written by Mr. Thomson is available on the Division 10 website.

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Missouri

Legislation:

As of January 2007, the following House and Senate bills were "pending" in the Missouri Legislature:

1. HB 88, which gives the state highways and transportation commission the authority to implement electronic bidding on state highway system projects.

2. HB 127, which provides an exemption from sales tax for all sales and purchase of tangible personal property, utilities, services, or other transaction made by a contractor for the use in fulfilling United States government contracts.

3. SB 52, which authorizes the Missouri Highways and Transportation Commission to make electronic bids for highway and bridge contracts and accept annual bid bonds for commission construction and maintenance projects.

4. SB 92, which establishes a time limit for claims made for damages to underground facilities in the event that such damage was incurred during excavation. The proposed law would require a claim be made within ninety days of the facility repairs being completed and no longer than one hundred eighty days after the excavator notifies the owner of the underground facility that damage has occurred. The new law also would allow underground facility owners to make temporary repairs to any facilities damaged, if the owner chooses to do so, then the one hundred eighty day limit may be extended for any claim pertaining to permanent repairs. SB 92 also requires any excavator who has been presented with a claim to pay the claim within ninety days after the claim has been received. When disputed, the excavator is required to put in writing reasons for the dispute and deliver it to the underground facility owner within ninety days after the claim has been received. The bill creates a rebuttable presumption in any attempt to collect the claim that the excavator owes the amount claimed if the written dispute has not been delivered within the ninety day period.

5. SB 155, which regulates various blasting and excavation activities. The bill requires individuals who use explosives to have a blaster's license or be supervised by a person with a blaster's license, with exceptions as listed. The act directs the Division of Fire Safety to create a blaster's licensing program. The act lays out qualifications for license applicants, which include completing an approved blaster's training course and passing a licensing examination. Licenses are valid for three years and may be renewed upon the applicant meeting renewal requirements as specified in the act. Blaster's licenses shall be required within 180 days of the division promulgating licensing rules.

6. SB 157 modifies the laws pertaining to dam and reservoir safety. The bill creates and defines three hazard classifications for dams and reservoirs: high hazard, significant hazard, and low hazard. The act limits the permitting and inspection requirements to only dams of high and significant hazards.

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Nevada

Legislation:

1. Private Work Prompt Payment Act

What has commonly been referred to as the Nevada Private Work Prompt Payment Act, but is officially known as “RIGHTS, DUTIES AND LIABILITIES UNDER CERTAIN AGREEMENTS FOR WORKS OF IMPROVEMENT” (the “Act”), is set forth in Sections 624.606 through 624.630 of the Nevada Revised Statutes. The expansive and remedial changes to Chapter 624 enacted in 2001, and subsequently amended in 2005, have resulted in a paradigm shift in the Owner’s and general contractor’s obligations relating to payment.

Although a full discussion of the Act is beyond the scope of this summary—and the entire article written by Mr. Lewis is available on the Division 10 website—some comments regarding the 2001 amendments and 2005 revisions are worth noting:

(a) The risk of non-payment has shifted to the Owners. Gone are the Owner's rights to withhold payment for liquidated damages, the absence of an updated schedule, insurance or required bonding, or reasonable evidence that the work can be completed for the unpaid balance of the contract sum or within the contract time. If the work of the lower-tiered subcontractor is defective, the Owner can withhold only to the extent that the cost of the remediation exceeds 50 percent of the retainage.

(b) "No damage for delay" provisions are, pursuant to Sections 624.622(2) and 624.628(3), void and unenforceable. Notice provisions that require the prime contractor or lower-tiered subcontractor to notify the other party of an agreement of an impact or be barred from bringing a claim would, thus, seem unenforceable. *Force Majeure* provisions that limit the prime contractor or lower-tiered subcontractor to a time extension only may be equally susceptible to challenge.

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New Jersey

Legislation:

1. New Jersey Expands its Prompt Payment Laws

New Jersey has amended its prompt payment statute governing construction contracts, NJSA 2A:30A-1 and 2. It applies to both public and private work. In addition to setting specific times within which payment must be made for construction work, the statue also makes New Jersey the exclusive venue for payment disputes involving construction projects in New Jersey. A prevailing party in such an action is entitled to an award of attorney's fees. The statue covers payments due prime contractors, defined as a person who contracts with an owner to improve real property, down through second tier subcontractors and suppliers. Improving property is broadly defined and includes the services of licensed professionals.

Payment requests are known as a "billing" under the statue and are defined by the parties' contract. A billing includes periodic payments, final payments, written approved change orders and requests for release of retainage. If a prime contractor has performed in accordance with the contract with the owner, and the contractor's billing has been approved, the owner must pay the amount due within 30 days of the "billing date" as specified in the contract. Billings are deemed approved 20 days after receipt unless the owner, within 20 days of receipt of the billing, provides the prime contractor with a written statement of the amount withheld and the reasons. A public owner whose governing body must vote on authorizations to make payments may provide in its bid specifications and contract documents that billings will be voted on at the next scheduled meeting and paid during the subsequent payment cycle. If only a portion of the work is considered unacceptable, payment may be withheld for the reasonable value of that portion only.

Prime contractors are obligated to pay subcontractors, and subcontractors must pay subsubcontractors within 10 days of their receiving payment, unless by written contract the parties have provided otherwise.. The amount paid must be the full amount received for the work of the subcontractor or subsubcontractor. Partial payments for ongoing projects are only payable if the payee is performing to the satisfaction of the payor. Unlike owners, prime contractors and subcontractors withholding payments are not under a specific obligation to provide a reason for the withholding, but if they do not the party who is not paid may have the right to suspend work until paid.

A party not making timely payment is liable for interest on the amount due at the prime rate, plus 1%.

The right to suspend work if not paid is not absolute. In addition to not receiving a payment, the party looking to suspend work must have also not gotten a written statement of the amount withheld and the reason. And, the payor must not be "engaged in a good faith effort to resolve" the dispute. What constitutes a good faith effort is not defined. A party intending to suspend work must provide 7 days written notice of its intent to do so. The section of the statue governing the right to suspend work does not apply to certain federally funded transportation projects.

As noted, the statue makes several references to the parties' contract, but does not mandate the parties have a written contract. It does however mandate that all contracts for the improvement of structures within New Jersey contain language regarding alternative dispute resolution for payment disputes. Exactly what type of ADR, if any, the statue requires is not entirely clear.

As originally drafted, the statue required that payment disputes be submitted to binding arbitration under the American Arbitration Association's expedited arbitration rules. In its final form, the language requiring binding arbitration was replaced by language providing that construction contracts "shall" provide that payment disputes "may" be submitted to "alternative dispute resolution".

The deletion of the arbitration requirement may have inadvertently created differences between litigation and arbitration of construction contract disputes, making litigation more attractive. Civil actions to collect payments under the statue must be brought in New Jersey and the prevailing party is entitled to an award of attorney's fees. Language making these provisions applicable to arbitration was deleted from the version signed into law. Presumably, arbitrations need not be conducted in New Jersey, but there may be no right to collect attorney's fees, unless the contract or arbitration clause provides otherwise.

The language mandating civil actions be conducted inside New Jersey applies to civil actions brought to collect payments under the prompt payment statute. However, New Jersey's Entire Controversy Doctrine, which requires that all aspects of a dispute between parties to litigation be included in a single action, will effectively mean that all construction litigation involving New Jersey projects be conducted within New Jersey.

The statute applies to all contracts entered into as of September 1, 2006.

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New Mexico

Case law:

1. *Mid America Constr. Mgmt, Inc. v. Mastec North America, Inc.*, 436 F.3d 1257 (10th Cir. 2006) involved a claim by an Oklahoma subcontractor against two foreign general contractors for the installation of fiber optic lines in Texas and New Mexico The Owner failed to pay the general contractors, who similarly failed to pay the subcontractor for the work performed. The district court granted summary judgment to the general contractors based on a pay-if-paid clause contained in the subcontract. On appeal, the Tenth Circuit was asked to consider whether New Mexico would enforce a pay-if-paid provision, particularly in light of the New Mexico Retainage Act, N.M.S.A. 1978, §57-28-1 et seq. There were no prior decisions out of New Mexico as to whether pay-if-paid clauses were enforceable. The Court found that the Retainage Act did not affect either positively or negatively the enforcement of pay-if-paid clauses. After considering the laws of other jurisdictions, the Court found that the provision was enforceable as drafted under New Mexico law.

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North Carolina

Case law:

1. *James River Equipment, Inc. v. Tharpe's Excavating*, Inc., 634 S.E.2d 548 (N.C. App. 2006). A rental company that rented equipment to a subcontractor on a public project could pursue a materialmen's lien on funds against funds held by the general contractor at the time the general contractor learned that the surety that issued the statutorily required payment bond was insolvent. The rental company was not, however, entitled to lien on funds that the Board of Education held at the time that the Board learned that surety that issued payment bond was insolvent because the lien statute does not apply to public bodies.

2. *West Durham Lumber Company v. Meadows*, 635 S.E.2d 301 (N.C. App. 2006). Although plaintiff had a valid claim of lien that attached to the Property, and such lien was superior to the balance from the deed of trust that the developer did not use to purchase the Property, plaintiff's lien was junior to a portion of the bank's deed of trust. Therefore, when the bank foreclosed on the property, the foreclosure sale instituted to satisfy the purchase money loan extinguished plaintiff's junior materialmen's lien. As plaintiff failed to take the steps necessary to perfect a claim against the surplus proceeds from the foreclosure sale, plaintiff did not have a valid and effective lien upon such funds.

3. *Carolina Bldg. Services Windows & Doors, Inc. v. Boardwalk, LLC*, 631 S.E2d 893 (N.C.App. 2006) (*unpublished*). An owner's default judgment against a general contractor obtained in the same action in which a subcontractor has asserted a claim of lien on funds has no bearing on the subcontractor's claim of lien on funds. The owner's

default judgment against the general contractor does, however, defeat the subcontractor's subrogated claim of lien against the owner's real property.

4. *O&M Industries, v. Smith Engineering Co.*, 360 N.C. 263, 624 S.E.2d 345 (N.C. 2006). An owner is personally liable to a subcontractor if the owner made a wrongful payment to the general contractor after owner received notice of the subcontractor's materialman's lien, even if amount retained by owner exceeded amount of lien claim.

Additional comments - The *O&M Industries* Court held that the owner had a duty to retain project funds upon receipt of proper notice from the subcontractor. The Supreme Court concluded that the critical time for determining whether there was any amount owed to the general contractor for purposes of determining the owner's liability to the subcontractor for "wrongful" payments was when the owner received the claim notice from the subcontractor and not when the project is completed and all set offs and backcharges assessed.

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Additional comments regarding O&M Industries decision submitted by: A. Holt Gwyn & Paul E. Davis, Conner Gwyn & Schenck PLLC, 2626 Glenwood Ave., Suite 180, Raleigh, NC 27608, (919) 789-9242, www.cgspllc.com

Legislation:

1. Lien Laws

Chapter 44A, Article 2, Parts 1 and 2, were ratified effective October 1, 2005. There were changes to numerous sections of the lien law were primarily intended to clarify the lien law. Although most of the changes are technical, there are substantive changes as well. The changes to the lien law apply to "Claims of Lien on Real Property" filed, and "Notices of Claims of Lien Upon Funds" served on or after October 1, 2005.

The amendments also clarify that it is against public policy to require a party to waive the right to claim a lien on project funds as consideration for obtaining a contract. Prior law only referenced the claim of lien on real property as being subject to this prohibition.

In addition, the amendments created a mechanism to discharge a lien upon funds similar to the existing procedure to discharge a claim of lien upon real property.

2. Public Contracts

N.C. Gen. Stat 115C-531 - Allows local school administrative units to enter into capital leases for school facilities and allows for those leases to contain an agreement relating to construction, repairs, or renovations. In doing so, the act contains two exceptions to existing law. Under current North Carolina law, no local board of education may contract for the erection of a school facility unless the property on which the building is to be located is owned in fee simple by the local unit. In addition, under current law, all construction and repairs must be under the control and direction of the local board of education. This act clarifies that when the building is the subject of a capital lease, the

board is not required to own the property and the lease may provide that the lessor is responsible for repairs and renovations.

3. Wastewater Contractors/Inspections

N.C. Gen. Stat. 90A-70 et. seq. - Requires the construction, installation, repair, and inspection of on-site wastewater systems in the State to be conducted by a certified on-site wastewater contractor or inspector.

4. Drinking Water Wells

N.C. Gen. Stat. 87-85 et. seq. - Establishes permitting, inspection, and water quality testing requirements for new private drinking water wells. The act provides for consistent statewide enforcement of regulations governing the location, construction, operation, repair, maintenance, and abandonment of private drinking water wells.

5. Licensing Requirements

N.C. Gen. Stat. 136-28.14 et. seq., 87-1.1, and 120-270 et. seq. - Amendments to these laws now exempt specified Department of Transportation (DOT) maintenance and repair contracts from general contractor licensing requirements, clarify an exception for heating and plumbing contractors and electrical contractors from certain licensing requirements when bidding directly on public building projects, and revise the State's policy concerning participation by disadvantaged minority-owned and women-owned businesses in highway construction contracts.

6. Preferences for N.C. Participants in Public Contracts

N.C. Gen. Stat. 143-64.31 - Provides that North Carolina architectural, engineering, surveying, and construction management firms must be given a preference in the award of contracts over nonresident firms in the same manner and to the same extent that a preference is granted in awarding contracts for these services by the other state to its resident firms. A North Carolina resident firm is one that has paid unemployment taxes or income taxes in North Carolina and whose principal place of business is located in this State.

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South Carolina

Case law:

1. In *Sloan Constr. Co. v. Southco Grassing, Inc.*, 629 S.E.2d 372 (S.C. Ct. App. 2006), the Court of Appeals held that South Carolina's binding scheme on state projects did not grant a subcontractor the right to bring a private action against a violating state agency. Thus, despite the statutes requiring a bond, the government agency was not held liable for its failure to require a payment bond.

The *Sloan* court viewed Section 57-5-1660(a)(2) of South Carolina's "Little Miller Act" and §29-6-250—both of which require the procurement of payment bonds for certain government projects—in light of the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 –200 (2005). Normally the State is immune from suit, however the Act grants a limited waiver of the State's sovereign immunity in certain situations "in the same manner and to the same extent as a private individual under like circumstances." Applying the Act to the facts in the case, the Court found that the bonding statutes dealt solely with government contracts and a private individual could never find itself in a position to be liable for failure to require the statutorily mandated bonds. Therefore, the Court held the Act's waiver of sovereign immunity did not apply to suits brought under these bonding statutes. The Court also stated that if the legislature desired South Carolina's bonding scheme to allow private actions against the government, then it could have easily called for such.

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Legislation:

1. Design-Build Approved for Highway Construction

South Carolina Code § 57-5-1625 was passed retroactively effective June 14, 2005 to establish that the Department of Transportation (DOT) may award highway construction contracts using a design build procedure. Selection criteria under the statute shall include project cost, and may include contractor qualifications, time of completion, innovation, design and construction quality, design innovation and other technical or quality related criteria. The intent of the statute is to provide the DOT with more flexible bidding alternatives in place of the more common and rigid closed sealed bidding. An unsettled issue will be how the courts interpret the criteria provisions. As it is currently written, the only criteria that is required is project cost, all others "may" be included.

2. Right to Cure for Commercial Contracts

South Carolina Code §§40-11-500–570 were added to afford contractors, subcontractors, suppliers and design professionals that have supplied materials for, or performed construction services on, a nonresidential construction project with a mandatory period in which a claimant must allow the respondent an opportunity to offer to settle or remedy a construction defect.

Before a claimant may proceed with filing a civil suit, arbitration or other such action, he must follow the steps outlined in the Act. First under § 40-11-530, the claimant must serve a written notice upon the contractor, subcontractor, supplier and/or design professional stating that he is asserting a construction defect, describing the defect, and the results of the defect if known. The recipient has 15 days from receipt of the claim to request further clarification, otherwise, the recipient has 60 days to inspect, offer to remedy, offer to settle with the claimant, or deny the claim regarding the alleged defects. The claimant must then serve a response within 10 days of said offer. If the parties cannot agree to settle the dispute within 90 days after service of the initial notice, then the claim is considered denied and the claimant may proceed with filing an action or other remedy. The Act does not apply to actions arising from claims for personal injury or death. The Act also does not affect one's ability to file and perfect a mechanic's lien, and it tolls the applicable statute of limitations and statute of repose.

The Act is intended to benefit all parties to a nonresidential construction defect case by providing the parties with sufficient opportunity and means to settle their claims without having to resort to litigation.

3. Public Contracting Amendments

Section 11-35-25 was added providing that the Procurement Code supersedes any and all other conflicting laws. Section 11-35-1520 was amended to provide that sealed bid procedures must be used for contracts greater than $50,000 (it was previously $25,000); increase the level at which an intent to award is required from $50,000 to $100,000, and shortens the intent to award period from 16 days to only 10; and, discontinued the requirement that a request for qualifications prior to an invitation for bids be approved by the Office of the General Services.

Section 11-35-1530 amended the request for proposal procedures to allow discussions with offerors who submitted proposals determined to be "reasonably susceptible of being selected for award"; allows for negotiations with the highest ranking offeror to include both "matters affecting the scope of the contract" and price.

Section 11-35-1550 increased the small purchase threshold from $25,000 to $50,000; the lower thresholds were amended so that less than $2,500 requires no competitive quotes, $2,500–$10,000 requires solicitation of written quotes from at least 3 qualified sources, $10,000–$50,000 requires South Carolina Business Opportunities advertisement at least once and a copy of the solicitation and quotes must be attached to the purchase requisition.

Section 15-35-1825 that allows for the prequalification of contractor, now allows for the prequalification of subcontractors for projects unique in nature or over $10,000,000 in value as well. In section 11-35-3020 the procedures for awarding construction contracts have been amended to shorten the intent to award period to 10 days; and, increase the authority to negotiate after an unsuccessful competitive sealed bidding from 5% to 10% above available funds when circumstances do not permit the delay required to resolicit competitive sealed bids.

Section 11-35-3030 amended the bid security requirement to require bidding security for all competitive sealed bidding for contracts in excess of $50,000 (was

$100,000); and, performance and payment bonds are to be provided for a project if the construction contract is over $50,000.

Section 11-35-3220 changed the procedures for selecting an architect, engineer or land surveyor; selection and ranking of firms shall be based on the 3 most qualified (was 5); and, two criteria were added that the agency selection committee shall use to evaluate each of the persons or firms interviewed. Section 11-35-3230 now allows state agencies to award contracts for architectural, engineering or land surveying services without approval of the State Engineer's Office where the amount is less than $25,000, but it must still be submitted for information.

Section 11-35-4210 the right to protest has been changed shortening the time bidder may protest an award from 15 to 10 days; protests for awards of potential value less than $50,000 are disallowed; and, the chief procurement officer is required to commence its administrative review of a protest within 15 days after the end of the protest period.

Section 11-35-4410 requires the Procurement Review Panel to be convened or an administrative review hearing scheduled within 15 days of a grievance being filed; and, the time allowed for the procurement review panel to publish its decision is shortened to 10 working days on non-complex matters.

Section 11-35-5220 allows the chief procurement officers to waive certain user and subscription fees for MBE's. Section 15-35-5230 increased the MBE tax credit from a maximum of $25,000 to $50,000 annually, and firms are eligible to claim the tax credit for 10 years instead of the prior 5 years. Section 15-35-5240 set the goal for agency spending with certified MBE's at 10%. Finally, section 12-6-3350 was amended so that the tax credit limitation on subcontracting with minority firms was raised from $25,000 to $50,000, and can now be claimed for ten years instead of the prior six year limitation.

4. Mechanic's Lien Provisions

S.46 – The General Assembly passed a bill allowing commercial real estate agents to file a mechanic's lien where under a written agreement with the Owner they have provided professional services consisting of marketing, developing, or improving commercial real estate preparatory to or as a part of a commercial real estate lease or rental transaction.

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Tennessee

Case law:

1. In *Travelers Indemnity Company of America et al. v. Moore & Associates Inc.*, __ S.E.2d __ (Tenn. 2007), the Tennessee Supreme Court ruled as a matter of first impression that water penetration resulting from faulty window installation was an "occurrence" under the policy and, thus, the insurer had a duty to defend the contractor

against the claim of faulty workmanship. In this case, the subcontractor's faulty installation of windows resulted in substantial water damage to the construction project. Consequently, the prime contractor's insurance carrier sought a declaratory action that it had no duty to defend or indemnify the prime contractor against claims raised for the defective work performed by the subcontractor.

2. In *Charles Hampton's A-1 Signs, Inc. v. American States Ins. Co.*, 2006 WL 3827319 (Dec. 28, 2006, Tenn. Ct. App.), the plaintiff installed steel structures that held up billboard signs. On one of the sign structures, the sign fell from its pole after installation. A subsequent investigation indicated that all sign poles fabricated by a particular sub-contractor had defective welds. The Court of Appeals held that physical damage arising out of and confined to defective welds performed by an insured was not covered under a commercial liability policy or an umbrella policy.

3. *Hubert v. Turnberry Homes LLC,* 2006 WL 2843440 (Oct. 4, 2006, Tenn. Ct. App.), involved the enforceability of an arbitration clause in a residential construction contract. After the construction was completed, the purchasers filed suit against the builder, alleging numerous construction defects and code violations. The builder moved to compel arbitration pursuant to the contract's arbitration clause. When the purchasers argued that the arbitration clause was invalid because they had not separately signed or initialed it as required by the Tennessee Uniform Arbitration Act, the builder asserted that the Federal Arbitration Act, rather than the Tennessee Uniform Arbitration Act, governed the parties' agreement to arbitrate. The trial court denied the builder's motion to compel arbitration without explanation, and the builder appealed. The appellate court determined that the Federal Arbitration Act preempts the Tennessee Uniform Arbitration Act except insofar as the purchasers' fraudulent inducement claim is concerned.

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Utah

Case law:

The following cases are noteworthy for those attorneys practicing construction law in Utah.

1. *Ellsworth v. American Arbitration Association*, 2006 WL 3488912 (Utah 2006). Homeowner husband was not bound by arbitration agreement contained in construction contract which contained his name, but which he did not sign. The construction contract was signed only by homeowner wife, who was bound by arbitration agreement.

2. *Yazd v. Woodside Homes Corp.*, 143 P.3d 283 (Utah 2006). Discusses duty of disclosure owed by developer-builder to buyers of real property; fraudulent concealment.

3. *Ellsworth Paulsen Const. Co. v. 51-Spr, L.L.C.*, 144 P.3d 261, 559 (Utah 2006). Discusses mechanic's lien filing deadline (old law); abuse of lien statute; lien waivers; and interest (distinction between contractual interest and prejudgment interest).

4. *John Holmes Const., Inc. v. R.A. McKell Excavating, Inc.*, 2006 WL 496244 (unpublished decision). Holds that if mechanic's lien is unenforceable, unjust enrichment claim may be available.

5. *Cedar Professional Plaza, L.C. v. Cedar City Corp.*, 131 P.3d 275 (Utah App. 2006). Damages caused by construction activities; Governmental Immunity Act.

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Legislation:

The following is a list of construction-related legislation passed by the Utah Legislature in the 2006 session:

1. HB 26 – This bill clarifies a cross reference and makes some technical changes to the Utah Mechanic's Lien Statute. The most significant change appears to be that mechanics' liens be filed within 90 days "after," instead of "from," the date of final completion of the original contract.

2. HB 132 – This bill modifies land use and impact fees provisions in the Utah Municipal and County Land Use, Development and Management Acts.

3. HB 160 – This bill modifies the Utah Mechanic's Lien Statute and the Utah Uniform Building Standards Act by addressing unenforced and wrongful liens and amending provisions related to the State Construction Registry.

4. HB 267 – This bill modifies the Utah Procurement Code by amending provisions related to the procurement of construction and transportation projects.

5. SB 92 – This bill modifies the Utah Construction Trades Licensing Act by requiring the certification of crane operators.

6. SB 161 – This bill modifies the waiver provisions of the Utah Mechanic's Lien Statute.

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Virginia

Case law:

1. In *W. R. Hall, Inc. v. Hampton Roads Sanitation District*, __ S.E.2d __ (Mar. 2, 2007), the Virginia Supreme Court enforced an indemnification clause in a construction contract pertaining to future personal injury. The contractual allocation of risk did not violate the public policy of the state.

2. In *Baker v. Poolservice Co*, 272 Va. 677, 636 S.E.2d 360 (2006), a service provider's demurrer in wrongful death action was sustained because Virginia law did not impose upon the service provider the legal duties that the personal representative

alleged. Virginia Code Ann. § 8.01-250 barred the claim against the manufacturer because the spa drain cover was "ordinary building material" covered by the statute of repose.

3. In *Norfolk Redevelopment & Hous. Auth. v. C & C Real Estate, Inc.*, 272 Va. 2, 630 S.E.2d 505 (2006), a condemnation by a redevelopment authority was dismissed as it gave a property owner no notice, under Virginia. Code Ann. § 36-50.1(2), to correct its property's blight. The time between finding the blight and the condemnation did not alter the taking's reason, violate a limitations period, or cause unfair compensation, so due process was not offended.

4. In *Cherrystone Inlet, LLC v. Bd. of Zoning Appeals*, 271 Va. 670, 628 S.E.2d 324 (2006), the Virginia Supreme Court held that variances to permit residential construction on five lots of an owner's land that were rendered unbuildable by overlapping setbacks imposed under the Chesapeake Bay Preservation Act (Act) were properly denied by the Board of Zoning Appeals. The lots did not exist when the Act was passed, and the denial did not interfere with all reasonable beneficial uses of the land.

5. In *GiniCorp v. Capgemini Gov't Solutions, LLC*, 2007 Va. Cir. LEXIS 5 (Fairfax County, Jan. 2, 2007), the contractor was awarded judgment on a subcontractor's breach of contract claim because the subcontractor could not recover lost profit damages as the contractor rightfully invoked a termination for convenience clause in the contract. The subcontractor was awarded termination/delay damages because the contractor failed to comply with the contract.

6. In *Connemara Corp. v. St. Andrews, LLC*, 2006 Va. Cir. LEXIS 295 (Fairfax County, Nov. 27, 2006), the bank's demurrer to a construction company's unjust enrichment claim was sustained because the bank validly foreclosed on the debtor's property under a deed of trust, but the company failed to perfect a lien for its work on the debtor's property, and the court could not put the company in a superior position in equity than it would have been in law.

7. In *Modern Cont'l S. v. Fairfax County Water Auth.*, 2006 Va. Cir. LEXIS 263 (Fairfax County, Nov. 21, 2006), a contractor's motion for reconsideration was denied as case was not akin to *Spearin* in that contractor agreed that it would determine if there were any problems in contract documents. Contractor's claim that it should not have been expected to discover discrepancies in contract documents by exercising reasonable diligence was unconvincing.

8. In *Stromberg Sheet Metal Works, Inc. v. United States Fid. & Guar. Co.*, 71 Va. Cir. 122 (Fairfax County, June 13, 2006), a sheet metal company, hired by subcontractor, fell within criteria for claimant under Va. Code Ann. § 2.2-4341(A), and thus company could recover against general contractor's payment bond. Even if surety was correct that language of bond was more general than Virginia law required, there was no conflict with Virginia Public Procurement Act.

9. In *T & M Elec. v. Prologis Trust*, 70 Va. Cir. 403 (Loudoun County, Apr. 27, 2006), the court held that because a tenant did not act as an owner's agent in ordering or authorizing improvements to the owner's property, pursuant to Va. Code Ann. § 43-20, the subcontractors and the general contractor were limited in recovery of their mechanics' lien and quantum meruit claims to the tenant's leasehold interest.

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Legislation:

1. Licensing

HB1801 authorizes the Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects to issue cease and desist orders for unlicensed activity. The bill provides for a right of appeal of the Board's issuance of such an order and specifies the civil penalty.

HB2757 exempts from the contractor licensing requirements work undertaken by students as part of a career and technical education project as defined in § 22.1-228 established by any school board in accordance with Article 5 (§ 22.1-228 et seq.) of Chapter 13 of Title 22.1 for the construction of portable classrooms or single family homes.

HB3162 requires the certification of elevator mechanics in order for them to practice their trade. The bill requires the Board for Contractors to issue temporary certifications in the event of a work stoppage or emergency under certain conditions. The bill contains technical amendments.

2. Public Contracts

HB2137 requires the Division of Purchases and Supply of the Department of General Services, the CIO of VITA, and the Director of SCHEV to solicit from each state agency under their respective control a list of all procurements conducted by an agency that were competed with the private sector by October 1, 2009. The bill also requires that the Commonwealth Competition Council update its commercial activities list every two years.

HB2380 provides that the governing body of a locality may, notwithstanding the provisions of the Virginia Public Procurement Act, negotiate and award a contract without competition to an entity that is constructing road improvements pursuant to a special exception condition in order to expand the scope of the road improvements by utilizing cash proffers of others or other available locally generated funds. This bill contains an emergency clause.

HB1917 failed passage by the General Assembly. The Bill would have required prospective vendors for state service contracts to disclose the location where services will be performed under the contract, including any subcontracts, and whether any services under the contract, including any subcontracts, are anticipated to be performed outside of the United States. In addition, the bill provides that the state public body may consider the disclosure of the prospective vendor and the economic impact to the Commonwealth and its citizens in awarding the contract or evaluating the bid or offer. Under the bill, if the vendor subsequently changed the location where the services are performed to a location outside of the Untied States, then the vendor would be in breach of the contract unless the public body made a written determination that circumstances required the change in location or termination of the contract would not be in the best

interest of the Commonwealth. The bill also provided for the Department of General Services to submit to the Governor and General Assembly by September 30 of each year a report detailing the impact of outsourcing services on the procurement cost of the Commonwealth.

3. Mechanic's Liens

HB2579 adds a certification of mailing to Virginia Code Ann. § 43-5, the statutory form for a memorandum for mechanic's lien claimed by a general contractor. This bill also adds a statement to the statutory mechanic's lien forms for general contractors, subcontractors (§ 43-8), and sub-subcontractors (§ 43-10) that provides that it is the intent of the claimant submitting the form to claim the benefit of a lien. These statements and the certification are required to be in a mechanic's lien memorandum under § 43-4.

HB2580 clarifies that subcontractors and sub-subcontractors are not subject to the same requirement as are general contractors to file along with a memorandum of lien a certification of mailing of a copy of the memorandum of lien on the owner of the property at the owner's last known address.

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Washington

Case law:

1. In *1000 Virginia Limited Partnership v. Vertecs Corporation*, 158 Wn.2d 566, 146 P.3d 423 (2006), the Washington Supreme Court held that the "discovery rule" was applicable to actions alleging breach of a construction contract, where latent defects in completed projects are alleged.

2. In *Ballard Square Homeowner's Association v. Dynasty Construction Company*, 158 Wn.2d 603, 146 P.3d 914 (2006), the Washington Supreme Court held that the amended statute of limitations for bringing claims against dissolved business entities applied retroactively and, thus, barred a suit against a condominium developer. The Supreme Court upheld a Court of Appeals decision that affirmed a grant of summary judgment by a trial court on the grounds that the defendant, a corporation and developer of a condominium project was immune from suit because it had been administratively dissolved for more than two years before the action was initiated, and under the then-existing statute of limitations, could not be pursued. This case is important because of the number of "single purpose entities" organized for the development and/or construction of individual projects. While the applicable statutes of limitations and repose in Washington provide a number of years following a project's completion to bring an action, such action may not be able to be brought for that same period if that entity has been dissolved.

3. In *Scoccolo Construction, Inc. v. City of Renton*, 158 Wn. 2d 506, 145 P.3d 371 (2006), the Washington Supreme Court ruled that a contractor is entitled to compensation under its public works contract with a municipality, despite a "no damages for delay" clause, if the contractor's work is impacted by the City or some person or entity acting for the City.

4. In *Henifin Constr., L.L.C. v. Keystone Constr., G.W., Inc.*, *et al.*, 145 P.3d 402 (Wn. App. 2006), the Court held that a subcontractor's lien was enforceable against the owner of real property, despite the lack of owner authorization to perform the work for which the lien was recorded. The subcontractor recorded a lien on a project owner's property after not having been paid for the removal and replacement of unacceptable foundation soils. The work performed by the subcontractor was authorized by the project's general contractor, and was included in a series of executed subcontract change orders. The general contractor received no corresponding change order for the additional earthwork from the project owner. Ultimately, the Court of Appeals held that because the work the subcontractor did "improved" the owner's property, and was done upon the authorization of the owner's "construction agent," the subcontractor's lien was enforceable.

Submitted by J. Todd Henry, Oles Morrison Rinker & Baker LLP, 701 Pike Street, Suite 1700, Seattle, WA 98101, (206) 623-3427, henry@oles.com

Legislation:

1. Statutory Initiatives

A number of construction-related bills were introduced during the 2005-06 legislative session. Though many of them were left to be considered during the next session, initiatives were made on topics including: (a) whether construction contracts providing that a party waives its claims absent strict compliance with written notice provisions should be unenforceable unless the party to receive the notice is prejudiced; (b) clarification of the condominium construction defect statute of limitations; and (c) the potential elimination of a homeowner "paying twice" as a result of a subcontractor's or material supplier's lien claim.

2. Washington Condominium Act

The Legislature passed EHB 1848, signed into law by Governor Gregoire on May 13, 2005 and effective as of August 1, 2005. That bill amends several sections of RCW 64.34, the Washington Condominium Act, and requires that building envelope inspections be conducted as a part of any new condominium construction as well as any conversion of existing properties to condominiums. The new law also includes specific requirements for condominium design drawings, definitively demonstrating how the building's exterior is to be constructed.

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Wisconsin

Case law:

1. In *James Cape & Sons Co. v. Mulcahy*, 285 Wis. 2d 200, 700 N.W.2d 243 (2005), a contractor was permitted to withdraw its bid and retain its bid bond after bid opening based on prompt notice of bid error beyond the contractor's control, but was not permitted to amend its bid with correct information to retain its position as lowest bidder.

2. In *Hoida, Inc. v. M&I Midstate Bank*, 291 Wis. 2d 283, 717 N.W.2d 17 (2006), the court held that a subcontractor could not maintain a negligence action as a third-party beneficiary against a bank that provided construction lending for the project on which the subcontractor worked because the bank's failure to obtain lien waivers before funding draw requests of the general contractor was not a breach of ordinary care. In addition, as a matter of judicial public policy, the subcontractor could not maintain a negligence action against the bank's disbursing agent, a title company, which acted solely at the direction of the bank.

3. In *1325 North Van Buren, LLC v. T-3 Group, Ltd.*, 2006 WI 94, 716 N.W.2d 822 (2006), the court held that a developer was barred from bringing a negligence claim against a construction manager for negligent provision of professional services under the economic loss doctrine, but the developer's contract claims against the construction manager were viable and also within coverage of the construction manager's professional liability insurance such that a direct action could be maintained against the construction manager's insurer.

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Legislation:

New construction-related statutes in 2006 session are as follows:

1. SB-516/AB-980 creates a new continuing education requirement for all contractors as a prerequisite to obtaining building permits; contractors must document 12 hours of continuing education, plus attend one professional meeting or educational seminar every two years.

2. SB-448/AB-1031 requires residential contractors (new or remodeling) to give statutory notices to their customers about a new requirement that owners must give notice of construction defects and opportunity to their contractor to cure before a court action may be commenced by the owner.

3. AB-146 changes from a “contracts above $15,000” to a “contracts above $25,000” as the amount above which a public construction contract let by a city, village, town, technical college, sanitary district or public library system must be let to the lowest responsible bidder.

4. SB-516 creates a contractor certification counsel for certifying financial responsibility of contractors and to develop rules for certifying building inspectors.

5. AB-657 – Wisconsin's response to U.S. Supreme Court's decision in *Kelo v. City of New London*, this statute alters the definition of "blight" and expressly prohibits the taking of "non-blighted property" for economic development by a Wisconsin municipality.

6. SB450 creates the first major set of revisions to Wisconsin's private and public construction lien and bond statutes since the mid-1950s; significant changes include

elimination of a subcontractor preliminary notice within 60 days of first commencement of their construction on all non-residential projects; remodeling and repair work are now expressly lienable; liens can be asserted for professional services, including construction management and preparation of plans, specifications and surveys; lien notices can be served by any method that provides independent confirmation of delivery or by service of process (except for claims to the State of Wisconsin on its public works projects, which continue to require delivery of lien notices by registered mail, return receipt requested); and upon the furnishing an undertaking bond by a single surety (rather than 2 sureties, as had been required), a construction lien may be removed of record.

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