Construction Law Update:

Case Law & Legislation Affecting the Construction Industry (2010-2011)

Presented by

Division 10 – Legislation and Environment

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INTRODUCTION

Division 10 is proud to present the Fifth Edition of the annual publication, ***Construction Law Update: Case Law & Legislation Affecting the Construction Industry (2010-2011).***

This the second year that the **Construction Law Update** will be distributed exclusively in an electronic format along with the materials for the 2011 Annual Meeting in Scottsdale, Arizona. The **Construction Law** Update is truly "cutting edge" within the meaning of this year's conference—*I Can See for Miles: Cutting Edge Tools for the Construction Practitioner.* In addition, we have also been able to work with the Forum to archive our previous year updates (2006, 2007, 2008, 2009) on the Forum's *eLibrary* site at:

http://www.legalist.com/scottsdale2011/elibrary.html

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

Personally, I would like to thank Angela Stephens and Joel Gerber for their work as contributing editors this year. Both have provided invaluable time and advice for bringing this year's update to publication. The Editorial Team would also like to thank all the volunteers and contributors for their efforts this year. Finally, we would be remiss if we did not thank Bonnie Eddington and Cherie Wickham, both of Stites & Harbison, PLLC, for their countless hours of administrative help this year.

The submissions in this publication are made throughout the 2010-2011 year, which means that some legislation may have passed, been rejected, or even tabled since the publication of this update. The case law and legislation included in this update are not intended to be an exhaustive compilation of every construction-related decision or legislative enactment from within a particular jurisdiction. We rely heavily on our authors to submit timely and accurate information. It is written by you and for you! If you would like to join this great team of contributors and authors, please contact one of our editors. Have a great year!

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FIFTY-STATE UPDATE

Alabama

Case Law

1. In *Public Building Auth. of Huntsville v. St. Paul Fire & Marine Ins. Co.*, ___ So.2d ___, 2010 WL 3937962 (Ala. Oct. 8, 2010), the Alabama Supreme Court opined on multiple significant construction issues. The plaintiff owner had terminated its general contract for convenience after structural problems arose, and engaged a completion contractor. After further investigation seemed to indicate construction deficiencies, the owner notified the original contractor and its surety that the convenience termination was being converted to a termination for default. St. Paul had provided performance bonding for the contractor on an AIA A312 form. Predictably, litigation ensued. Affirming summary judgments, the Supreme Court held that absent any contract language authorizing it, which could not be found, the owner had no right to successively terminate a contract for convenience and for default; that the failure to satisfy the conditions precedent specified in the A312 bond discharged the surety from any obligation, and that the contractor did not have continuing obligations to refund progress payments on account of defective work following convenience termination of its contract. On another issue, the owner continues to pursue claims against several subcontractors, and they sought to defeat these claims on the basis of the economic loss doctrine, which has been adopted in Alabama in a product liability case and is frequently pleaded in construction cases. The trial court certified to the Supreme Court the legal question whether the economic loss doctrine applies in a commercial construction case so as to preclude the owner from asserting tort claims against subcontractors for damage to the property. The Supreme Court answered the question in the negative, holding that the issue whether a duty actionable in tort is owed by subcontractors to an owner in a construction setting is a factual question to be analyzed in consideration of the foreseeability of harm, the nature of the relationship, the moral blame attached to the alleged conduct, and other factors.

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Alaska

Case Law

1. In *Weed v. Bachner Company, Inc.*, No. S-13284, ___ P.3d ___, 2010 WL 1930158 (Alaska May 14, 2010), the Alaska Supreme Court held that state procurement officials have qualified, but not absolute, immunity with regard to causes of action arising from their conduct in the procurement process.

2. *State, Dep't of Admin. v. Bachner Co.,* 167 P.3d 58 (Alaska 2007) was the bid protest case. In December 2001 the Alaska Department of Administration issued a request for proposals soliciting bids to provide the office and storage for another state agency. Among the companies submitting responsive proposals were Bachner and McKinley. Bachner proposed to lease existing buildings, while McKinley offered to construct and lease a new building. Based on the evaluation of the proposals by a five member panel of procurement officials, and the procurement officer issued a notice of intent to award the contract to McKinley. Bachner filed a bid protest with the procurement officer, alleging irregularities in the bidding scoring process. The procurement officer denied Bachner's protest and declined to stay the contract award. After the procurement officer awarded the contract to McKinley, Bachner appealed the denial of its protest to the commissioner of the department. The department's hearing officer found "grave deficiencies" in four of the five procurement officials' proposal evaluations. The hearing officer granted Bachner its bid preparation costs, but the hearing officer, and ultimately the state supreme court, denied Bachner's request to have to the contract canceled or have the bids re-evaluated.

In conjunction with its bid protest, Bachner also filed a civil action against four of the five procurement officials as individuals, asserting claims against each for the state common law tort of intentional interference with prospective economic opportunity and a federal tort claim under 42 U.S.C. § 1983. Bachner alleged that the four procurement officials had engaged in the following tortious conduct during the procurement process: (1) two procurement officials gave McKinley's bid higher scores because of the McKinley's site location, even though site locations was not one of the exclusive criteria they were permitted to consider; (2) a third procurement official advised the first two officials that they could not consider site location, but they did not lower their scores; (3) a fourth official intentionally lowered his score on Bachner's bid in order to counteract what he perceived as favoritism of that bid by another official; and (4) after Bachner filed its initial protest, the third official intentionally misstated that time constraints prevented the state from postponing award of the contract while the protest was pending.

The superior court dismissed the federal claim, but allowed the state common law claim to go forward on the basis that procurement officials did not have absolute immunity. The state supreme court granted discretionary review on the sole issue of whether procurement officials have qualified immunity or absolute immunity.

In examining the extent of the procurement officials' immunity, the court considered three-factors: (1) the nature and importance of the official function to government administration;

(2) the likelihood that the official will frequently be accused of wrongful motives in performing his function, and how easily the officer can defend against those accusations; and (3) the availability of other relief to an injured party. The court found that although the

availability of alternative relief weighed in favor of absolute immunity, the nature and importance of the function and the lack of increased likelihood of litigation or burden on defense weighed in favor of qualified immunity. Balancing these three factors, the court concluded that in defending against common law claims arising out of actions taken in the bidding process, state procurement officials are entitled only to qualified immunity. On this basis, the court allowed the state common law tort claims to proceed against the individual procurement officials.

The court noted that its ruling was not an open door to sue procurement officials, clarifying that for "an official with qualified immunity to be held liable, his conduct must have been outrageous or evidenced reckless indifference to the interest of another person." Furthermore, the court indicated that this decision may not be its last word on this issue or even this case. In a concurring opinion, one justice wrote that although she agreed procurements officials were entitled only to qualified immunity, "the exclusive remedy provision of the procurement code [AS 36.30.690] may bar lawsuits such as this one." Because the court's review of this case was limited to the narrow question of qualified vs. absolute immunity, the court did not decide whether the exclusive remedy provision would apply. Thus, until the court addresses the exclusive remedy provision in a subsequent appeal of this case, or a future case, it is by no means a foregone conclusion that procurement officials can be held personally liable for tortious conduct arising out of their actions in the procurement process.

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Arizona

Case Law

1. In *Flagstaff Affordable Housing Ltd. Partnership v. Design Alliance, Inc*., 223 Ariz. 320, 223 P.3d 664 (2010), the Arizona Supreme Court clarified Arizona's economic loss rule by holding that the parties to a contract in construction defect cases (regardless of whether one party is an architect or design professional) will be limited to their contractual remedies for purely economic losses.

As an initial matter, the Court clarified the definition of the economic loss rule, namely that a *contracting* party will be limited to its contractual remedies for the recovery of economic losses, such as repair costs, diminished value, or lost profits, that are unaccompanied by physical injury to persons or other property. The Court found that the policies of contract law – encouraging parties to order their prospective relationships, allocate the risks of future losses, and identify available remedies – are particularly applicable to construction defect cases. These construction-related contracts are often negotiated between the parties on a project-specific basis and have detailed provisions allocating risks of loss and specifying remedies. Furthermore, when a construction defect causes only damage to the building itself, contract law remedies are adequate because they allow recovery of the costs of remedying the defects and other reasonably foreseeable damages. The Court confirmed that parties can contractually agree to preserve tort remedies for solely economic loss, but if the contract is silent, the parties will be limited to contractual remedies.

2. In *Donnelly Construction Co. v. Oberg/Hunt/Gilleland*, 139 Ariz. 184, 677 P.2d 1292 (1984), the Court also clarified that the previous holding which held that a contractor could recover against an architect on a negligence theory based on the contractor's increased costs arising out of errors or omissions in the architect's plans – resulted not because of any implied duties of an architect, but rather because the parties did not have a contract and the economic loss rule did not apply. Thus, the Court confirmed that tort claims may be possible against design professionals in the absence of contractual privity if a duty is found on the part of the design professional to the plaintiff.

3. In *Richard E. Lambert, Ltd. v. City of Tucson Department of Procurement*, 223 Ariz. 184, 221 P.3d 375 (App.2009), the Arizona Court of Appeals upheld an administrative decision by the City of Tucson denying a contractor's claim for excusable delay due to the contractor's failure to establish a delay to the project's critical path. Arizona courts look to the federal court of claims and the federal boards of contract appeals for guidance in public contract law. The Arizona Court of Appeals held that in order to excuse its untimely performance the contractor was obligated to demonstrate a delay to the overall completion of the project, or in other words, to the project's critical path. While the contractor was able to establish that various events "caused delay," the Court of Appeals found that the contractor failed to meet its burden because the contractor did not establish how these delays contributed to "the overall completion of the project." The Court of Appeals, however, held that "we leave for another day the decision of whether critical path analysis is the *only* method of proving excusable delay."

4. In an Order issued in *Jeffrey C. Stone d/b/a Summit Builders v. MidFirst Bank*, case no. 2:09-cv-01218-ROS (D.Ariz.2010), the Arizona District Court held that Arizona's Stop Notice law, A.R.S. § 33-1058, was preempted by the Home Owners' Loan Act of 1933 (12

U.S.C. § 1464) (the "Act"). The District Court found that, pursuant to 12 C.F.R. § 560.2, the Act promulgated a preemption regulation stating that the Act "occupie[d] the entire field of lending regulation" and that federal savings associations must be afforded "maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation." By its own language, the federal preemption regulation specifically preempted any state law "purporting to impose requirements regarding…disbursements and payments." Thus, the District Court held that Arizona's Stop Notice law, which purportedly imposed withholding and disbursement requirements on a federal savings institutions, was preempted, The District Court granted summary judgment in favor of MidFirst Bank on the plaintiff's stop notice claims.

5. In *Daniel Wendland v. Adobeair, Inc*., 223 Ariz. 199, 221 P.3d 390 (App.2009), the Arizona Court of Appeals held that OSHA standards may be considered as some evidence of the standard of care even when OSHA requirements are not binding on the defendant so long as there is sufficient foundation (1) establishing that the standard at issue is directly related to the exercise of reasonable care and (2) a reasonable nexus exists between the proffered standard and the circumstances of the injury." In this case, involving an accident on a construction site, the Court also upheld the following jury instruction:

"The only question presented here is whether OSHA standards may be relied upon as some evidence of the standard of care when offered through expert testimony; whether OSHA standards may be introduced at trial as stand-alone evidence is not before us. Evidence has been introduced in this case on the subject of Occupational Safety and Health Administration, OSHA, standards for the *limited purpose of suggesting standards to protect others from floor openings*. The issue of negligence in this case must be determined by you based on all the evidence submitted to you, and by applying the law as I have instructed you."

Legislation

1. S.B. 1375, Modifications To The Arizona Prompt Payment Act.

The Arizona legislature has approved and Governor Jan Brewer has signed Senate Bill 1375 ("SB 1375"), which modifies the Arizona Prompt Payment Act in several ways.

One significant change involves exempting residential homeowners from the requirements of the Act in most cases. SB 1375 would create A.R.S. § 32-1129.07, which would generally exempt construction contracts for "dwellings" with "owner occupants." An owner-occupant is defined as any natural person who holds "legal or equitable title to the dwelling" and resides or intends to reside in the dwelling for at least thirty days. The Act would not apply to contracts with owner occupants unless each billing statement includes on the first page a statement (set forth in § 32-1129.07(a)) that provides the owner notice of the Act and its general requirements.

In addition to adding the owner occupant exception, SB 1375 also seeks to clarify the Act in light of the Arizona Court of Appeals' decision in *Stonecreek Building Company, Inc. v. Hecker*. In *Stonecreek*, the court determined that an owner could not withhold payment on an invoice for defective work that was certified and approved in a previous invoice. SB 1375 amends A.R.S. § 32-1129.01(E) to overrule this holding. Specifically, the amended A.R.S. § 32-1129.01(E) provides:

An owner may decline to certify and approve a billing or estimate or a portion of a billing or estimate under subsection D of this section whether or not the reason to decline arises from work or materials appearing on a prior billing or estimate and whether or not the owner has previously certified, approved or paid the prior billing or estimate.

As a result, SB 1375 expressly authorizes owners to decline a progress payment for defects discovered in work previously approved and paid.

SB 1375 addresses the detail required from an owner when disputing an invoice or billing. The amended § 32-1129.01(D) requires an owner to state "in reasonable detail the owner's reasons for not certifying or approving all or a portion in the billing or estimate." In addition, the bill adds an express authorization for owners to withhold retention from progress payments.

SB 1375 also includes other significant modifications. The bill:

Includes new definitions of "retention," "work," "substantial completion," and "final completion" that provides additional clarification;

Sets a timeline for releasing retention (§ 32-1129.01(J));

Allows owners to change the Act's definitions of "retention," "substantial completion," and "final completion" if certain requirements are followed (§ 32-1129.01(V));

Limits the amount of retention a general contractor can withhold from a subcontractor or supplier to the actual amount withheld by the owner for the subcontractors' work (§ 32-1129.02(D));

In the event that an owner disputes a contractor's billing or estimate for defective work, the contractor is still required to pay subcontractors and/or suppliers not responsible for the alleged defective work within 21 days after payment would otherwise have been made by the owner. (§ 32-1129.02(G));

Requires that any "mediation, arbitration or other dispute resolution proceeding arising from a construction contract for work performed in this State shall be conducted in this State." (§ 32-1129.05(B)).

2. H.B. 2340, The Revised Uniform Arbitration Act.

HB 2340, the Revised Uniform Arbitration Act (the "Act"), was signed into law by Governor Jan Brewer on April 23, 2010. The Act represents a significant change from Arizona's Uniform Arbitration Act, which had stood unrevised since 1962. First, the Act changes the arbitration process substantially by, among other things, adopting rules that:

a. Require a party seeking arbitration to file a formal notice of claim by certified mail or via process server;

b. Permit an arbitrator to issue subpoenas for the attendance of witnesses and production of records in the same manner as a trial court judge;

c. Allow for depositions of arbitration witnesses;

d. Permit protective orders in certain circumstances;

e. Allow for awards of punitive damages and equitable relief by arbitrators; and

f. Permit arbitrators to award attorneys' fees to the victorious party if the victorious party would have been entitled to collect its fees in Court.

The Act excludes certain classes of claims, including claims: (1) between an employer and employee; (2) arbitration clauses in insurance contracts; (3) between a national banking association and its customers; or (4) claims under the Securities Exchange Act or the Commodity Exchange Act. The Act also expressly prohibits allowing parties from waiving various provisions, including (1) the right to appeal an arbitration award; (2) the right to seek injunctive relief; and (3) the right to be represented by counsel at the arbitration hearing.

The Act permits courts to overturn arbitration decisions in very limited circumstances, including: (1) fraud, corruption, or other undue means in procuring an award; (2) evident partiality, corruption, or misconduct by the arbitrator; (3) an arbitrator who exceeds his or her assigned powers; or (4) a finding that there was no agreement to arbitrate.

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Arkansas

Case Law

1. In *Crumpacker v. Gary Reed Constr. Inc., 2010 Ark. App. 179, __ S.W.3d __ (Ark. App. 2010)*, the Crumpackers filed suit against Gary Reed Construction alleging that it had breached the implied warranty of habitability. Although this case does not represent a drastic change in Arkansas construction law, it provides a clear understanding of the facts required of a plaintiff in order to pursue a breach of implied warranty of habitability claim.

2. In this case, the Crumpackers hired Gary Reed Construction to construct their new home. *Id*. at The Crumpackers claim that shortly after they moved into the house, the walls began to crack, doors would not close, and windows would not open. *Id*. Gary Reed Construction attempted to correct these settling problems but the attempts were unsuccessful. *Id*. Therefore, the Crumpackers were forced to hire a third party to correct the problems at a cost of $26,550. *Id*. Based on these facts, the Crumpackers filed suit seeking reimbursement of the home repair. *Id*.

Gary Reed Construction moved for summary judgment and claimed that the Crumpackers could not point to any facts which show what it did or did not do during construction which may have caused the settling issues. *Id*. at 2-3. The trial court agreed with Gary Reed Construction and granted its motion for summary judgment. *Id*. at 3.

Appealing the trial court's ruling on the summary judgment motion, the Crumpackers argued that summary judgment was not proper because "proof of causation is not an element of a claim for . . . breach of implied warranty of habitability." *Id*. The Court of Appeals of Arkansas agreed with this argument. *Id*. According to the court, in order to withstand a motion for summary judgment in a breach of implied warranty of habitability case, a plaintiff need only present evidence that the newly constructed house is defective and that "they sustained monetary damages as a result of those defects." *Id*. at 4-5.

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California

Case Law

1. In *Martin Bros. Construction, Inc. v. Thompson Pacific Construction, Inc.*, 179 Cal.App.4th 1401, 102 Cal.Rptr.3d 419 (2009), the Court of Appeal held that: (1) a prime contractor may avoid prompt payment penalties by including language in its subcontract that conditions payment on certain requirements; and (2) a prime contractor may withhold retention funds in the event of any bona fide dispute, even if the dispute is unrelated to retention funds.

In this case, Thompson Pacific Construction, Inc. ("Thompson") was the general contractor on a public works project. Thompson entered into a subcontract with Martin Brothers Construction, Inc. ("Martin"), which provided that Martin would furnish all applicable administrative documents required by the subcontract and applicable lien releases pursuant to Civil Code Section 3262 before Thompson would make a progress payment. The subcontract also required that Martin provide both conditional and unconditional lien releases before Thompson's final payment of the contract retention previously withheld. When Martin completed its work on the project, it submitted a pay application for outstanding change orders and its retention. However, Martin did not submit the lien releases with its pay application. Thompson refused to pay either the change orders or the retention, arguing the change orders were in dispute. The parties eventually agreed to a final payment, however at trial, Martin argued that it was entitled to prompt payment penalties for Thompson's untimely payment.

The Court of Appeal affirmed the trial court's ruling that Martin was not entitled to any prompt payment penalties for either its retention or progress payment claims. (*Id.* at 1411-1417.) With regard to the retention, the court held that Thompson could withhold retention from Martin pursuant to Public Contract Code Section 7107 because there was a bona fide dispute. (*Id.* at 1411-1412.) The court rejected Martin's argument that the dispute had to be specifically about the retention funds. (*Id.*) Rather, the court held, the code does not contain any limit on the type of dispute which could justify a withholding of the retention funds, other than that the dispute be bona fide. (*Id.* at 1412.) With regard to the progress payments, the court held that Martin had "opted out" of the protections of the prompt payment penalty statutes when it agreed in its subcontract that the progress payments were not due until the conditional lien releases were submitted. (*Id.* at 1415.)

This case illustrates the importance of reviewing the subcontract documents to see if there are any prompt payment "opt out" provisions. Prime contractors and owners may increasingly seek to include such language in order to justify payment withholdings from contractors who are not diligent in submitting lien releases or any other conditions to payment. Contractors will likely want to avoid the erosion of the protections afforded to them under the prompt payment penalty statutes.

2. In *UDC-Universal Development, L.P. v. CH2M HILL*, 181 Cal.App.4th 10, 103 Cal.Rptr. 3d 684 (2010), the Court of Appeal held that a contractual duty to defend arises upon the mere tender of defense of a claim brought against the party contractually entitled to a defense, even if there were no allegations or showing of negligence on the part of the party from whom a defense is demanded.

In this case, CH2M HILL agreed to provide engineering services for developer UDC-Universal Development, L.P. ("UDC"). Paragraph 20 of the contract obligated CH2M HILL to indemnify UDC under certain conditions and "to defend UDC against any suit, action or demand brought against UDC on any claim or demand covered" by the indemnity obligation. (*Id.* at 14.) The homeowners' association ("HOA") brought a construction defect claim against UDC. UDC tendered its defense to CH2M HILL, which CH2M HILL rejected. The HOA and UDC settled, and UDC's cross-complaint against CH2M HILL for negligence and breach of contract proceeded to trial. The jury found that CH2M HILL had not been negligent and had not breached the contract. Nonetheless, the trial court concluded that, based on the recently decided *Crawford v. Weather Shield Manufacturing, Inc.*, 44 Cal.4th 541 (2008), CH2M HILL had breached its duty to defend.

The Court of Appeal affirmed the trial court's ruling, holding that CH2M HILL's duty to defend arose as soon as UDC tendered its defense to CH2M HILL. (*Id.* at 17.) The court rejected CH2M HILL's argument that the contract created a defense obligation only if a claim against UDC arose out of CH2M HILL's negligence, finding instead that the contract provision did not state that there must be an underlying claim of negligence specifically against CH2M HILL to trigger CH2M HILL's defense obligation. (*Id.* at 20.) It distinguished CH2M HILL's indemnity and defense obligations, concluding that while CH2M HILL's duty to indemnify depended upon a negligent act or omission by CH2M HILL, the duty to defend "applied to *any* suit, action or demand brought against UDC on any claim or demand covered herein." (*Id.* (emphasis in original).) Thus, the facts that: (1) the HOA never alleged even alleged negligence against CH2M HILL; and (2) the jury ultimately found that CH2M HILL was not negligent, had no bearing on CH2M HILL's duty to defend. (*Id.* at 21.) Rather, CH2M HILL's duty to defend was triggered as soon as UDC tendered the defense, regardless of the outcome of the litigation. (*Id.* at 21-22.)

This case greatly expands the duty to defend to situations in which there are not even any allegations of negligence or omission against the specific subcontractor. *Crawford* and *CH2M HILL* illustrate how important it is for subcontractors and design professionals to evaluate their contracts at the outset for broadly worded indemnity and defense provisions. If the contract does contain such a broad indemnity and defense provision, the subcontractor or designer should make sure to include much more limiting and protective language that states that it will not indemnify or defend the contractor if the subcontractor or designer is not adjudged liable for the claim against the contractor.

3. In *San Francisco Unified School District ex rel. Contreras v. Laidlaw Transit, Inc.*, 182 Cal.App.4th 438, 106 Cal.Rptr.3d 84 (2010), the Court of Appeal held that a government contractor could be liable under the California False Claims Act ("CFCA") for submitting claims for payment to the school district at times when it knew that it was in breach of various terms of its contract with the school district.

In this case, Laidlaw Transit, Inc. ("Laidlaw") entered into a contract with the San Francisco Unified School District ("SFUSD") to provide bus transportation services. The contract contained numerous provisions that Laidlaw was to comply with, such as maintaining its buses in excellent mechanical condition, and providing buses that met a specified particulate matter emissions standard. The contract further provided that the SFUSD was to provide payment for services satisfactorily performed by Laidlaw after receipt of properly documented invoices. The plaintiffs filed suit against Laidlaw, alleging Laidlaw had violated the CFCA by

submitting claims for payment to the SFUSD at times when it was knowingly in breach of the material terms of its contract to provide bus transportation services for students by using buses that were not in safe operating condition and by failing to meet the pollution control requirements in the contracts. The trial court sustained Laidlaw's demurrer to the complaint.

The Court of Appeal overturned the demurrer, finding that the plaintiffs had adequately alleged a violation of the CFCA. (*Id.* at 442.) The court held that Laidlaw had impliedly certified compliance with its express contractual requirements when it billed SFUSD for providing bussing services. (*Id.*) Further, allegations that "the implied certification was false and had a natural tendency to influence [SFUSD]'s decision to pay for the goods or services [were] sufficient to survive a demurrer." (*Id.*)

This case expands the scope of liability under the CFCA to include implied certifications of compliance with material contract terms. This means that state and local governments may now seek CFCA damages and penalties for progress payments submitted during a time when the contractor was in breach of the contract. General contractors on public works projects can expect claims like this to become commonplace unless and until this precedent is overturned.

4. In *Dillingham-Ray Wilson v. City of Los Angeles*, 182 Cal.App.4th 1396, 106 Cal.Rptr.3d 691 (2010), the Court of Appeal held that contractors can use the modified total cost method to prove damages on close-out claims against a public entity and that a contractor is entitled to use the best evidence available to prove its damages.

In this case, Dillingham-Ray Wilson ("DRW") was awarded a contract by the City of Los Angeles ("City") for work at the Hyperion waste treatment plant. During construction, the City issued over 300 change orders containing more than 1,000 changes to the plans and specifications. Not all of these change orders were settled. When DRW completed the project, it asked for an equitable adjustment to compensate for work performed without a price, and for expenses and losses incurred due to City's interference and delays. The City refused and assessed liquidated damages against DRW. DRW brought suit against the City for breach of contract, and the City cross-complained.

Before the trial, the City filed a motion in limine to prevent DRW from proving its damages with engineering estimates, based on Public Contracts Code section 7105. The City also filed a motion in limine to prevent DRW from presenting a total cost claim to the jury, based on *Amelco Electric v. City of Thousand Oaks*, 27 Cal.4th 228 (2002). Both motions were granted by the trial court.

The Court of Appeal reversed the trial court's rulings on both motions in limine. (*Id.* at 1402.) The court agreed that, based on *Amelco*, DRW could sue for the benefit that DRW would have received for change orders if the City had performed. (*Id.* at 1406.) The court concluded that DRW was entitled to prove its damages with the best evidence available, even if that evidence took the form of engineering estimates. (*Id.* at 1405.)

The court further held that DRW may pursue a modified total cost measure of damages. (*Id.* at 1408.) Under the modified total cost method, the contractor is not foreclosed from proving the amount of damages caused by the public agency just because the contractor itself is responsible for some of its extra costs. (*Id.*) Rather, if the contractor is responsible for some

of its increased cost of performance, then those costs are subtracted from the contractors' damages to arrive at the modified total cost. (*Id.*)

This case confirms the propriety of both the total cost and modified total cost methods of proving damages in California. The court in *Dillingham-Ray Wilson* also clarified *Amelco*, holding that *Amelco* did not limit common law methods of proving damages against a public agency. Rather, *Amelco* only states that the abandonment theory of liability is not allowed against a public agency.

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5. In *Los Angeles Unified School District v. Great American Ins. Co*., 49 Cal.4th 739, 2010 WL 2720825 (2010), the California Supreme Court held that a contractor need not prove the affirmative fraudulent intent to conceal by a public entity to recover additional compensation for entity's misrepresentation or failure to disclose material information, expressly disapproving *Jasper Construction, Inc. v. Foothill Junior College Dist.*, 91 Cal.App.3d 1 (1979) ("*Jasper*").

In this case, the Los Angeles Unified School District (LAUSD) entered into a contact with general contractor Lewis Jorge Construction Management, Inc. to construct an elementary school for approximately $10.1 million, based on plans and specifications prepared by LAUSD. LAUSD eventually terminated the contractor for default and sought proposals from other contractors to correct defects in the work performed by the terminated contractor and complete the construction of the school. In addition to the plans and specifications, which none of the parties to the action contended were erroneous, LAUSD also provided prospective bidders with a 108 page list of work by the terminated contractor that inspectors found to be missing, incomplete or defective. The list provided to bidders explicitly stated that any bidder awarded the job would be responsible for ensuring that the finished project complied with the plans and specifications provided by LAUSD, regardless of whether a particular deficiency, omission or incomplete item was mentioned on the list. Hayward Construction Company's bid of $4.5 million was accepted by LAUSD and the parties entered into a cost-plus-fee contract, which included a maximum contract price of $4.5 million.

Shortly after beginning work, Hayward informed LAUSD that it had significantly underestimated the cost of the remedial work, claiming that the project suffered from deficiencies that had not been noted on the list provided to bidders. On that basis, Hayward sought $2,847,592 in extra compensation for completion of the project, alleging, among other things, that the school district had failed to disclose a consultant's report that would have alerted the contractor to the scope of the defects affecting the project and that the district was aware Hayward's intended methods for repairing the project would not be effective.

The trial court granted LAUSD's motion for summary judgment, as to certain claims, and motion for judgment on the pleadings, as to the other remaining claims, reasoning that under *Jasper*, Hayward could not recover because it had not alleged or established that LAUSD either actively concealed or intentionally omitted material information from Hayward. The Court of Appeal, however, reversed the trial court's rulings in connection with LAUSD's two motions, finding that, "Hayward may maintain a cross-action for breach of contract based on non-disclosure of material information if it can establish that the District knew material facts

concerning the project that would affect Hayward's bid or performance and failed to disclose those facts to Hayward."

The Supreme Court, which only reviewed the appellate decision on the limited issue regarding whether intent to conceal must be alleged and ultimately proven by a plaintiff, affirmed the Court of Appeal's ruling, based in large part upon a series of well-established authorities including *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285; *Wunderlich v. State of California* (1967) 65 Cal.2d 777; and *Souza & McCue Constr. Co. v. Superior Court* (1962) 57 Cal.2d 508. Contrary to *Jasper*, each of the cases support a claim for extra compensation against a public entity where the entity carelessly failed to disclose material information it possessed, but which was unknown to the contractor, *regardless of the public's entity's affirmative fraudulent intent to conceal the information or the contractor's allegations or actual evidence regarding such an intent by the public entity.*

Explicitly disapproving the rule relied on by the court in *Jasper*, the Supreme Court (relying in part on the elements of a nondisclosure claim under the Restatement Second of Contracts and federal court standard from cases such as *Helene Curtis Industries, Inc. v. United States* (Ct. Cl. 1963) 312 F.2d 774) found that a contractor shall be entitled to recover extra compensation from a public entity for nondisclosure where: (1) the contractor submitted its bid or undertook to perform without material information that affected performance costs; (2) the public entity was in possession of the information and was aware the contractor had no knowledge of, nor any reason to obtain, such information; (3) the contract specifications or other information furnished by the public entity misled the contractor or did not put it on notice to inquire; and (4) the public entity failed to provide the relevant information. The decision also described a number of factors that could affect recovery, including the use of disclaimers by the public entity, the difficulty of detecting the condition in question, time constraints imposed by the public entity, and the type of information a reasonable contractor in like circumstances would have discovered on its own. As succinctly stated by the Supreme Court: "The public entity may not be held liable for failing to disclose information a reasonable contractor in like circumstances would have or should have discovered on its own, but may be found liable when the totality of the circumstances is such that the public entity knows, or has reason to know, a responsible contractor acting diligently would be unlikely to discover the condition that materially increased the cost of performance."

The Supreme Court's ruling regarding the "superior knowledge doctrine" should affect and inform a public entity's decision-making regarding the information made available to public works contractors. As provided above, this case may be utilized to support an award of extra compensation *even where the public entity lacks fraudulent intent to conceal information*, and may result in a finding of liability where the public entity has simply failed to provide all relevant and material information affecting a contractor's bid on a project, where the contractor lacks access to the information. The case is not a panacea to public works contractors, however, as the case clearly limits the application of the "superior knowledge doctrine" to certain, fact-specific instances where the contractor is clearly entitled to extra compensation based on the public entity's failure to provide such information to the contractor.

Based on the Supreme Court's clarification of the state of the law in California, the Advisory Committee on Civil Jury Instructions is in the process of seeking public comment regarding a set of proposed CACI construction law jury instruction, including an instruction based on the holding of *Los Angeles Unified School District v. Great American Ins. Co*.

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Legislation

1. AB 457 modifying California Civil Code Sections 3084 and 3146. Assembly Bill 457 modifies California's mechanic's lien statutes with new notice requirements. The new law requires that a mechanic's lien and Notice of Mechanic's Lien now be served on the owner of the property, or on the construction lender or original contractor if those parties cannot be served. A proof of service affidavit must be completed and signed by the person serving the Notice of Mechanic's Lien and would be included as part of the mechanic's lien. The lien is unenforceable if it is not properly served according to the new statute. *[NOTE: The legislation was scheduled to go into effect on January 1, 2011.]*

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Colorado

Case Law

1. In *Smith v. Executive Custom Homes, Inc.*, ___ P. 3d. ___ , No. 09SC223, 2010 WL 1840828 (Colo. 2010)(unpublished), the Colorado Supreme Court considered, as a matter of first impression, whether "equitable tolling" of the statute of limitations under the common-law "repair doctrine" applies to claims asserted under Colorado's Construction Defect Action Reform Act ("CDARA"). By way of background, equitable tolling under the repair doctrine tolls a limitation period while a construction professional undertakes repair efforts intended to remedy the defect. *See Highline Vill. Assocs. v. Hersh Cos.*, 996 P.2d 250, 257 (Colo. App. 1999)(setting forth elements of repair doctrine). The court held that equitable tolling does not apply and toll the two-year statute of limitations for claims brought under CDARA. The Court was further asked to consider whether a claim for personal injury caused by a construction defect accrues at the time of injury or at the time manifestations of the defect are first observed. The court held that a claim for construction defects, whether resulting in personal injury or property damage, accrues at the time the defect is observed, not at the time of the injury.

In *Smith*, the plaintiff homeowners brought a personal injury action against the defendant homebuilder for injuries sustained in a fall on ice that accumulated on the home's exterior steps as a result of alleged defective roof gutters and downspouts. *Smith* at *2. Defendant filed a motion for summary judgment arguing that plaintiffs failed to satisfy the two-year statute of limitations in § 13-80-104(1), C.R.S. (2009) applicable to claims against "architects, contractors, builders or builder vendors, engineers, inspectors and others." *Id*. The trial court granted the motion and plaintiff appealed. The Court of Appeals reversed the trial court, holding that the repair doctrine equitably tolled plaintiffs' claims, as the contractor had attempted to repair the alleged defects. *Id.* In reversing the Court of Appeals, the Colorado Supreme Court first pointed out that § 13-80-104(b)(I), C.R.S. (2009) plainly and clearly states that claims for recovery of damages for injury caused by a deficiency arise "at the time the claimant discovers the physical manifestations of a defect which ultimately causes the injury." *Id.* at *3. Therefore, a claim under CDARA accrues when the homeowner discovers, or should have discovered, the alleged defect. Regarding the equitable repair doctrine, the court stated that CDARA already provides an adequate legal remedy in the form of statutory tolling of the limitations periods under specific and defined circumstances, including during the time in which repairs are being performed. *Id.* at *5. "Importantly, the statute of limitations and repose located in [§ 13-80-104, C.R.S.] are tolled for the duration of the notice of claim procedure and for sixty days following its completion so that a homeowner's ability to bring a claim under the CDARA will not be prejudiced by compliance with the statute." *Id.* at *6. Therefore, applying an equitable tolling procedure is redundant. *Id.* at *6. Moreover, the court observed that "it could frustrate the operation of CDARA because it could allow tolling for repairs outside of the limited circumstances set forth by the General Assembly in the statute." *Id*. The court held that because the homeowners brought their suit nearly three years after discovering the defect, remand was unnecessary because the claim was time-barred by CDARA's statute of limitation.

2. In *Lafarge North America, Inc. v. K.E.C.I.*, ___ P.3d ___, No. 09CA0460, 2010 WL 726052 (Colo.App. 2010)(unpublished), the Colorado Court of Appeals resolved the following issues relative to a subcontractor's duty to indemnify and defend a general contractor based upon claims of joint negligence. The Court of Appeals concluded that: 1) the mere allegation that the subcontractor was partially at fault on an underlying negligence claim did not

render it liable for indemnification; 2) the allegation of fault on the part of the subcontractor was sufficient to trigger the subcontractor's duty to defend the general contractor; 3) the subcontractor's liability insurance, on which the general contractor was a named insured, provided coverage for the general contractor's negligence; and 4) the subcontractor was not required to provide primary, as opposed to excess, insurance.

K.E.C.I. was a traffic control subcontractor to general contractor Lafarge on a Colorado Department of Transportation highway project. *Id.* at *1. During construction, Lafarge left equipment in an on-ramp, and a motorcyclist struck the equipment. The cyclist was killed and the passenger was seriously injured. *Id*. The passenger filed suit against Lafarge and K.E.C.I. alleging negligence against both parties. Lafarge tendered to K.E.C.I. a demand for defense and indemnity under their contract and K.E.C.I.'s insurance policy. K.E.C.I. and its insurer denied the tender. *Id*. Lafarge settled the passengers claim and separately sued K.E.C.I. for breach of contract and other claims, asserting that K.E.C.I. was contractually obligated to defend and indemnify Lafarge; and that K.E.C.I. was contractually obligated to provide primary insurance coverage, as opposed to excess coverage. *Id.* at *1, *2. Each party filed cross-motions for summary judgment. The trial court granted Lafarge's motion and denied K.E.C.I's motion. *Id.* at *1. K.E.C.I. appealed the ruling.

In its discussion, the Court of Appeals acknowledged that, under Colorado law, a court will enforce the parties' intent in an indemnity agreement in accordance with the plain and ordinary meaning of the agreement language. *Id.* at 3. An indemnitee should not recover for his own negligence unless this intent is reflected in "clear and unequivocal language to that effect." *Id.* at 4. The Court of Appeals first ruled that the subcontractor's indemnity clause unambiguously required K.E.C.I. to indemnify Lafarge for Lafarge's own negligence where liability arises out of an incident that is at least partially caused by K.E.C.I.'s acts or omissions. *Id*. However, the trial court erred in determining at the summary judgment stage that K.E.C.I. was at fault under the clause. *Id* at *5. The passenger in the personal injury action only alleged that K.E.C.I. was at fault. There was no finding of fact of K.E.C.I.'s actual fault that would trigger its indemnity obligation. *Id* at *6. The Court of Appeals further held that the duty to indemnify and the duty to defend are independent duties, and acknowledged that a party can have a duty to defend, but not a duty to indemnify. As to the duty to defend, that the duty does arise upon a mere allegation of negligence. *Id.* Finally, as to K.E.C.I.'s obligation to insure Lafarge, the Court held that since none of the contract documents required K.E.C.I. to provide primary insurance to Lafarge's satisfaction, as opposed to excess insurance, then the excess policy constituted "liability" insurance. *Id* at *7. The Court held that K.E.C.I. was still obligated to provide coverage for Lafarge's negligence, not just K.E.C.I.'s negligence. *Id.* at *8. Coverage was nevertheless only triggered if K.E.C.I.'s acts or omissions resulted in Lafarge's liability. The Court of Appeals did not determine damages for K.E.C.I.'s breach of contract for its failure to indemnify and insure Lafarge and remanded the case to the trial court.

Legislation

1. HB10-1394, Concerning Commercial Liability Insurance Policies Issued to Construction Professionals: HB10-1394 passed out of the legislature on May 10, 2010. The Bill was submitted to Governor Ritter, and he is expected to sign it. The pending Bill amends Colorado statutory law concerning principals of contract construction and interpretation for commercial liability insurance policies issued to construction professionals, § 13-20-808, C.R.S. (2009). The proposed amendments were in response to the Colorado Court of Appeals' ruling

in *General Security Indemnity Company of Arizona v. Mountain States Mutual Casualty Co.*, 205 P.3d 529 (Colo. App. 2009), where the court excluded claims for certain construction defects claims and imposed no obligation to defend in a contractor's professional liability insurance policy.

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

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

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Connecticut

Case Law

1. In *Shelton v. Olowosoyo,* No. FST-CV-065002921-S, 2009 Conn. Super. LEXIS 2115, Superior Court, judicial district of Stamford-Norwalk (July 30, 2009)(Mintz, J.), an owner's failure to enforce completion dates in a construction contract functioned as a waiver of the completion deadlines. As a result, the owner was prevented from asserting a breach of contract claim against the contractor who did not meet those completion deadlines.

In this case, the plaintiff homeowners entered into a contract with the defendants to demolish an existing house and construct a new house on the plaintiffs' property. When the defendants failed to meet the original completion date, the plaintiff agreed to enter into a subsequent agreement to extend the completion date. However, after extending the completion date three separate times, the plaintiffs terminated the defendants and sought damages for breach of contract because of their continued failure to meet the completion dates.

The trial court concluded that the plaintiffs had waived the completion date provisions in the construction contract, because they took affirmative steps to work with the defendants in order to complete the project after the defendants had missed numerous completion dates.

2. In *RP Building Contractors, LLC v. Primax Properties, LLC,* No. UWY-CV-075003464-S, 2009 Conn. Super. LEXIS 2178, Superior Court, judicial district of Waterbury (July 23, 2009)(Scholl, J.), the court ruled that a construction contract with an indefinite time of performance still requires performance within a reasonable time. In this case, the contractor and the owner negotiated a contract for site improvements. Although a project schedule was given to the contractor for the early stages of the project, it was not part of the contract. After numerous delays on the project, the owner terminated the contractor.

The contractor brought a claim for breach of contract against the owner, claiming that the project had a 210-day schedule and the defendant could not terminate it after only two months. However, the court found that the termination was not unreasonable. The court explained that when a contract's time of performance is indefinite, the promised performance must still be rendered within a reasonable time.

The termination of the contractor, prompted by its continued failure to man the project sufficiently to meet the owner's requirement to complete construction within 210 days, did not constitute a breach of the contract because the contractor could not have completed its obligations within a reasonable construction schedule.

3. In *Cianci v. Original Werks, LLC*, No. DBDCV085005822S, 2009 Conn. Super. LEXIS 384, Superior Court, judicial district of Danbury (Feb. 20. 2009)(Shaban, J.), the court discussed the rule for determining when the "last day" of work occurs for purposes of filing a mechanic's lien. Pursuant to Conn. Gen. Stat. §49-34, a mechanics lien is not valid unless it is filed with the town clerk within ninety days of "performing the services or furnishing the materials." Although typically the time period for filing a mechanic's lien commences on the last day on which services are performed or materials are furnished, when work has been substantially completed and the contractor unreasonably delays final completion, the time for filing a lien is computed from the date of substantial completion. The date of the "substantial

completion" is used as the starting date for filing a mechanics lien when: (1) the contractor has unreasonably delayed final completion, and (2) any services or materials provided by the contractor subsequent to the date of final completion must have been furnished at the contractor's initiative, rather than at the owner's request.

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

The court concluded that the services renders by the contractor on September 23, 2008 and thereafter, though minimal, were done so at the owner's request and not on the initiative of the defendant for the purpose of saving the mechanics lien. Therefore, the owner's application to discharge the lien was denied.

4. In *Edgewood Mac, LLC v. Mirg Mystic Harbour, LLC*, No. CV065002009, 2009 Conn. Super. LEXIS 849, Superior Court, judicial district of New London (March 26, 2009)(Abrams, J.), the defendant contractor successfully defended the validity and priority of its $119,000 mechanic's lien, and argued that he was entitled to attorney's fees pursuant to Conn. Gen. Stat. §52-249. The plaintiff argued that Conn. Gen. Stat. §52-249, which permits the recovery of attorneys fees in foreclosure actions, did not apply to the defendant, because the defendant's counsel was focused on proving the validity and priority of its lien rather than its foreclosure.

The court concluded that "establishing the validity of [the mechanics] lien was a necessary condition precedent to its foreclosure . . . . [and that] any fees related to proving the validity [and priority] of the lien are recoverable as an invalid lien cannot be foreclosed." Thus, the court found that the right to recovery of attorneys fees bestowed by Conn. Gen. Stat. §52-249(a) applies in this instance and to the effort in proving the validity and priority of the lien.

However, the court noted that, pursuant to Conn. Gen. Stat. §52-249(a), these fees are only recoverable "upon obtaining a judgment of foreclosure when there has been a hearing as to the form of judgment . . ." Therefore, defendant's claim for attorney's fees was premature, given the defendant had not yet filed a motion for judgment of foreclosure.

5. In *Dynamic Elec. Contractors, Inc. v. Southport Contracting,. Inc.,* No. CV075006557, 2009 Conn. Super. LEXIS 2645, Superior Court, judicial district of Fairfield (Sept. 22, 2009)(Arnold, J.), the court did not recognize a common law breach of contract action against a bond. In this case, a subcontractor filed suit against a general contractor and its surety alleging that the surety breached a written surety agreement by failing to pay the subcontractor's claims. The surety moved to strike the breach of contract count in the complaint, arguing that it was a claim under Conn. Gen. Stat §49-42(b), and was therefore untimely under the one-year statute of limitations. However, the subcontractor asserted that the

mere fact that it referenced the payment bond in its allegation did not elevate the claim to a cause of action under Conn. Gen. Stat. §49-41. Instead, it argued that its claim was a common law breach of contract claim, and thus it was timely, because it was filed within the six year statute of limitation pursuant to Conn. Gen. Stat §52-576.

The court found for the surety, concluding that there is no common law breach of contract action against a bond, and that the subcontractor's claim was a breach of the surety agreement governed by Conn. Gen. Stat §49-42(b). Therefore, the action was barred, because it was brought after the one-year statute of limitations under Conn. Gen. Stat §49-42(b) had passed.

6. In *Naples v. Keystone Bldg. and Dev. Corp.*, 295 Conn. 214 (2010), the Supreme Court of Connecticut articulated the measure of damages for defective or incomplete construction. In this case, homeowners sued their contractor, alleging poor workmanship in the construction of their home. The homeowners offered expert testimony to prove the amount needed to correct the defective work. Using the "reasonable costs of construction" method to calculate these "cost to correct" damages, the court rendered judgment for the homeowners in the amount of $59,140.40. However, the court refused to accept the expert's estimates for labor to replace trim and siding on the home and the estimate for profit and overhead, claiming that the homeowners failed to prove these amounts with a sufficient degree of certainty. Thus, it did not award the homeowners these costs.

On appeal, the Supreme Court concluded that the trial court improperly failed to award the homeowners the full cost required to repair their home. In making its determination, the Supreme Court stated its most recent articulation of calculating the measure of damages in a defective construction case. First, the Court noted that the fundamental rule of damages in these types of cases is that the damage award should put the non-breaching party in the position it would have been in had the contract been performed correctly. The Court further explained that in defective construction cases, the owner's damages are measured by computing either the reasonable costs of construction and completion in accordance with the contract, if that is possible and does not involve unreasonable economic waste; or the difference between the value of the property if the contract had been performed and the value of the property given the breach – the diminution in the value measure. The Court also reiterated the rule that a cognizable measure of damages, such as the costs of repairs, cannot produce improvements to the property beyond, or better than, those for which the parties had contracted.

7. In *Drain Doctor, Inc. v. Lyman,* 115 Conn. App. 457 (Conn. App. 2009), the court analyzed the scope of the Home Improvement Act ("HIA"), concluding that the installation of a sewer line and repair activities to a storm water drain fell within the scope of the HIA. However, since the plaintiff was a licensed plumber and the aforementioned activities were "work which it was licensed to perform," exemption to the contractual requirements of HIA applied. The Court further found that plaintiff's activities, such as retrenching/patching the driveway and reseeding the lawn, in relation to the installation of a sanity sewer line and repair activities to a storm water drain, were included within "the work it was licensed to perform."

8. In *Centimark Corp. v. Village Manor Associates Limited Partnership*, 113 Conn. App. 509 (Conn. App. 2009), the Court found that a landowner alleged a sufficient claim for a violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. §42-110a

et seq., against a contractor, where the contractor misrepresented what entity would be performing the roofing work.

In this case, pursuant to an agreement, a contractor was to perform an entire roofing project. The general contractor entered into a subcontract agreement with a highly respected roofing company (Dzen Company), and the general contractor represented to the owner that Dzen Company would provide materials for and perform the installation of the shingled portion of the roof. However, Dzen Company contracted the labor for the shingled portion of the roof, to a local roofing contractor, who hired a small crew of independent contractors with limited experience.

When the owner discovered defects in the installation of the shingled roof and that Dzen company had not performed the work, it refused to pay the general contractor. As a result, the general contractor filed a mechanics lien on the property and filed a one-count complaint to foreclose on it. The owner filed a counterclaim against the plaintiff alleging violations of CUTPA.

The owner claimed that the general contractor misrepresented on numerous occasions that Dzen Company would be performing the work on the shingled portion of the defendant's roof. However, it failed to inform the defendant that Dzen Company would be subcontracting the work to another less experienced subcontractor. The trial court held that such misrepresentations constituted a deceptive act within the meaning of CUTPA, and the Appellate Court affirmed.

9. In *North Haven Construction Co., Inc. v. Banton Construction Co., Inc.*, No CV044004809S, 2010 Conn. Super. LEXIS 82, Superior Court, judicial district of New Haven (Nov. 2, 2009)(Hadden, J.), the court analyzed the relation back doctrine and how it applies to the statute of limitations. In this case, the plaintiff commenced an action in June 1999 against the defendant construction company and its surety. The only cause of action asserted was against the surety for a claim on a payment bond. On August 20, 2007, the plaintiff filed an amended complaint adding a bad faith count against the surety, and the defendant filed a motion for summary judgment against this count claiming that it was barred by the statute of limitations.

The plaintiff argued that the bad faith count was timely because it related back to the date of the original complaint, and alternatively, that the continuing course of conduct doctrine tolled the statute of limitations. In rejecting the plaintiff's first argument, the Court concluded that if an amended complaint creates a new and different cause of action, such an action commences on the date the amended complaint was filed, for purposes of the statute of limitations. Since the facts the plaintiff needed to prove to establish its payment bond claim in the original complaint were completely different than what it would have to prove to establish bad faith, the bad faith claim did not relate back to the original complaint, and thus, it was time-barred.

As for the second argument, the plaintiff only alleged a single wrongful act in its bad faith count, failure to pay its bond claim. There were no allegations of ongoing or recurring wrongful conduct. As a result, the statute of limitations could not be tolled by the continuing course of conduct doctrine, and the surety's motion for summary judgment was granted.

Legislation

1. Public Act 09-6, September 2009 Special Session. An Act Implementing The Provisions Of The Budget Concerning Education, Authorizing State Grant Commitments For School Building Projects, And Making Changes To The Statutes Concerning School Building Projects And Other Education Statutes. This act approves grant commitments for local school construction projects and makes various changes in statutes relating to school construction projects.

For school projects authorized after July 1, 2009 and costing more than $10 million, the act bars state reimbursement for construction change orders and other change directives that exceed 5% of the project's total authorized cost. Under prior law, change orders exceeding 5% of the authorized cost of such projects were reimbursed at 50% of the otherwise eligible amount.

2. Public Act 09-7, September 2009 Special Session. An Act Implementing The Provisions Of The Budget Concerning General Government And Making Changes To Various Programs. This act appropriates funds for state agencies and programs to the General Fund and Special Transportation Fund for FY 10 and FY 11, notwithstanding the budget act (PA 09-3, June Special Session (JSS)). It also makes numerous changes as described below.

a. §§67-68 & 132-134 – Building Construction Projects: This act gives the Judicial Branch more independence over building projects by increasing the threshold requiring the Department of Public Works (DPW) supervision from 500,000 to §1.25 million. The act also increases the threshold of construction projects requiring the DPW commissioner's prior approval. It requires prior approval on alterations or repairs to buildings (1) rented or occupied by the Judicial Branch that cost up to $1.25 million or (2) under the supervision of the Office of the Chief Court Administrator or a constituent unit of higher education that cost up to $500,000. Under prior law, these agencies had to obtain the commissioner's prior approval for alterations and repairs that cost over $100,000.

b. §§157-162 – The Department of Administrative Services (DAS) Authority and Duties Concerning Small Estate and Contracts: This act:

1) requires the DAS commissioner to revoke or deny the prequalification of a contractor or substantial subcontractor based on the acts of his or her principal or key personnel;

2) requires that notice of most public works contracts be posted on the state contracting portal on the internet and eliminates a requirement that they be advertised in newspapers;

3) extends to state agencies the authority to complete evaluations of subcontractors and substantial subcontractors by relying on evaluations completed by general contractors;

4) eliminates a requirement that contractors include a copy of their prequalification certificate with their bids on all public works contracts, other than

Department of Transportation (DOT) contracts, and instead requires them to provide the certificate when the public agency soliciting the bids requests it;

5) specifies that subcontractors do not have to prequalify with DAS before performing work on highway, bridge, or construction projects administered by DOT; and

6) clarifies that subcontractors must be prequalified by DAS before they perform work on any non-DOT-administered public works projects, instead of just building projects, if the total contract is valued at $500,00 or more.

3. PA 09-8, September 2009 Special Session. An Act Implementing The Provisions Of The Budget Concerning Revenue. Starting with income years beginning on or after January 1, 2012, this act allows the state to give corporation taxpayers a credit if they build buildings that meet certain energy and environmental standards.

4. PA 09-18. An Act Concerning Disclosures By Home Improvement Contractors And New Home Construction Contractors. This act requires contractors to include a disclosure provision in new home and home improvement construction contracts. They must disclose every corporation, limited liability company, partnership, sole proprietorship, or other legal entity that is or has been a home improvement or new home construction contractor in which they were shareholders, members, partners, or owners within the past five years.

5. PA 09-146. An Act Concerning Construction Change Orders. The act applies to commercial construction contracts, which are subject to state law and apply to private sector construction contracts and public works contracts exceeding $100,000, other than those administered by or in conjunction with the Department of Transportation. This act requires payment requests made in accordance with construction contracts among owners, contractors, and suppliers to state the status of all pending change orders, change directives, and approved changes to the original contract or subcontract. The statement must include (1) when they were initiated, (2) their associated costs, and (3) a description of completed work.

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Delaware

Case Law

1. In *Reid v. Thompson Homes at Centreville, Inc.*, C.A. No.: 06C-10-075 (RBY) (Delaware, September 16, 2009), the Delaware Superior Court held that accrual clauses in architect contracts abrogate the time of discovery rule which normally serves to toll the statute of limitations.

The Architect entered into an AIA B151-1997 contract with an entity known as "Thompson Builders" in March of 1999 by which the Architect was to provide architectural design services for several homes. Plaintiffs subsequently contracted with Thompson Homes, Inc., and/or Thompson Homes at Centreville, Inc. (collectively, "Thompson Homes"), for the construction of their residential property.

The accrual clause, §9.3 in the B151 contract, provided:

> *Causes of action between the parties to this Agreement pertaining to acts or failures to act shall be deemed to have accrued and the applicable statutes of limitations shall commence to run not later than either the date of Substantial Completion for acts or failures to act occurring prior to Substantial Completion or the date of issuance of the final Certificate for Payment for acts or failures to act occurring after Substantial Completion. In no event shall such statutes of limitations commence to run any later than the date when the Architect's services are substantially completed.*

Plaintiffs settled on their home on August 31, 2000, and took possession soon thereafter. In the course of a lawsuit filed on October 9, 2006 against only Thompson Homes, Plaintiffs alleged water intrusion into the residence. Thompson Homes filed a Third-Party action against Architect and several other Third-Party Defendants on February 2, 2009, for contribution and indemnification.

Architect filed a motion for summary judgment based upon application of the accrual clause and the passage of the three year statute of limitations. In opposition, Thompson Homes argued that causes of action for contribution and indemnification generally do not accrue until the underlying claim is finalized. Since the first party claims of the Plaintiffs had not been adjudicated, it was argued by Thompson Homes, its claims against the Architect had not accrued and could not be time-barred. In granting the Architect's motion for summary judgment, the Court accepted Thompson's position as a matter of general law, but held that the freedom of contract must prevail over such general precedent. The Court further held that Thompson Homes' claims were derivative of Plaintiffs' and therefore were based upon a theory of breach of contract irrespective of Thompson Homes' attempts to categorize them as claims for indemnification and contribution. As such, they were subject to the accrual clause found in the contract. Since the complaint and third-party complaint were not filed until more than three years after substantial completion, any claims against the Architect by Thompson Homes were now time-barred.

2. In *Tri-M Group, LLC v. Sharp*, 705 F.Supp.2d 335 (D. Del. April 14, 2010) the U.S. District Court struck down Delaware's residency requirement for apprenticeship sponsors as improperly discriminatory to out-of-state contractors in violation of the Commerce Clause of the U.S. Constitution.

The Plaintiff in *Tri-M Group* was a Pennsylvania-based electrical contractor that was the successful bidder on a state-funded project in Delaware. As such, it was subject to Delaware's prevailing wage laws and regulations. At all relevant times, Plaintiff properly maintained an apprentice program that was registered with the Pennsylvania Apprenticeship and Training Council of the Pennsylvania Department of Labor and Industry ("PATC") and employed apprentice electricians who participated in that program and were individually registered with PATC . However, Plaintiff did not have a Delaware registered apprenticeship program and, likewise, none of Plaintiff's apprentices were registered with the Delaware Dept. of Labor (DDOL), the agency charged with administering the Delaware Prevailing Wage Law ("PWL"). 29 Del. C.§ 6960, *et seq*.

Regulations in effect at the time defined apprentices as individuals in a *bona fide* apprenticeship program and individually registered by the program sponsor. Program sponsors were limited to "Delaware Resident Contractors" who regularly maintain a place of business in Delaware which, under the PWL, did not include site trailers, temporary structures associated with one contract or set of related contracts, nor the holding, nor the maintaining of a post office box within this State. In essence, only apprentices registered by contractors with permanent Delaware offices could be considered eligible to be paid the apprentice wage rate under the PWL. Since Plaintiff did not maintain a permanent Delaware office, all of Plaintiff's apprentices were considered non-registered apprentices who must be paid the journeymen or mechanic's wage rate.

This statutory and regulatory scheme, Plaintiff alleged, unfairly discriminated against it as an out-of-state contractor in violation of the Due Process Clause in the U.S. Constitution – the "dormant" aspect of which prohibits states from unjustifiably discriminating against or burdening interstate commerce. Plaintiff argued, and the Court agreed, that requiring an in-state presence facially discriminated against out-of-state contractors. Finding no legitimate local interest that could not be protected by less discriminatory means, the Court invalidated the residency requirement for program sponsors. By doing so, out-of-state contractors bidding on Delaware, state-funded jobs may now calculate their bids using the prevailing wage for apprentices instead of the higher journeymen rate.

Legislation

1. 10 *Del. C.* §5702, Delaware's Uniform Arbitration Act, jurisdiction; applications; venue; statutes of limitation.

Amendments to §5702(a), hereafter require parties to specifically reference the Delaware Uniform Arbitration Act, and the parties' desire to have it apply to their agreement to confer jurisdiction on the Court of Chancery to enforce the agreement and to enter any judgments on an award thereunder.. Section 5702(c) provides that any agreement not conforming to the requirements of sub-section (a) will be decided in conformance with the Federal Arbitration Act.

2. 10 Del. C. §5703, Delaware's Uniform Arbitration Act, proceedings to compel or enjoin arbitration; notice of intention to arbitrate.

Amendment to §5703(b), eliminates right of parties to seek injunction with Chancery Court under the DUAA on statute of limitations defense. Newly amended §5703(b) provides that parties in Chancery Court are limited to challenging applicability of an arbitration clause on the grounds that a valid agreement was never entered into or had not been complied with.

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District of Columbia

Case Law

1. In *United States ex rel. Miller v. Bill Harbert International Construction, Inc.*, 608 F.3d 871 (D.C. Cir. 2010), the U.S. Court of Appeals for the District of Columbia applied a 2009 amendment to the False Claims Act ("FCA") to hold that the Government's FCA claims for two of the three contracts at issue were barred by the FCA's six-year statute of limitations because they did not relate back to the qui tam plaintiff's claims. The facts presented in *Bill Harbert International* concerned allegations of bid rigging among multiple contractors concerning three different sewer projects in Egypt that the United States funded. Essentially, a group of bidders agreed to allow one bidder to win the project, with a "loser's fee" to be paid to the remaining members of the group. In 1995, Richard Miller filed a complaint under seal as an FCA qui tam plaintiff in which he alleged bid rigging in connection with Contract 20A. The U.S. Government kept Miller's complaint under seal for more than the six-year statute of limitations period while pursuing criminal investigation and prosecution of the bid rigging participants. In 2001, however, the Government unsealed Miller's complaint and intervened to add claims of bid rigging on two other contracts, Contracts 29 and 07. The defendants argued that the Government's claims as to all three contracts were barred by the FCA's statute of limitations.

The 2009 amendments to the FCA provide that the Government's intervening complaint in a FCA action filed by a qui tam plaintiff relates back to the filing date of the qui tam plaintiff's complaint "to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person." While the court found that the Government's complaint for Contract 20 arose out of the same conduct, transactions and conduct set forth in Miller's complaint, it also found that the Government's complaint concerning Contracts 29 and 07 did not because there were important differences with respect to those latter contracts concerning "the work to be performed, who was prequalified to participate in the bidding that was allegedly rigged, when the contract was awarded, who won the contract, and the amount of the winning bid." As a result, the Government's claims on Contract 20 were permitted, but its claims on Contracts 29 and 07 did not relate back and were, therefore, barred by the statute of limitations.

The court also addressed whether the false claims provision of the Foreign Assistance Act preempted the FCA and whether the evidence offered in support of the damages awarded for Contract 20 was sufficient. As to preemption, the court held that the false claims provisions of the FCA and the Foreign Assistance Act presented a choice of remedies for the Government that overlapped, but did not conflict. Thus, the FCA was not preempted and the qui tam suit was permitted. As for damages, the court upheld the award of $29 million as falling within the range of damages if the adjusted contract amount awarded to the bid rigging contractor was compared to (1) other "free of influence" estimates for the contract; or (2) the contractor's actual costs plus 25% markup for overhead and profit.

2. In *National Association of Home Builders v. Occupational Safety & Health Administration*, 602 F.3d 464 (D.C. Cir. 2010), the U.S. Court of Appeals for the District of Columbia confirmed the authority of the Secretary of Labor to establish rules that made the failure to provide respirators or workplace training an OSHA violation as to each affected employee. In so holding, the court rejected the argument of three trade associations who claimed the Secretary lacked the requisite statutory authority because Congress delegated the "units of prosecution" determination to the OSHA Commission. To the contrary, the court held that with respect to violations of the Secretary's standards, the Secretary "stands in the shoes of

the legislature" and that "[i]n giving the Secretary the authority to define what constitutes a violation, the Act necessarily gave the Secretary the authority define the unit of prosecution." (citations omitted)

3. In *G.E. Transport S.P.A. v. Republic of Albania*, 693 F. Supp. 2d 132 (D.D.C. 2010), the U.S. District Court for the District of Columbia granted default judgment and confirmed an International Chamber of Commerce, International Court of Arbitration ("ICA") arbitral award against the Republic of Albania for more than $20 million in connection with the petitioners' contract with Albania to modernize Albania's rail network. The court concluded it had subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA") because the action was brought against a foreign state to confirm an arbitral award pursuant to the New York Convention. Given the existence of subject matter jurisdiction, the court also held that it had personal jurisdiction because petitioner properly served Albania pursuant to the procedures outlined in their contract, thereby complying with § 1608 of the FSIA. After noting that none of the New York Convention's Article V defenses to confirmation of the award applied, the court addressed whether it should adjourn any decision on enforcement of the award pursuant to Article 6 of the New York Convention and in deference to Albania's ongoing appeal of the award in Italy. The court concluded that adjournment was not required and the award should be enforced because it would further the purpose of arbitration to secure prompt dispute resolution, four years had passed since petitioners commenced the arbitration, the Italian appeal proceedings were estimated to last until 2014, Albania had unsuccessfully pursued a post-arbitration appeal in the ICA, and the Italian court had declined to set aside the award on an interim basis.

4. In *National Association of Home Builders v. U.S. Army Corps of Engineers*, 699 F. Supp. 2d 209 (D.D.C. 2010), the U.S. District Court for the District of Columbia rejected the claim of the National Association of Home Builders (the "Association") challenging the authority of the U.S. Army Corps of Engineers (the "Corps") to issue Nationwide Permit 46. The permit at issue required permit coverage for discharges into non-tidal upland ditches that the Association claimed were not navigable waters and, therefore, not within the scope of the Corps' jurisdiction. After determining the Association did have standing due to the time and costs involved for pursuing permit coverage, the court considered the merits of the Association's challenge in light of the deference required for agency action, including a presumption of regularity. After noting several differing holdings from various courts concerning whether particular ditches constituted navigable waters, the court rejected the Association's challenge because the Association could not show that there were no set of circumstances under which the permit would be valid.

5. In *Urban Development Solutions, LLC v. District of Columbia*, 992 A.2d 1255 (D.C. Ct. App. 2010), the D.C. Court of Appeals dismissed the claims of Urban Development Solutions, LLC ("Urban Development") in connection with its protest of the District's decision to award a contract to another firm for the purchase and development of land owned by the District. After providing a detailed review of the factual record and noting that it would look generally to federal courts and contracting decisions for guidance, the court undertook a "highly deferential" review of the District's procurement decision, noting that it would not be disturbed absent a showing that it was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. After noting that the procuring agency determines whether a bid defect is material, the court affirmed the District's finding that the awardee was both responsive and responsible. The court also found that while the Request for Proposal did constitute a "promise to administer the selection process fairly … and in good faith," Urban Development failed to show that the District breached its promise. As a result, the court dismissed all of Urban Development's claims.

6. In *WWC Services of San Francisco, Inc. v. Washington Convention & Sports Authority*, 998 A.2d 314 (D.C. Ct. App. 2010), the D.C. Court of Appeals rejected a bid protest for failure to exhaust administrative procedures. In *WWC Services*, the disappointed bidder filed a bid protest because the awardee failed to attend the on-site inspection that was required by the Request for Proposals as a condition precedent for award. The disappointed bidder, however, protested the bid directly in D.C. Superior Court without first complying with the bid protest procedures of the Washington Convention Center Authority. In dismissing the bid protest, the court held that the Authority's regulations had the force and effect of law and that the failure to file a timely bid protest pursuant to said regulations required dismissal of the bid protest.

7. In *Quincy Park Condominium Unit Owners' Association v. D.C. Board of Zoning Adjustment*, 4 A.3d 1283 (D.C. Ct. App. 2010), the D.C. Court of Appeals upheld the constitutionality of a provision permitting notice to the condominium owners' association in lieu of direct notice to the unit owners when the number of units exceeded 25, even though unit owners were not directly notified of the close proximity of new construction to its property line that required a zoning variance and special exception. In *Quincy Park*, the Quincy Park Condominium Unit Owners' Association (the "Association") challenged the decision of the Board of Zoning Adjustment (the "Board") to approve the expansion of the Morrison-Clark Hotel in downtown Washington, D.C. The hotel expansion required zoning variances and a special exception in part because the construction would extend to the property line and result in the rear wall of a new structure being just three feet from the Quincy Park building. In seeking the approval of the local Advisory Neighborhood Commission ("ANC"), Morrison-Clark provided documents on two separate occasions that did not show the adjacent buildings or how close the hotel's new structure would be. Both times the ANC responded by approving the project. It was only in a pre-hearing submission to the Board that Morrison-Clark may have finally shown the location of the proposed construction vis-à-vis the Quincy Park building. No one from the ANC or the Association, however, appeared at the hearing, although a unit owner did attend.

Upon learning of the close proximity of the new construction, the unit owner moved the ANC to rescind its approval, which it did. The Board, however, had already approved Morrison-Clark's zoning requests and subsequently denied the ANC's request for a rehearing. In upholding the Board's decision, the D.C. Court of Appeals held that although the Board did permit a new hearing and give "great weight" to the issues raised by the ANC, the Board was not required to do so because the ANC's motion for a rehearing came too late to be considered during the Board's deliberations. The court also held that the rule permitting notice to be made to the Association, rather than directly to the unit owner, was constitutional. The court reasoned that the Association's board members are fiduciaries of the unit owners and found that the distinction allowing notice to the Association instead of unit owners was rationally related to the government's legitimate interests in ensuring notice is provided while reducing administrative burdens.

8. In *Loney v. D.C. Rental Housing Commission*, Nos. 08-AA-1203 & 08-AA-1603, 2010 D.C. App. LEXIS 549 (D.C. Ct. App. Sept. 23, 2010), the D.C. Court of Appeals upheld the D.C. Rental Housing Commission's finding that a petition for substantial rehabilitation of an apartment complex filed pursuant to 14 DCMR § 4212 (2004) and D.C. CODE § 42-3502.14 (2001) should not have been granted because it lacked substantial evidence in support. To be approved, the proposed renovation must meet or exceed 50% of the assessed value of the housing and be in the interest of the tenant. Whether the proposed rehabilitation is in the tenant's interest depends in part on (i) the existing physical condition of the housing; (ii) health, safety and welfare considerations of the tenant; and (iii) the financial impact to the tenant. As

for Loney's petition, the Commission found that in preparing the projected costs for the project, Loney failed to verify whether each unit actually needed the proposed rehabilitation. By removing the renovation costs for each unit (due to the lack of verification), the proposed rehabilitation failed to meet the 50% threshold requirement, thereby justifying rejection of Loney's petition.

9. In *McNair Builders, Inc. v. Taylor*, 3 A.3d 1132 (D.C. Ct. App. 2010), the D.C. Court of Appeals declined to decide whether the application of the judicial proceedings privilege barred a mechanic's lien complaint because the court determined it did not have jurisdiction to hear an interlocutory appeal on the issue. Essentially, the court held that while the judicial proceeding privilege affords absolute immunity to attorneys from actions in defamation for communications made in judicial proceedings, it "does not implicate a substantial public interest of a 'high order' on a par with those noted by the Supreme Court," such as "safeguarding constitutional separation of powers, preserving the ability of officials to carry out their public duties, ensuring the sovereign rights of states under the Eleventh Amendment, and protecting due process rights of criminal defendants." (citing *Will v. Hallock*, 546 U.S. 345 (2006)).

10. In *Charlton v. Mond*, 987 A.2d 436 (D.C. Ct. App. 2010), the D.C. Court of Appeals found that telephone calls to persons in the District of Columbia, but originating from Maryland, were insufficient to establish personal jurisdiction where the owner and general contractor were both Maryland residents, the project was performed in Maryland, and the contract was negotiated and executed in Maryland. The court further found that the owner did not waive personal jurisdiction by filing a counterclaim because the counterclaim was not filed until after the trial court (incorrectly) denied the initial motion to dismiss for lack of personal jurisdiction.

Legislation

1. Whistleblower Protection Amendment Act of 2009, Law 18-117, Act 18-265 (approved Jan. 11, 2010) (effective Mar. 11, 2010) (amending D.C. CODE §§ 1-601.01 *et seq.,* 2-223.01 *et seq.,* 2-308.15(f)(1)). The Whistleblower Protection Amendment Act of 2009 is intended to clarify what constitutes a prohibited procurement act, to protect against retaliation acts against contractors making protected disclosures and to extend the limitations period for whistleblower retaliation claims. The Act protects against various retaliatory acts made "wholly or in part" because of a protected disclosure, including termination of a contract (for default or convenience), delaying or withholding payment, imposing extra-contractual conditions, or any other "action designed to or having the effect of impeding a contractor's performance; or … injuring the business or reputation of a contractor." The statute of limitations for retaliatory claims requires that an action "be filed within 2 years after a violation occurs or within one year after the contractor first becomes aware of the violation, whichever occurs first." The Act also increases the maximum amount a qui tam plaintiff may recover from 20% to 25% of the settlement or judgment proceeds.

2. Stimulus Accountability Act of 2010, Law 18-194, Act 18-405 (approved May 19, 2010) (effective July 23, 2010). The Stimulus Accountability Act of 2010 imposes certain reporting requirements on subcontractors and contractors, among others, who receive grants or funds from the American Recovery and Reinvestment Act of 2009 ("ARRA"). These requirements include reporting the jobs created as a result of the grants and funds and the number of D.C. residents hired for ARRA-funded positions.

3. Department of Small and Local Business Development Amendment Act of 2009, Law 18-141, Act 18-306 (approved Feb. 3, 2010) (effective Apr. 20, 2010) (amending D.C. CODE §§ 2-218.01 *et seq.*). The Department of Small and Local Business Development Amendment Act of 2009 establishes certain reporting requirements for contractors and subcontractors and authorizes the imposition of fines and penalties for violating the Act. The Act includes new definitions for "joint venture", "local manufacturing" and "veteran-owned" business enterprises that are subject to the Act. The Act also requires each developer or beneficiary to provide a copy of a "certified business agreement" within 10 business days of execution to the Office of District of Columbia Auditor, which must include a subcontractor utilization plan for certified business enterprises ("CBEs"). A quarterly report must also be provided and include for each subcontract with CBEs the price to be paid, a description of the goods or services to be provided and the amount paid by the contractor to the subcontractor.

Importantly, the Act provides for "a rebuttable presumption that a contractor willfully breached a subcontracting plan" if it fails to submit a required subcontracting plan monitoring or compliance report or submits such a report with the intent to defraud. This presumption may be rebutted only by showing, with clear and convincing evidence, that the contractor is in full compliance with the requirements of the subcontracting plan. Penalties for violations of the act may include up to the greater of $15,000 or 5% of the total amount of the subcontract *for each breach*.

The Act also establishes a minimum amount of participation by small business enterprises or disadvantaged business enterprises in development projects on District-owned property or projects supported by District funds, to include "20% in equity participation and 20% in development participation." The failure to meet these minimum requirements will require the developer to "pay to the District the outstanding cash equity amount as a fee … ." These "fees" are required to be applied toward vocational training programs for D.C. residents and low interest loans or grants to certain small businesses. Finally, the Act provides certain oversight controls in the form of a fraud hotline, quarterly and annual reporting requirements for each government corporation and the revocations of certificates of registration of a person or business enterprise willfully failing to cooperate in an audit or investigation.

4. Small Business Stabilization and Job Creation Strategy Amendment Act of 2010, Law 18-159, Act 18-350 (approved Mar. 25, 2010) (amending D.C. CODE §§ 2-218.01 *et seq.*). The Small Business Stabilization and Job Creation Strategy Amendment Act of 2010 establishes the District of Columbia Small and Local Business Opportunity Commission as the administrative body for hearing, and imposing penalties, for violations of the CBE certification requirements. Non-frivolous complaints filed with the Commission must be heard within three months of the filing of a complaint, but no earlier than one month after providing the respondent with notice of the hearing. The Commission is authorized to issue subpoenas, revoke or suspend the respondent's registration or take "any other action it considers appropriate." The Act, however, limits the term of imprisonment to no more than five years for identifying a CBE in a bid or proposal without notice to the CBE, authorization by the CBE, and/or actual performance of the contract by the CBE.

The Act also requires the Department of Small and Local Business Development to provide certain "stabilization services" for CBEs. These services include programs to assist in "securing capital and repairing damaged credit," seminars on obtaining credit and loans, and access to non-traditional financing sources, as well as traditional sources. The Department must also contract for expert consulting and education services to CBEs, as well as counseling

for potential borrowers to improve presentations to potential lenders, and develop online "survival" resources for CBEs and a list of financing options.

In addition, the Act establishes the Volunteer Corp of Executives and Entrepreneurs within the Department of Small and Local Business Development. The mission of the Volunteer Corp is to mentor, educate and provide consulting and networking services to CBEs. The Volunteer Corps is charged with, among other things, development of a plan to increase the proportion of CBEs with socially and economically disadvantaged backgrounds, to establish benchmarks concerning mentoring hours, performance evaluations and demographic and geographic characteristics of persons within CBEs assisted by the Volunteer Corp. The Volunteer Corps also is expected to provide advice to CBEs and implement a networking program.

Finally, the Act requires the development of an annual job creation plan and identification of, and assistance to CBEs, business opportunities or contracts for CBEs, including those made available under the ARRA.

5. *Lis Pendens* Amendment Act of 2010, Law 18-180, Act 18-377 (amending D.C. CODE §§ 42-1207 *et seq.*). The Lis Pendens Amendment Act of 2010 addresses the cancellation of notices concerning the pendency of an action (*lis pendens*) with respect to real property located in the District of Columbia. The Act is retroactive and establishes that the party filing a notice of pendency of action on such property must cancel the notice by filing the necessary documentation with the Recorder of Deeds within 30 days of dismissal or termination of the underlying action. Should one year pass without the notice being cancelled as required, the Mayor is authorized to have the notice cancelled or released, and the party responsible for cancelling the notice shall be subject to a civil fine not to exceed $500.

The Act also empowers a person with an interest in the subject property to file an action in D.C. Superior Court or a motion in an action pending therein (or in the U.S. District Court for the District of Columbia) seeking cancellation of the notice. Under such circumstances, the court may cancel the notice if the notice is noncompliant or the underlying action or proceeding "has not been prosecuted in good faith, with all reasonable diligence, and without unnecessary delay." The court may also cancel the notice if the moving party has shown a substantial likelihood of success in the underlying action or proceeding, will be irreparably harmed if the notice is not cancelled and both the balancing of potential harm and the public interest favor cancellation of the notice.

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Florida

Case Law

1. SADD Homes, Inc. v. Rivero, 34 Fla. L. Weekly D2589a (3rd DCA 2009). In this venue dispute, homeowner originally filed a breach of contract action in Miami-Dade County regarding the construction of a personal residence. A month after the homeowner's action was filed, the contractor recorded a claim of lien in Broward County where the personal residence was located. When the contractor filed its enforcement action on the lien in Broward County (as required based on the property's location), the contractor also sought to dismiss the homeowner's Miami-Dade County contract action for improper venue. The 3rd DCA reversed the trial court's denial of the motion to dismiss for improper venue (filed three times) reasoning that "Broward County is the appropriate venue since the property is located in Broward County. In addition, the work occurred in Broward County and the alleged breach as well as the majority of evidence and witnesses were located there."

2. Worthington Communities, Inc. v. Mejia, 34 Fla. L. Weekly D2565b (2d DCA 2009). In this construction injury dispute, Worthington was developing a condominium project as both owner and general contractor. An employee of a subcontractor was injured, and brought suit against Worthington alleging "that Worthington was negligent by failing to provide [plaintiff] with a safe place to work. [Plaintiff] did not allege that Worthington was vicariously liable for the negligence of [the subcontractor]. Instead, [plaintiff] alleged that Worthington had been actively negligent in causing this accident. The essence of the [plaintiff's] claim was that Worthington, as the owner/general contractor, had a duty to maintain the site in a safe condition for all workers and that Worthington had breached that duty by failing to correct, or arrange to have corrected, the dangerous condition created by [the subcontractor] when it loaded mesh bundles onto the unbraced [] joists." The 2d DCA affirmed the jury's $6.5 million award based on, among other reasons, that some evidence existed that Worthington knew of an unsafe condition and did not warn subcontractor or its employees of it. The opinion also provides a detailed summary of an owner/general contractor's duty to maintain a construction site in a reasonably safe condition.

3. *Premier Real Estate Holdings, LLC v. Butch, 35 Fla. L. Weekly D3b (4th DCA 2009).* An order denying a motion to compel arbitration concerning a contract dispute was erroneously entered by the trial court. The disputed contract contained an arbitration clause as well as a provision stating that the contract should be interpreted using Florida law. A space in the arbitration clause, which was supposed to be filled in with the governing rules, was left blank. Despite the blank, the court held that the arbitration clause still contained all the necessary terms to form a binding agreement. Because the contract was to be interpreted under Florida law, Chapter 682, Florida Statutes, which sets forth the rules and procedures for arbitration in the event that an arbitration clause is silent, serves as a gap filler.

4. *Banner Supply Co. v. Harrell, 35 Fla. L. Weekly D31a (3rd DCA 2009).* The court affirmed the denial of a motion to abate in a construction defect action when proper pre-suit notice and opportunity to inspect pursuant to Chapter 558 was not given, but the abatement motion occurred more than sixty days after the plaintiff filed its complaint. Because the defendant was effectively given adequate time to inspect during the pendency before the abatement hearing, the court reasoned that granting abatement would be futile.

5. *Crystal Motor Car Company of Hernando, LLC v. Bailey, 35 Fla. L. Weekly D101a (5th DCA 2009).* A genuine issue of fact existed as to whether an arbitration agreement

was forged and, therefore, the court held that an evidentiary hearing to determine the validity of the arbitration agreement must be held before the underlying dispute could be compelled to arbitration

6. *Whitehead v. Smith, 35 Fla. L. Weekly D114a (2d DCA 2010) (special concurrence).* Parties to an arbitration do not necessarily have an unfettered right to choose a partial arbitrator, even when the arbitration agreement seems to suggest they do. In this case, the arbitration agreement in question contained a provision granting each party the right to choose one arbitrator, but also contained a clause stating that claims were to be determined by a panel of neutral arbitrators. When one party chose an arbitrator whose partiality was questionable, the court intervened and dismissed that arbitrator. On appeal, the court held that the neutrality clause set the parameters of the parties' right to choose an arbitrator, and thus, the court could intervene and dismiss a selected arbitrator when partiality was a concern

7. *Associated Builders and Contractors, Florida East Coast Chapter v. Miami-Dade County, (11th Cir. Jan. 26, 2010).* The 11th Circuit upheld a permanent injunction prohibiting Miami-Dade County from enforcing an ordinance that set binding regulations for the construction, installation, operation, and use of tower cranes, personnel, and material hoists. The court held that the ordinance was federally pre-empted by OSHA (the Occupational Safety and Health Act), a piece of federal legislation which, among other things, seeks to ensure the occupational safety of workers operating tower cranes by requiring compliance with certain specifications. Because Miami-Dade County's ordinance contained wind load standards that directly regulated how construction workers could use and erect tower cranes, the ordinance directly affected the occupational safety of crane workers, an area already occupied by OSHA..

8. *MasTec, Inc. v. Suncoast Underground, Inc., 35 Fla. L. Weekly D171f (3d DCA 2010).* The appellate court reversed the lower court's order granting summary judgment in favor of Suncoast, a subcontractor of Mastec, holding that genuine issues of material fact existed as to whether Suncoast fulfilled its statutory duties when it performed excavation work for Mastec that resulted in damage to a City owned water main. Because Mastec was being held liable for the damage to the water main, MasTec sought indemnification from Suncoast. Suncoast asserted that it was not liable because it fulfilled its statutory duties. Florida's Underground Facility Damage Prevention Act, chapter 556, Florida Statutes (2005), requires that any person performing excavation work must report the work to Florida's "One Call" hotline at least two business days before beginning work. Area utility companies are then required to mark any underground utility lines that may be affected within two days, unless they do not have accurate information as to the location of the lines. Where lines are unmarked two business days after the One Call notification, the excavator can proceed with its excavation, but must use "reasonable care" and "detection equipment." Within two days of Suncoast's One Call notification, the City had responded to the hotline that it did not have sufficient information to locate the underground facilities. However, the Third DCA concluded that the City had an obligation to contact Suncoast directly under section 556.105(4)(b). Because the City did not directly contact Suncoast within two days of the One Call notification, the court held that Suncoast was statutorily permitted to proceed with the excavation. Nevertheless, Suncoast was required to perform its excavation with reasonable care using detection equipment. Because there was insufficient evidence on the record to determine whether Suncoast met this standard, the court reversed the order granting summary judgment in Suncoast's favor.

9. *Rodriguez v. Builders Firstsource - Florida, LLC, 35 Fla. L. Weekly D245a (4th DCA 2010)* Court upheld trial court's order compelling arbitration of personal injury claims stemming from mold exposure based on the clear and unambiguous language of the arbitration

clause. In this case, homeowners sued a developer for personal injuries sustained from exposure to mold which infiltrated their home due to faulty construction. The purchase agreement between the homeowner and the developer contained an arbitration clause which by its terms applied to: "Any claimed defect in or to the home . . . or the construction of the home . . . or any claims for personal injury." The court rejected the homeowner's reliance on recent case law holding that actions by homeowners against developers for injuries arising from mold exposure were not subject to arbitration, reasoning that the arbitration clauses in those cases did not specifically address construction defects or personally injury claims.

10. *JPG Enterprises, Inc. v. McLellan, 35 Fla. L. Weekly D331a (4th DCA 2010).* In this case, a property owner sued a contractor under Section 504.1357, Fla. Stat. to recover deposit monies given to the contractor for the construction of a single-family home on the property owner's land. The court held that Section 501.1357, Fla. Stat., which requires contractors or developers to hold a buyer of a single family home's deposit money in an escrow account and return the money to the buyer if the contract is properly terminated, is not applicable when the buyer already owns the land the house is being constructed on. Since the statute often refers to the time of "closing," the court reasoned that the statute is only applicable to transactions involving a "closing," meaning the transfer of legal title to **both** the dwelling unit and underlying land to the buyer. Therefore, Section 501.13587is not applicable when a landowner contracts to have a single family home constructed on its own land.

11. *Avatar Properties, Inc. v. Greetham, 35 Fla. L. Weekly D372a (2d DCA 2010).* An arbitration agreement was enforceable even though it was not explicit in the underlying home purchase agreement, but was located in a home warranty which the purchase agreement incorporated by reference. In this case, a homeowner filed suit against a developer for breach of a home purchase agreement and the developer moved to compel arbitration. The purchase agreement expressly incorporated a home warranty by reference, but the warranty was not actually attached to the purchase agreement. Rather, the warranty was available to the homeowner on request. The home warranty contained an arbitration provision, which was the basis for the developer's motion to compel arbitration. The court held that even though the home purchase agreement made no explicit reference to arbitration and the homeowner never actually saw the warranty containing the arbitration clause, it was still part of the purchase agreement as it was validly incorporated by reference and was, therefore, enforceable.

12. *Southeast Land Developers, Inc. v. Reaves, 35 Fla. L. Weekly D379c (1st DCA 2010).* A default judgment based on a complaint which failed to state a sufficient claim was void. This case involved a subcontractor who sued a contractor for failure to pay under the contract. The contract contained several conditions precedent to the subcontractor's receiving payment, but the complaint made no mention of the conditions, stating only that money was "due and payable." The contractor failed to answer the complaint and the subcontractor obtained default judgment. On appeal, the court held that since the complaint failed to allege conditions precedent, it did not state a valid claim and, accordingly, default judgment based on that complaint was void.

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Georgia

Case Law

1. In *Consolidated Pipe & Supply Co. v. Genoa Const. Services*, 302 Ga. App. 255, 690 S.E.2d 894 (2010), the Georgia Court of Appeals strictly enforced the required contents of a Notice to Contractor under O.C.G.A. § 10-7-31. When a subcontractor filed for bankruptcy, one of its suppliers filed a payment bond claim for unpaid materials. The general contractor and surety denied the claim based on a contention that the supplier's Notice to Contractor failed to comply with all of the requirements of the statute. The Court of Appeals agreed, holding that the supplier, Consolidated, failed to include both the name and *address* of each person at whose instance the materials were furnished, instead including only the name. Furthermore, Consolidated's Notice neglected to include both the name and *location* of the project, instead including only the name. The Court rejected Consolidated's arguments that it "substantially complied" with the statute's requirements, emphasizing that strict compliance with Section 10-7-31 is necessary.

2. In *Callahan v. Hall*, 302 Ga. App. 886, 691 S.E.2d 918 (2010), the Court of Appeals reaffirmed the longstanding rule that there can be no quasi-contractual recovery for remote contractors. When a contractor on a residential project failed to pay its grading sub, with whom it had entered into an oral subcontract, the subcontractor filed a lien claim and a lawsuit against both the general contractor – for breach of contract – and the homeowner – for *quantum meruit*. The trial court invalidated the subcontractor's lien for failure to comply with notice requirements but found in the sub's favor and against the homeowner on the *quantum meruit* claim. The Court of Appeals reversed, citing the line of Georgia caselaw holding that where, as here, there was no evidence of any direct contractual relationship between the subcontractor and the property owner, then the subcontractor's sole remedies are a suit against the party with whom it directly contracted or a claim of lien against the property. In the event such a subcontractor fails to properly perfect its lien rights, then it has no recourse whatsoever against the owner.

3. In *Landsouth Construction, LLC v. Lake Shadow Limited, LLC*, 303 Ga. App. 413, 693 S.E.2d 608 (2010) an owner and contractor on a condominium project entered into a contract with an arbitration provision. When a dispute arose, the contractor filed a claim of lien and then a lawsuit against the owner with three causes of action: Foreclosure of the lien claim, *quantum meruit*, and unjust enrichment. The complaint did not mention arbitration, and the suit was settled and dismissed prior to the filing of an answer by the owner. The owner later filed its own lawsuit against the contractor, whereupon the contractor moved to dismiss the lawsuit and compel arbitration. The trial court denied the contractor's motion, holding that the contractor had waived its contractual right to arbitrate by earlier filing a lawsuit with two additional causes of action beyond the mere foreclosure of its lien. The trial court held that if the contractor's prior suit had sought to foreclose its lien *only*, as is statutorily required, then it would not have waived its right to arbitrate. The Court of Appeals reversed, citing three main bases for its ruling. First, the three causes of action in the contractor's suit were held as three alternative theories for the same relief and damages, not three separate and distinct causes of action. Second, the owner failed to demonstrate any prejudice arising from the earlier lawsuit, given that it was resolved before an answer was even filed. Finally, the Court noted the contract's requirement that any waivers of contractual rights had to be in writing. The *Landsouth* opinion further illustrates the legal and statutory preference for the enforcement of arbitration provisions in Georgia.

4. In *Atlantic Station, LLC v. Vratsinas Construction Company*, 2010 Ga. App. LEXIS 1025 (Ga. Ct. App. Oct. 29, 2010), the Court looked at the converse issue and decided that the considerations that apply to waiving the right to arbitrate also apply to waiving the right to stay arbitration. A construction company entered into a contract with a developer to build a parking deck at its multi-use complex. The contract contained an arbitration provision. The contractor later filed a demand for arbitration with the developer, ostensibly under the contract, seeking payment for certain pre-development expenses incurred by the contractor relating to the entire development – the contractor asserting that it was entitled to these expenses when the developer breached an extra-contractual, oral agreement to grant the contractor first option to build commercial buildings at the complex. After eighteen months of complex arbitration proceedings, including discovery and depositions, the developer moved the trial court to stay the contractor-initiated arbitration proceedings, arguing that it had now discovered, via a second amended demand for arbitration filed by the contractor, that the damages being sought were outside the scope of the written contract and, thus, outside the scope of the arbitration provision. The Court of Appeals held that the trial court did not err in denying the developer's motion to stay the arbitration and in concluding that the developer waived its right to stay the arbitration by participating in the process for eighteen months. It noted that the contractor claimed in its very first arbitration demand that the parties had proceeded to collaborate under mutual understandings that modified the terms of the written contracts. The Court applied the same reasoning used to evaluate waiver of the right to arbitrate and held that by participating in and failing to object to the arbitration process, the developer waived any right it had to stay the proceedings.

5. In *Mandato & Associates, Inc. v. Sepulveda Masonry*, 303 Ga. App. 438, 693 S.E.2d 620 (2010), a general contractor's insurer undertook the defense of a defective construction claim brought by a homeowner. When the homeowner submitted an offer to settle in the amount of $325,000, the insurer paid the settlement amount without any evidence that the contractor – its insured – had consented to the settlement. The insurer then attempted to assert subrogation rights by filing a lawsuit against five subcontractors alleged to have performed the negligent work. The trial court granted summary judgment to the subs on the basis of O.C.G.A. § 33-7-12(a), which requires an insurer to obtain written consent from an insured prior to paying a settlement if the statutory insurer-insured relationship is to be preserved. The Court examined the writings of record and concluded that none of them met the statutory standard of a "consent in writing" by the insured, and thus, under Section 33-7-12, the payment by the insurer without such written consent was deemed to create an "independent contractor" relationship between the insurer and insured, insufficient to trigger the right of subrogation in the insurance policy.

6. In *Cagle Construction, LLC v. The Travelers Indemnity Company*, 2010 Ga. App. LEXIS 790 (Ga. Ct. App. Aug. 25, 2010), the Court reiterated the standard for a surety to recover costs of completion from its defaulting principal. A contractor working on projects for the Georgia Department of Defense (GDoD) executed a standard General Agreement of Indemnity (GAI) in favor of its surety. When the GDoD dismissed the contractor and demanded that the surety complete the bonded projects, it did so and subsequently filed suit against its principal under the GAI, seeking repayment of the costs of completion. The surety filed a motion for summary judgment, supporting its claim for damages with a tabular summary of completion costs attached to the affidavit of the surety's representative. The Court of Appeals held that such a showing was sufficient to not only obtain summary judgment on liability, but damages as well. The GAI plainly provided that a default asserted by GDoD triggered liability in the contractor for its attendant losses and expenses to the insurer as surety. The surety's affidavit was sufficient not only to establish this liability but also to make a *prima facie* showing of damages consisting of costs incurred. Once this showing was made, the burden shifted to the

defaulted contractor to tender evidence that the costs claimed by the surety were either not incurred at all or were excessive or unreasonable for the scope of work performed. Absent such an affirmative evidenciary showing, summary judgment for the surety was proper.

7. In *Smith v. Hilltop Pools & Spas, Inc.*, 2010 Ga. App. LEXIS 1080 (Ga. Ct. App. Nov. 19, 2010) a homeowner filed suit against a contractor alleging defective construction of an in-ground pool. The trial court granted the contractor's motion for summary judgment based on Georgia's six-year statute of limitations, given that the pool was constructed and completed in August 2001 but suit was not filed until October 2007. The owner cited an agreement with the contractor to change the pool's liner in February 2002, which the owner contended was defective and because of which the owner had never made final payment, as the trigger date for the statute of limitations. The Court of Appeals disagreed, affirming the trial court's judgment that the parties' agreement to change the liner in 2002 did not serve to change the trigger date for the statute of limitation because the pool served the purpose for which it was constructed beginning in August 2001. Since the purported defect in the liner of the pool was visible, the owner's right of action had accrued by the time that the contractor removed its workers from the site in August 2001. Despite an affidavit from another contractor that the contractor's statements that the pool was structurally sound were false, there was no evidence of fraud by the contractor sufficient to toll the statute of limitations.

8. In *Nesbitt v. Wilde*, 2010 Ga. App. LEXIS 1057 (Ga. Ct. App. Nov. 16, 2010) a contractor entered into an agreement with homeowners to build their house. The homeowners executed a security deed for the property in favor of a lender. After filing an action against the contractor for fraud, breach of contract, breach of warranty, negligent construction, and other allegations, the homeowners filed for bankruptcy and the lender foreclosed on the security deed. Thereafter, the trial court granted the contractor's motion for summary judgment on the ground that the homeowners were no longer the real parties in interest. The Court of Appeals reversed, holding that foreclosure on the security deed did not transfer the cause of action to the lender. Any cause of action remained with the homeowners until the lender exercised its option to take the proceeds of a cause of action or prosecute the action in its own name. Absent an assignment to the lender, the homeowners' cause of action based on the construction contract was never a part of the estate owned by the lender after it foreclosed on the security deed. The bankruptcy proceeding did nothing to change the status of the cause of action other than to transfer it to the bankruptcy estate and since the bankruptcy trustee abandoned the estate's claim, the claim never left the homeowners in the first place.

Legislation

1. The Georgia Constitution was amended in 2010 to implement the Georgia Restrictive Covenants Act, O.C.G.A. § 13-8-50, *et. seq.*, which dramatically changed the law regarding restrictive employment covenants in Georgia. In addition to providing express guidance to employers as to which types of covenants are enforceable (previous guidance had come only through caselaw), the Act allows courts to "blue pencil", or edit, otherwise unenforceable restrictive covenants to make them enforceable. The new statute is effective January 1, 2011.

2. Code Section 44-14-361.1, governing mechanic's and materialmen's liens, was amended effective July 1, 2010. Prior to the enactment of this section, a recorded claim of lien could not be altered or amended in any way unless the 90-day filing period had not yet expired. The new law allows for the amendment of claims of lien to reduce the amount of the claimed

lien. This will allow for lien claims to be reduced in the event partial payments are received by the contractor.

3. Another Constitutional Amendment passed on November 2, 2010, Amendment 4, cleared the way for the State of Georgia to enter into Guaranteed Energy Savings Performance Contracts (ESPC). This is a third-party financing program for energy improvements in existing facilities. The projected savings stream created by the energy improvements, which is guaranteed, is designed to pay for the energy retrofits via financing. The third-party firm, called an Energy Services Company or ESCO, designs and installs the energy upgrades in a design/build arrangement and provides the savings guarantee.

4. Code Section 50-17-22, relating to the State Financing and Investment Commission, was amended so as to provide that the Construction Division of GSFIC shall give preference to in-state materialmen, contractors, builders, architects, and laborers in state contracting, provided that such preference does not impair quality and cost considerations.

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Hawaii

Case Law

1. *District Council 50, of the Int'l Union of Painters and Allied Trades v. Saito, 121 Haw. 182, 216 P.3d 108 (Haw. Ct. App. 2009)*. A union and subcontractor sued the State of Hawaii, challenging the award of a capital improvements contract to a general contractor. The general contractor did not hold a glazing and tinting specialty license. The State argued Plaintiffs failed to exhaust administrative remedies under Haw. Rev. Stat. Chap. 103D, the Public Procurement Code. Further, questions regarding the scope of a contractor's license could be pursued under Haw. Rev. Stat. Chap. 444, but Plaintiffs had ignored these procedures before filing suit. The Circuit Court agreed and dismissed the case. The Intermediate Court of Appeals affirmed. Although Chapter 444 governed the licensing and conduct of contractors, it did not authorize the Contractor's License Board (CLB) to reformulate contracts, dictate to whom those contracts should be awarded, or require changes in the bidding process. Moreover, the Procurement Code provided for appropriate remedies, but only for bidders and contractors. The Plaintiffs were neither. As neither the Procurement Code nor Chapter 444 granted the remedies Plaintiff sought, the Circuit Court correctly dismissed the lawsuit.

2. *Communications-Pacific, Inc. v. City and County of Honolulu, 121 Haw. 527, 721 P.3d 505 (Haw. Ct. App. 2009).* After the City of Honolulu issued a request seeking professional services for a City transportation project, Plaintiff was identified as sub-consultant in the bid submitted by one consultant. The City insisted on the selection of another sub-consultant, which ended up with ten percent of the total work, while Plaintiff only received one percent of the work. Suit was filed alleging that the City had violated Haw. Rev. Stat. Chap. 103 D, the Hawaii Public Procurement Code, by unilaterally adding the other sub-consultant. The Circuit Court dismissed the suit because plaintiff had not pursued its exclusive remedy under the Procurement Code. The Intermediate Court of Appeal affirmed. The Procurement Code barred the sub-consultant from bringing a lawsuit against the City in tort for injury suffered as a result of the local government's alleged violations of the Procurement Code.

3. *Koga Eng'g & Construction, Inc. v. State of Hawaii, 122 Haw. 60, 222 P.3d 979 (Haw. 2010).* The contractor entered into a contract with the State to widen a road. Prior to commencing work on the project, the contractor noticed a discrepancy in the plans between the proposed installation of a new drain line and an existing waterline. After the existing waterline was relocated, the contractor submitted a change order incorporating the cost of the relocation. When the state denied the claim, the contractor sued, alleging the State had breached the contract by failing to compensate the contractor for its increased costs. The State argued it had been prejudiced by the contractor's failure to provide notice for additional compensation within thirty days of the waterline discovery, as required by the contract. The Circuit Court granted summary judgment to the contractor, determining it was entitled to damages and payment of part of the contract price that the State retained. The Intermediate Court of Appeals affirmed, except for the portion regarding the retainage. The Supreme Court determined that the contractor's claim that the State failed to pay retainage was subject to the dispute resolutions procedure set forth in Haw. Rev. Stat. §103D-703. Because the contractor had not utilized these procedures, the Circuit Court was instructed to dismiss the claim for lack of jurisdiction. The damages portion was vacated and returned to the Circuit Court for a determination of whether the State was prejudiced by the contractor's claim.

4. *Scherer v. Contractors License Bd., No. 27958, 2010 Haw. App. LEXIS 15 (Jan. 15, 2010).* When the homeowner noticed problems with the contractor's concrete work, she

attempted the resolve the matter with the contractor. Unable to do so, she received proposals from three other construction companies to repair and complete the construction work. Repairs were made and the job was completed by one of these construction companies. The original contractor pursued payment issues in a hearing before the Contractors License Board (CLB). The CLB found in favor of the homeowner. The contractor then sued the CLB, but the Circuit Court granted judgment to the CLB. On appeal, the contractor argued its motion in limine should have been granted to restrict testimony of the homeowner. The Intermediate Court of Appeal determined the homeowner's testimony regarding remedial work and materials was relevant to establish the cost and purchase of materials used to make the repairs. Further, the Circuit Court properly ruled that the contractor willfully departed from or disregarded the plans and specifications. There was no evidence that the remedial work performed or the materials utilized were unreasonable or unnecessary. The homeowner was entitled to restitution. Therefore, the final judgment of the Circuit Court was affirmed.

5. *Nordic Const. Co., Ltd. v. Maui Beach Resort Ltd. P'ship, No. 30151, 2010 Haw. LEXIS 55 (Haw. April 8, 2010).* The project owner commenced a mechanic's lien. The application was dismissed upon the posting of bond. A motion to discharge the bond was filed. The motion was denied without prejudice because the dispute was yet to be resolved, making the request to discharge the bond premature. The owner then appealed the denial of the motion to discharge the bond. The contractor moved to dismiss the appeal for lack of appellate jurisdiction. The Intermediate Court of Appeal granted the motion to dismiss. The Supreme Court accepted the owner's application for writ of certiorari, but affirmed the ICA's order granting the motion to dismiss. The Circuit Court's order denying the motion for discharge did not finally determine the owner's right to have the bond discharged. Consequently, the order was not a final order appealable pursuant to Haw. Rev. Stat. §641-1 (a).

6. *Group Builders, Inc. v. Admiral Ins. Co., No. 29402 (Haw. Ct. App. May 19, 2010). In 2004,* the Ninth Circuit predicted that the Hawaii appellate courts would find that construction defects do not constitute an occurrence under a comprehensive liability policy. *See Burlington Ins. Co. v. Oceanic Design & Constr. Inc.*, 383 F.3d 940 (9th Cir. 2004). On May 19, 2010, the Intermediate Court of Appeals adopted the Ninth Circuit's prediction. The insured was an insulation subcontractor for construction of the Kalia Tower at the Hilton Hawaiian Village in Waikiki. After completion of the Tower, mold damage was discovered. An investigation revealed numerous construction defects in the Tower, some of which contributed to or caused the mold growth. Hilton sued numerous defendants, including the insulation subcontractor. The subcontractor sought a defense from Admiral, which was refused. In the coverage action, the circuit court concluded there was no evidence of property damage caused by an occurrence and granted Admiral's motion for summary judgment. The ICA affirmed, holding that breach of contract claims based on allegations of shoddy performance were not covered under CGL policies. Further, tort-based claims, derivative of the breach of contract claims, were also not covered.

Legislation

1. *H.B. 1927. Contractors: Owners-Builders*. Amends the owner-builder law by: (1) Allowing an exemption for the sale or lease of property by an owner builder prior to the expiration of the one-year prohibition period in the event of hardship; (2) Defining when a construction or improvement is completed; (3) Exempting improvements pursuant to an approved building permit where the estimated valuation as reflected in the building permit is less than $10,000; (4) Establishing fines fro the failure of an owner-builder to comply with the requirements set forth in the disclosure statement provided to the owner-builder by the county.

2. *H.B. 2197*. *Condominiums; Solar Energy; Wind Energy*. Gives boards of directors authority to install or allow the installation of solar energy or wind energy devices on the common elements of condominiums.

3. *H.B. 2897*. *Contractor License; Revocation or Suspension; Illegal Worker*. Subjects a contractor to revocation, suspension, or nonrenewal of its license for knowingly or intentionally employing a person on any project or operation who is not eligible to work in the United States under federal law. Not yet signed by the Governor.

4. *S.B. 2220*. *Construction Site Inspection Task Force*. Establishes a construction site inspection task force to be convened by the department of commerce and consumer affairs to discuss the potential advantages and drawbacks of investigating and inspecting construction sites for unlicensed contractors, illegal workers, and workplace safety violations. The bill was enrolled to the Governor on May 3, 2010.

5. *S.B. 2325*. *Contractors; Licensing of Electricians and Plumbers*. Requires licensed electrical or plumbing workers to display their license while on a construction job site to allow a determination of whether the contractor has met the requirement that at least 50 per cent of electrical or plumbing workers be licensed.

6. *S.B. 2597*. *Hawaii Employers Mutual Insurance Company*. Clarifies that the Hawaii Employers Mutual Insurance Company shall not have any additional third-party duty nor incur any additional liability toward members or beneficiaries beyond that explicitly created by statue. Makes housekeeping amendments.

7. *S.B. 2837*. *Licensing; Electricians*. Revises the minimum requirements for licensing electricians beginning July 1, 2013.

8. *S.B. 2840*. *Procurement; Construction Projects; Resident*. Requires at least eighty per cent of workers on construction procurements to be Hawaii residents; provides sanctions for noncompliance including temporary suspension of contract work, payment withholding, disqualification from the project, recovery of contract payments, and disbarment or suspension.

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Illinois

Case Law

1. In *Universal Structures, Ltd. v. Buchman*, No. 1-09-1421, 2010 WL 2675216 (1st Dist. June 30, 2010), the first district appellate court was tasked with determining whether a contractor was precluded from asserting a mechanics' lien and seeking other relief against homeowners where the contractor failed to execute a written contract with the homeowners for its remodeling work and did not provide the homeowner with the consumer rights brochure as required by the Home Repair and Remodeling Act (the "Act"). The facts which gave rise to the dispute are fairly common: the contractor executed a written contract for preliminary demolition work at the defendants' home and proceeded to remodel the residence without securing a written contract or providing the homeowners with a copy of the Illinois consumer rights brochure. Instead the remodeling work proceeded under a work order system where the contractor performed approximately $1.4 million of work before being terminated by the homeowners. After the homeowners refused to pay the contractor the remaining balance for work performed, the contractor filed a lien on the property and sued for breach of contract and mechanics lien foreclosure.

The court began its analysis by reviewing recent case law that had interpreted the requirements of the Act. In doing so, the court relied heavily on a recent decision from the Third District holding that, while a contractor's failure to comply with the Act constitutes an unlawful violation under the Act, such violation would not invalidate an otherwise enforceable agreement and prevent the contractor from recovering under its contract with the homeowner. *See Fandel v. Allen*, 398 Ill. App. 3d 177 (3d Dist. 2010).

The *Buchman* Court also noted the absence of any language in the Act declaring that a contract that does not strictly comply with the Act would be void and unenforceable. Last, the court referenced recent proposed legislation that would remove language in the Act making it "unlawful" for a contractor to engage in home remodeling or repairs before obtaining a signed contract and presenting the homeowner with the consumer rights brochure. Accordingly, the Court concluded that the contractor's "procedural violations under the Act" did not bar it from asserting its mechanics' lien or breach of contract claim against the homeowners.

Legislation

1. *815 ILCS 513/1 et seq., Illinois Home Repair and Remodeling Act*. On July 12, 2010 the Illinois General Assembly amended the Home Repair and Remodeling Act (815 ILCS 513/1 *et seq.*) (the "Act") to add clarification to a section of the Act which many Illinois courts had previously found ambiguous. This amendment essentially adopts the holdings of several Illinois appellate court cases which have held that a contractor's failure to strictly abide by each of the Act's requirements does not prevent that contractor from later suing the homeowner for breach of contract or to foreclose its mechanics lien.

Under the recent amendment to section 30 of the Act, homeowners must prove actual damages pursuant to section 10a of the Illinois Consumer Fraud and Deceptive Business Practices Act to recover damages for a contractor's violation of the Act. It is now clear: a contractor's failure to execute a written contract with the homeowner, provide a homeowner a consumer rights brochure, or provide the homeowner with proper notice of contractual provisions requiring arbitration or waiving the homeowner's right to a jury trial will not invalidate

the contractor's contract with the homeowner or invalidate the contractor's mechanics lien on the homeowner's property.

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Indiana

Case Law

1. In *Indianapolis-Marion County Public Library v. Charlier Clark & Linard, P.C.,* 929 N.E.2d 722 (Ind. 2010), the Indiana Supreme Court reaffirmed the application of the economic loss doctrine to construction disputes in Indiana. The owner engaged the services of an architect ("WMP"), who subcontracted a portion of its design, engineering and consulting obligations to Thornton Thomasetti Engineers ("TTE") and Charlier Clark & Linard, P.C. ("CCL"). There was no direct contract between the owner and either TTE or CCL. After significant construction and design defects were discovered, the owner sued (amongst others) TTE and CCL and sought from both the recovery of (a) material, equipment and labor costs for repairs, (b) expert and consulting fees incurred during the repair process, (c) increased insurance premiums and costs of utilities, and (d) extended rental fees. Critically, the owner did not incur any personal injury, nor did it sustain any damage to property other than the defectively designed and constructed library. The trial court dismissed the owner's negligence claims against TTE and CCL and the Supreme Court affirmed, relying upon the economic loss doctrine.

The owner argued that the economic loss doctrine should not bar its negligence claims against TTE and CCL. First, the owner asserted that TTE's and CCL's negligence contributed to the unstable condition of the structure. The owner claimed that, although no personal injuries had been suffered, there was an imminent risk of danger and safety concerns to the public resulting from the instability and that this condition should trump the application of the doctrine. The Supreme Court disagreed and held that the economic loss doctrine applies notwithstanding the presence of an imminent risk of danger. This is an important pronouncement from the Court. An owner would literally have to wait for its unstable structure to fall to the ground and potentially injure or kill its employees or members of the public at large before it could sue certain contractors or design professionals in negligence for construction or design flaws. **Second**, the owner argued that it should be permitted to seek recovery from TTE and CCL because both entities were professionals who provided services (rather than tangible products). Again the Supreme Court disagreed, holding that the economic loss doctrine applies to claims against design professionals who provide only professional services.

The Court ultimately held that "there is no liability in tort to the owner of a major construction project for pure economic loss caused unintentionally by contractors, subcontractors, engineers, design professionals, or others engaged in the project with whom the project owner, whether or not technically in privity of contract, is connected through a network or chain of contracts." While the owner in *IMCPL* may have had recourse for certain of its losses and claims, its remedies were against only those with whom it had directly contracted. Contractors and design professionals in Indiana are clearly insulated from potential tort liability when the owner (or another contractor) seeks recovery for economic losses (i.e. costs of repair or replacement, diminution in value, lost profits, etc.).

2. In *Sheehan Const. Co., Inc. v. Continental Cas. Co.*, 935 N.E.2d 160 (Ind. 2010), the Indiana Supreme Court addressed whether a contractor's CGL policy covers a subcontractor's faulty workmanship. Two individuals purchased a home in a subdivision. The general contractor (GC) hired subcontractors, and the subcontractors actually built the home. After moving into the home, the homeowners began experiencing water leaks and reported the problem to their homeowner's insurance company. The homeowner's insurance company

investigated and discovered leaking windows, fungus, decayed sheathing and joists, and other water damage, which was caused by the faulty work of the GC's subcontractors.

The homeowners sued the GC under Indiana's construction defect statute. The GC's insurance carrier asked the court to determine that it had no obligation to pay for the damages, arguing that a CGL policy only covers damage to property other than to the product or completed work itself (i.e. the finished house). In other words, the insurer argued that CGL coverage is for tort liability for physical damages to others and not for contractual liability when the product or completed work does not live up to the bargain.

The Indiana Supreme Court focused on the CGL policy's definition of a covered "occurrence" and ultimately found that coverage may exist. The CGL policies defined a covered "occurrence" as "an accident, including continuous exposure to substantially same general harmful conditions." The Court defined "accident" as " an unexpected happening without intention or design."

Thus, the Court determined that whether faulty workmanship constitutes a covered "occurrence" depends on facts of each case. If faulty workmanship is intentional from the viewpoint of the insured, it cannot be an "accident" or "occurrence" under a CGL policy. However, if faulty workmanship is "unexpected" and "without intention or design" and thus not foreseeable from viewpoint of the insured, then it is an accident within meaning of CGL policy. Under this standard, the Court explained that if, from the GC's viewpoint, the assumption was that the work would be completed properly, then resulting damage—even to the completed product itself—is unforeseeable and constitutes an "accident" and "occurrence" under the CGL policies.

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Iowa

Case Law

1. In *Everly v. Knoxville Cmty. Sch. Dist*., 774 N.W.2d 488 (Iowa 2009), a local taxpayer initially brought the action against the school district, school district superintendent, and private-party supplier to the successful bidder for the replacement of football stadium lighting. Taxpayer challenged the school district's purchasing decision. Iowa does not allow suits by disappointed bidders. Plaintiff dismissed various parties and kept only the supplier in the suit. The Iowa Supreme Court affirmed the district court's dismissal of the amended petition, which only named the supplier, on the grounds that "a taxpayer cannot sue [only] a private entity, who was not a party to the allegedly illegal contract at issue." The court remanded the case with regard to the award of sanctions.

2. In *DB Acoustics, Inc. v. Great River Contrs., L.L.C*., 2010 Iowa App. LEXIS 284 (Iowa Ct. App. Apr. 8, 2010), the Iowa Court of Appeals held that a non-signatory, third-party beneficiary to a contract between a contractor and sub-contractor could be compelled to arbitrate its claim. No decision regarding the publication of this opinion has been made. Note that unpublished opinions shall not constitute controlling legal authority. Further review pending by the Iowa Supreme Court.

3. In *Constr. Servs. v. Eco Tech Constr., L.L.C.*, 2010 Iowa App. LEXIS 305 (Iowa Ct. App. Apr. 21, 2010), the Iowa Court of Appeals found that construction manager was a third-party beneficiary to a contract between contractors and school district and therefore had the right to enforce an indemnification clause against contractor for payment of damages to contractor's employee for injuries sustained on a building project. No decision regarding the publication of this opinion has been made. Note that unpublished opinions shall not constitute controlling legal authority.

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Kansas

Case Law

1. In *Tarlton v. Miller's of Claflin, Inc., ___ Kan.App.2d ___, 227 P.3d 23 (2010),* the Tarltons hired a general contractor for the construction of their new home. Before completing the project, the general contractor died and his estate was unable to satisfy the outstanding claims of his subcontractors. Two subcontractors, Miller's of Claflin, Inc. ("Miller") and S&H Lumber Co. ("S&H") filed mechanic's liens, although neither sent the Tarltons the warning statements required of subcontractors pursuant to K.S.A. 60-1103a(b). The Tarltons filed an interpleader action with respect to the remaining unpaid funds for the project, and Miller and S&H counterclaimed for enforcement of their mechanic's liens. The trial court struck down the liens, concluding that Miller and S&H failed to perfect their liens as subcontractors as they did not provide the statutorily required notice to the Tarltons.

On appeal, the court focused on whether Miller and S&H were subcontractors or whether they had independent, direct contracts with the Tarltons. If Miller and S&H had independent, direct contracts with the Tarltons, then they would not have been required to provide the warning statements set forth in K.S.A. 60-1103a(b). However, both Miller and S&H failed to meet their burden of proof establishing an independent, direct contract with the Tarltons, and both were determined to be subcontractors. The court reiterated that Kansas law requires that in order to create a lien, a claimant must strictly comply with the applicable statute. As Miller and S&H both failed to provide the warning statements pursuant to K.S.A. 60-1103a(b), the Court of Appeals affirmed the lower court's ruling striking down their mechanic's liens.

2. In *Razorback Contractors of Kansas, Inc. v. The Board of County Commissioners of Johnson County, Kansas, ___ Kan.App.2d ___, 227 P.3d 29 (2010)*, Razorback Contactors of Kansas, Inc. ("Razorback") entered into a contract for the construction of a sanitary sewer line with the Johnson County Board of County Commissioners ("the Board"). Razorback claimed that during construction it encountered site conditions materially different from what had previously been disclosed by the Board. Razorback sought additional compensation, but the district court granted summary judgment in favor of the Board because Razorback failed to provide notice of its claim in accordance with the parties' contract.

Work commenced on the sewer line on July 19, 2004. In September 2004, Razorback provided oral notice that it had encountered unanticipated water conditions. However, Razorback did not request a time extension on the project until February 23, 2005. The Board agreed to this request and moved the completion date from April 15, 2005 to June 14, 2005. On June 10, 2005, four days prior to the completion date and nine months after it first experienced unanticipated water conditions, Razorback formally requested in writing an increase in contract price based upon the wet and muddy soil conditions.

The Board denied Razorback's request for an increase in contract price. The Board relied on provisions within the construction contract in support of its position. Specifically, the Board noted that the contract required the contractor to provide the project engineer written notice of any claim for extra compensation within thirty days after the start of the event giving rise to the claim. The Board argued that Razorback was required to provide written notice of its claim for extra compensation in October 2004.

Razorback argued that substantial performance with the contract provisions should be enough to preserve its claim for extra compensation, as the Board had actual knowledge of its claim. The Court of Appeals rejected Razorback's argument. The court held that written notice of changed conditions provisions should be strictly enforced. In this case, Razorback clearly failed to comply with the contract's notice requirements as its notice for additional compensation was not given until nine months after it first discovered the unanticipated water conditions.. The Board was entitled to notice in accordance with the provisions of the contract, and the district court's entry of summary judgment was affirmed.

Legislation

1. *House Substitute for S.B. 377*, An Act relating to retention in public and private construction contracts. House Substitute for Senate Bill 377 amends K.S.A. 16-1802, 16-1804, 16-1902 and 16-1904. This bill was signed by the governor and takes effect on July 1, 2010. The bill requires that retainage shall not exceed 5% of the value of a contract or subcontract unless the owner or contractor determines that a higher rate of retainage is required to ensure performance. In no event could retainage exceed 10% of the value of the contract. Also, in the event that a contractor or subcontractor is not performing to schedule or if there are workmanship issues, the owner can increase retainage to 10%.

The bill also requires the owner to release all remaining retainage or any undisputed payment due within thirty days after substantial completion of a project. However, if any contractor or subcontractor is still performing work on a project, an owner may withhold that portion of the retainage attributable to such work until thirty days after such work is completed.

Also of note, an owner, contractor, or subcontractor may not withhold more than 150% of the value of any incomplete work, provided the incomplete work is due to the fault of another. Any amounts retained for incomplete work shall be paid within 45 days after completion of the work as part of the regular payment cycle.

One other significant change is that a general contractor or subcontractor may request "alternate security" in lieu of retainage. "Alternate security" is defined to mean an irrevocable bank letter of credit, certificate of deposit, cash bond, or other type of asset or security of value equal to or exceeding the amount of retained funds. It does not include a performance bond or a payment bond. If a contractor or subcontractor opts to use alternative security, the owner or contractor who would otherwise withhold the retainage shall have the right to determine which type of alternative security shall be accepted.

Lastly, the bill permits the early release of retainage to a subcontractor if it is determined by the owner, the contractor, and the project architect or engineer that a subcontractor has completed performance satisfactorily and that the subcontractor can be released prior to substantial completion of the entire project without risk or additional cost to the owner or contractor.

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Kentucky

Case Law

1. In *Cincinnati Insurance Co v. Motorists Mutual Insurance, 306 S.W.3d 69 (Ky. 2010)*, the Kentucky Supreme Court aligned with the majority of jurisdictions and found that a claim of defective construction is not deemed an "occurrence" (or accident) under a commercial general liability (CGL) insurance policy. The Court found that the contractor had control over the construction of the project directly or through its subcontractors, and therefore, the faulty construction was not an accidental occurrence. *Id.* at 76. The Court adopted the reasoning of a South Carolina Court which provided that this policy "ensures that the ultimate liability falls to the one who performed the negligent work . . . instead of the insurance carrier. It will also encourage contractors to choose their subcontractors more carefully instead of having to seek indemnification from the subcontractors after their work fails to meet the requirements of the contract." *Id.* at 75.

2. In *River Run Farm, LLC v. Storm*, 2010 Ky. App. LEXIS 189 (Ky. App. October 15, 2010), the Kentucky Court of Appeals found that a homeowner who oversees construction of his or her home, and is not in the business of building, and, therefore, cannot be held liable to a subsequent purchaser of the home for negligent construction. The Court reasoned that since the homeowner was not in the business of building homes for sale and did not enter into a contract to supervise the construction of the home, the homeowner did not owe a duty to the purchaser of the home.

3. In *Brown Sprinkler Corp. v. Somerset-Pulaski Co. Dev. Found., Inc.*, 2010 Ky. App. LEXIS 122 (Ky. App. July 16, 2010), the Court of Appeals held that a subcontractor's failure to pursue and perfect its mechanics lien rights did not prevent it from maintaining a common law equity action for quantum meruit. The Court reasoned that "in order to abrogate the common law and create an exclusive statutory remedy, the legislature must specifically and explicitly state that it intends to do so." *Id.* at *7. Because the Kentucky mechanics lien statutes did not specifically abrogate such common law actions, the doctrine of unjust enrichment was not abrogated by the enactment of such statutes. *Id.* at *8.

4. In *Laurel Constr. Co., Inc. v. Paintsville Utility Commission*, 2010 Ky. App. LEXIS 40 (Ky. App. Feb. 19, 2010), a contractor which had the lowest bid on a water tank construction project filed suit against a utility commission alleging that it violated the Kentucky Model Procurement Code (KMPC) after it was not awarded the contract. The trial court granted summary judgment to the utility commission, and the contractor appealed the decision. While the contractor agreed that the utility commission did not adopt the KMPC, it argued that the KMPC applied because a grant agreement between the utility commission and the Kentucky Infrastructure Authority mentioned that the utility commission would act consistently with the KMPC. *Id.* at *8-9. The Court of Appeals affirmed the trial court's decision and found that the grant agreement did not bring the project within the scope of the KMPC because (1) the reference that the utility commission would act consistently with the KMPC did not require the commission to act in accordance with the KMPC, and (2) the contractor was not a third-party beneficiary to the grant agreement and therefore had no standing to assert a violation of the KMPC. *Id*. at *9. Even though the court found that the utility commission did not have to act in accordance with the KMPC, it noted that the trial court was correct that the contractor's failure to file a protest under KRS 45A.285 amounted to a failure to exhaust administrative remedies which barred the trial court's review of the action. Furthermore, since the KMPC was not involved, a disappointed bidder has no standing to challenge the award of a public contract to

another bidder "absent a showing of fraud, collusion or dishonesty." *Id.* at *7-8 (citing *Pendleton Bros. Vending, Inc. v. Comm. of Ky. Finance and Admin. Cab.*, 758 S.W.2d 24-27 (Ky 1988)). The Court of Appeals found that the contractor did not raise any specific claim of fraud, collusion, or dishonesty by the utility commission. The court reasoned that (1) the bid advertisement gave the commission the right to reject any bid, (2) the commission reserved a great deal of discretion in selecting the bid, (3) the contractor was advised that its bid could be rejected even if it was the lowest submitted, and (4) the contractor was advised that the commission could look at factors beyond the bid price. The Court also stated:

Kentucky law has long recognized that a low bidder is not necessary the best bidder:

That it is assumed when a governmental agency awards a contract to one other than the lowest bidder, that the award of contract is still to the best bidder, and the burden is on one who challenges the bid to show not just that the award was not in fact, to the lowest and best bidder, but that there was an abuse of discretion on the agency's part amounting to fraud, arbitrariness or capriciousness in awarding the contract.

5. *Handy v. Warren County Fiscal Court*, 570 S.W.2d 663, 664 (Ky. 1978)(superseded by statute as stated in *Pendleton Brothers Vending, Inc.*, 758 S.W. 2d 24). Municipalities have wide discretion in the exercise of acceptance or rejection, and where they reserve the right to reject, the courts will not disturb their actions based on mere technicality, even if made unwisely or under mistake." *Ohio River Conversions, Inc. v. City of Owensboro*, 663 S.W.2d 759, 761 (Ky. App. 1984).

Id. at *12. The Court ultimately held that the commission's decision to reject the contractor's low bid was not arbitrary but was based on multiple considerations such as the overall life-time cost of the accepted bid was significantly lower than the contractor's bid. *Id.* at *12-13.

6. In *ISP Chemicals, LLC v. Dutchland, Inc.*, 2010 U.S. Dist. LEXIS 82609 (W.D. Ky. Aug. 4, 2010), an owner asserted various claims against a design/build contractor (and its employees) arising from the failure of a concrete water tank. The primary issue before the Court was whether the plaintiff's claims were barred by KRS 413.245, which contains a one year statute of limitations for claims, whether brought in tort or contract, arising out of any act or omission in rendering professional services. The important portion of the Court's holding deals with the statute of limitations applicable to negligent misrepresentation claims asserted against design professionals.

In 2006, the Kentucky Court of Appeals, in an unpublished decision, held that KRS 413.120(12)'s 5 year statute of limitations applied to a negligent misrepresentation claim asserted against an engineer because liability was based on "an independent duty to avoid misstatements intended to induce reliance" not a "professional duty". *Mid States Steel Products Co. v. University of Kentucky*, 2006 Ky. App. LEXIS 278, 2006 WL 1195914 (Ky. App. Aug. 18, 2006) (unpublished decision).

In this case, the Court held that a negligent misrepresentation claim asserted against an engineer is subject to KRS 413.245's one year statute of limitations. *ISP Chemicals, LLC*, 2010 U.S. Dist. LEXIS 82609 at *25. *[Note: The Court initially held that KRS 413.245 only applies to engineers who are licensed in the Commonwealth of Kentucky because non-licensed engineers are not engaged in "professional services" as defined in KRS Chapter 322. Id. at *14. However, the defendant filed a motion for reconsideration which prompted the Court, upon*

*further analysis, to hold that KRS 413.245 applies to all professional services, regardless of whether the individual is actually licensed in the state of Kentucky. ISP Chemicals, LLC v. Dutchland, Inc., 2010 U.S. Dist. LEXIS 112431, *8 (W.D. Ky. Oct. 21, 2010).]* The Court primarily relied on a prior decision from the Western District of Kentucky holding that KRS 413.245 applied to a negligent misrepresentation claim asserted against an architect. *See Van Eekeren Family, LLC v. Carter & Burgess, Inc.*, 2009 U.S. Dist. LEXIS 17730, *4 (W.D. Ky. Mar. 4, 2009) (opinion written by Judge McKinley). In that case, the Court stated:

The fact of the matter is that Plaintiff's distinction between errors in design and a failure to timely disclose information is without relevant difference. KRS § 413.245 contemplates only whether an action "arises out of any act or omission in rendering professional services;" as long as it does, the provision applies. Here, Defendant's failure to make "timely disclosures" was an act or omission in the course of rendering professional services that gave rise to the Plaintiff's misrepresentation claim. Accordingly, Plaintiff's negligent misrepresentation claim is subject to the one-year limitations period in KRS § 413.245.

ISP Chemicals, LLC, at *24-*25 (*quoting Van Eekeren Family, LLC, supra*). The Court acknowledged that "the Kentucky Court of Appeals is correct in stating that a negligent misrepresentation claim is not the equivalent of a professional malpractice claim." *Id.* at *25. But KRS 413.245 "was intended to encompass additional claims beyond those labeled "professional negligence" or "professional malpractice" and "applies to all claims arising from the rendering of professional services." *Id.*

Kentucky state courts have yet to issue a published decision specifically addressing the statute of limitations applicable to negligent misrepresentation claims asserted against design professionals. However, the Kentucky Court of Appeals has held that similar claims asserted against an attorney are subject to KRS 413.245's one year statute of limitations. *Abel v. Austin*, 2010 Ky. App. LEXIS 96, *28 (Ky. App. May 28, 2010) (opinion is "to be published," however, a motion for discretionary review is pending before the Kentucky Supreme Court). For the time being, parties should assume that negligent misrepresentation claims against design professionals are subject to KRS 413.245's one year statute of limitations until a published Kentucky state court decision establishes that a different statute of limitation applies.

Legislation

1. Pursuant to *KRS 45A.494*, which became effective July 15, 2010, Kentucky adopted a new section in its Model Procurement Code which requires the public agency give a reciprocal preference to resident bidders if a non-resident bidder's state gives or requires a preference to bidders from that state. The amount of the preference shall be equal to the preference required by the non-resident bidder's state. If the procurement results in a tie between resident and non-resident bidders, the resident bidder shall be given preference.

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Louisiana

Case Law

1. Public Works Act: In *Bossier Parish School Board v. Leblanc*, 48 So.3d 355 (La. App. 2 Cir. 2010), the court held that the five-year peremptive period in the Public Works Act, La. R.S. 38:2189, applies to all claims directly relating to a public work. In *Bossier*, the Bossier Parish School Board ("BPSB") filed suit against a general contractor seeking among other claims, damages for defective construction on the roof of a school. The general contactor filed an exception of peremption/prescription, alleging that the BPSB's claims were brought more than five years from the date of substantial completion of the roofing work. The trial court found the School Board's claim perempted and the Second Circuit affirmed, relying on the holding of *Orleans Parish School Bd. v. Scheyd, Inc.*, 737 So.2d 954 (La. App. 4th Cir. 1999), which held that the five year period applies to all claims against the public works contractor and all claims are subject to the time limitation set forth in the Public Works Act.

2. Public Bid Law: In *State, Div. of Admin., Office of Facility Planning & Control v. Infinity Surety Agency, L.L.C.,* 47 So.3d 647 (La. App. 1 Cir. 2010), the State brought an action against a bidder and its surety for forfeiture of the bid bond as liquidated damages for delay and for the additional work caused by their failure to procure an acceptable bond. "Bidding on the Project required that any surety retained to secure a bid must be authorized to write bonds in accordance with La. R.S. 38:2219." *Id.* at 648. Defendants submitted a bid form that misrepresented that the requirements of La. R.S. 38:2219 had been met. The State failed to reject the bid based on the surety's noncompliance with the statute. The court found that since the bid was non responsive (for failure to meet the statutory requirements), the contract was null and void. The court reasoned that "[t]he awarding authority has a duty to carefully consider the written bid." *Id.* at 649. The court found that the State failed to acknowledge this duty and thus, was not entitled to the liquidated damages.

3. Public Bid Law: In *Smith v. Richland Parish Police Jury*, 31 So.3d 538 (La. App. 2 Cir. 2010) an unsuccessful bidder on a parish gravel hauling contract filed an injunction against the Police Jury seeking to enjoin it from executing any contract with the successful bidder. There was a dispute as to whether the successful bidder's bid was timely received. The court of appeal noted that the evidence reflected that the unsuccessful bidder believed as early as the date of the bid opening that the low bidder's bid envelope was turned in too late. However, the unsuccessful bidder delayed in filing suit for almost three months. The Police Jury argued that injunctive relief was unavailable to the unsuccessful bidder since the public contract had been previously awarded and work on the contract had begun. The trial court and the Second Circuit agreed that absent a supported allegation in the petition that the unsuccessful bidder was somehow prevented from filing suit for injunctive relief prior to the time of the award of the contract, the unsuccessful bidder was prevented by law from pursuing any action at all against the police jury.

4. Private Works Act: In *Standard Materials L.L.C. v. C & C Builders, Inc.*, 2010 WL 5479903 (La. App. 1 Cir. 2010) the court interprets the language of the Private Works Act section 9:4802(G)(2), which states:

For the privilege under this Section or R.S. 9:4801(3) to arise, the seller of movables shall deliver a notice of nonpayment to the owner at least ten days before filing a statement of his claim and privilege. The notice shall be served by registered or certified mail, return receipt requested, and shall contain the name and address of the seller of movables, a general

description of the materials provided, a description sufficient to identify the immovable property against which a lien may be claimed, and a written statement of the seller's lien rights for the total amount owed, plus interest and recordation fees. The requirements of this Paragraph (G)(2) shall apply to a seller of movables sold for use or consumption in work on an immovable for residential purposes.

The issue was whether the last sentence in this section required that notice be given to owners of all immovables or only to owners of immovables used for residential purposes. The court found that it was the latter: "notice is required only for properties used for residential purposes." *Id.* at 4.

5. Private Works Act: In *Tee It Up Golf, Inc. v. Bayou State Const., L.L.C.,* 30 So.3d 1159 (La. App. 3 Cir. 2010), a general contractor of two simultaneous projects filed materialman's liens on both properties with the Clerk of Court in Rapides Parish. The issue was whether the liens met the procedural requirements of the Private Works Act. The court found that the liens failed to meet the requirements of the Private Works Act section 9:4822(G). First, the court found that the only reference to identify the property subject to the lien was the municipal street address where the materials were delivered. The court held that a municipal address is insufficient to perfect a privilege. Next, the court found that the lien "failed to properly set forth the amount and nature of the obligation giving rise to the claims or privileges and reasonably itemize the elements comprising them," where the description used was merely "Materials Supplied" and the liens listed a lump sum for both projects. *Id.* at 1162. The court reasoned that it would be impossible to differentiate how much would be owed for each project. Finally, the court awarded the owner $3,000 in attorneys fees pursuant to Private Works Act section 9:4833(B) for the general contractor's failure to have the liens cancelled within ten days.

6. New Home Warranty Act: In *Taylor v. Leger Const., LLC*, 2010 WL 4967841 (La. App. 3 Cir. 2010) homeowners filed suit seeking to recover for the alleged faulty construction of their residence in Crowley, Louisiana. Plaintiffs named a number of defendants , including Post Tension Slabs, Inc., who allegedly "furnished the labor material, and design for the construction of the foundation and foundation system of their residence." *Id*. at 1. Defendants filed an exception of no right of action / no cause of action, alleging that since plaintiffs' petition focuses on deficiencies in the construction of their residence, all claims fall within the purview of the New Home Warranty Act ("NHWA") and since there were no allegations that defendants served as the residence's builder, plaintiffs had no right nor cause of action against defendants. The trial court agreed and granted the exception of no cause of action. The Third Circuit reversed and remanded, framing the question presented in the case "as whether the NHWA precludes a party from asserting a claim for structural defects against a non-builder pursuant to other avenues of recovery." *Id*. The court relies on the plain text of the NHWA section 9:3150, which states only that the NHWA provides the exclusive remedies and warranties between a "builder" and an "owner" relative to "home" construction. *Id*. at 2. The court also relied on Louisiana jurisprudence. *See Cosman v.Cabrera*, 28 So.3d 1075, 1079 (La. App. 1 Cir. 2009) (stating "[w]hile it is true that the NHWA provides protection to new homeowners against builders, we do not interpret the NHWA so broadly that a subcontractor would be considered a builder, because subcontractors do not construct the entire structure and deliver it to the owner as a new home."); *Allstate Enter., Inc. v. Brown,* 907 So.2d 904, 912 (La. App. 2 Cir. 2005) (stating the court "did not find that the NHWA was intended to have a scope applicable to a contractor that did not construct the entire structure and deliver it to the homeowners as their new home."). The court concluded that "Post-Tension failed to sustain its burden of demonstrating that the petition set forth no cause of action against it due to the exclusivity of the NHWA." *Id*. at 3.

7. New Home Warranty Act: In *Allemand v. Discovery Homes, Inc.*, 38 So.3d 1183, (La. App. 1 Cir. 2010) a husband and wife, in their individual capacities as homeowners and as tutors for their minor child brought suit against a homebuilder and homebuilder's insurer for their daughters respiratory illness allegedly suffered as a result of the mold resulting from the home's alleged faulty construction and their resulting loss of consortium. Defendants argued that the child's bodily injuries and the parents loss of consortium claims were excluded from the builder's warranties under the New Home Warranty Act ("NHWA") and, therefore not recoverable as a matter of law. The trial court initially agreed and granted defendant's summary judgment dismissing all claims. The First Circuit affirmed in part and reversed in part. The court reasoned that the NHWA provides the exclusive remedies, warranties, and preemptive periods as between a builder and an owner relative to home construction. *Id*. at 1187. The court found that the owners of the home were the parents and not the daughter, thus the daughter was outside the scope of the NHWA and therefore she could pursue her claims for bodily injury. However, the court found that the parents claim for loss of consortium could not be recovered under the Act because it fell outside the scope of defects in construction and were excluded by the NHWA.

Legislation

1. Act 67 of the 2010 Legislative Session, Sen. Donahue enacted La. R.S. 37:2171.2(B) which requires nonresident commercial, residential, or home improvement contractor applicants to provide a federal taxpayer identification number to the local building permit official, as well as proof of registration to do business in this state. This new law became effective on August 15, 2010.

2. Act 492 of the 2010 Legislative Session, Sen. Martiny and Rep. Ligi enacted La. R.S. 9:2780.1 which provides that certain construction contract provisions are invalid as a matter of law. The new statute makes certain types of indemnity provisions and choice of law provisions unenforceable. § 2780.1(B) makes it impermissible for any construction contract to have one party indemnify a second party for the second party's own negligence. The construction contract would be deemed against public policy and would be null, void, and unenforceable. Except in limited exceptions listed in the statute, § 2780.1(C) makes construction contracts void and unenforceable if the contract purports to require an obligor to procure liability insurance covering an obligee's own negligence. § 2780.1(D) requires that the laws of Louisiana apply to and govern any construction contract that will be performed in this state, regardless of any contractual provisions to the contrary. Thus, any construction project in Louisiana will be governed by the laws of Louisiana. This new law becomes effective and will apply to all contracts entered into after January 1, 2011.

3. Act 601 of the 2010 Legislative Session, Rep. Burns amended La. RS 9:4822(E)(2) and (4) which amends the Louisiana Private Works Act. Under existing Private Works Act, an owner or his representatives were authorized to sign the notice of termination and provided that a notice of termination of work shall be conclusive of the matters certified if it was made in good faith by the owner or his representatives. The new law retains the existing law and also authorizes and allows the same certification to apply to a new owner or his representatives if the immovable has been conveyed. This new law became effective on August 15, 2010.

4. Act 638 of the 2010 Legislative Session, Sen. Appel enacted La. R.S. 9:4815 which amends the Louisiana Private Works Act and requires that owners deposit retainage funds in interest bearing escrow accounts. The new law applies to private project contracts of

$50k or more that are not contracts for single family residences, double family residences, or a contract for the construction or improvement of one or more of the listed industrial facilities. The escrow account must be mutually agreed upon by the parties to the contract and the escrow account must be located at a financial institution under the control of an escrow agent. The interest generated by the account will benefit the contractor and will be released upon "completion of the work" if there are no existing claims by the owner. The entire amount of the funds shall be paid to the contractor within three business days of receipt by the escrow agent of a notarized request of the contractor. This new law became effective on August 15, 2010.

5. Act 651 of the 2010 Legislative Session, Sen. Appel amended La. R.S. 9:2772(H)(2) concerning the preemptive period for actions involving deficiencies in surveying, design, supervision, or construction of immovable or improvements thereon. The existing law granted a five-year peremptive period for actions against contractors involving these deficiencies, but exempts from such peremptive period any action against any such contractor whose fraud has caused the breach of contract or damages sued upon. The new law retains the existing law and adds that if fraud is alleged in nonresidential contracts in actions commenced after the five-year period and the court determines that the allegation was brought in bad faith and no fraud is found, then the party who made the allegation shall be liable for court costs and attorney fees. If fraud is proven, then the party that has committed the fraud shall be liable for court costs and attorney fees. This new law became effective on August 15, 2010.

6. Act 685 of the 2010 Legislative Session, Rep. Fannin, et. al. enacted La. R.S. 40:1730.28(A)(3)(f) and (g) concerning the Louisiana Building Codes and the La. State Uniform Construction Code Council (the "Council"). The new law prohibits the Council, a municipality, or parish from adopting or enforcing any code, regulation, or ordinance that requires a fire protection sprinkler system in one- or two-family dwellings. In addition, the new law requires factory built homes be inspected in accordance with the codes in effect at the ultimate location site of the factory built home at the time construction commences. This new law became effective on June 29, 2010.

7. Act 819 of the 2010 Legislative Session, Rep. Girod Jackson amended La. R.S. 38:2225.2.1(A)(3) concerning public bid law. The law allows for an extension from 3-years to 4-years for certain public entities listed in the statute to utilize the design-build method in the construction or repair of any public building or structure which was destroyed or damaged by Hurricane Katrina, Hurricane Rita, or both. This new law became effective on August 15, 2010.

8. Act 868 of the 2010 Legislative Session, Sen. Appel amended La. R.S. 39:1767 and R.S. 48:251.8 and enacted La. R.S. 38:2196.1, La. R.S. 39:200(N), R.S. 39:1493.1, and La. RS 39:1758). The Act requires contractors awarded public contracts without a bid to disclose compensation. The full disposition, splitting, or sharing of commissions, fees, or other consideration shall be disclosed to the public entity in writing by an affidavit of notice of fee disposition. If affidavit is found to be incorrect, then the contract will be deemed null and void. If affidavit is found to contain intentional misrepresentation of the facts, the party may be subject to penalties for filing or maintaining false public records. This new law became effective on July 1, 2010.

9. Act 945 of the 2010 Legislative Session, Rep. Hines, et. al. enacted La. R.S. 38:2227 concerning bidders of public projects. The new law requires contractors who submit bids for public projects to attest that they or an individual partner, incorporator, director, manager, officer, organizer, or member, who has a minimum of a ten percent ownership in the

bidding entity, has not been convicted of, or has not entered a plea of guilty or nolo contendere to any of the crimes or equivalent federal crimes listed in the statute. Entering a plea of guilty or nolo contendere to public bribery, corrupt influencing, extortion, or money laundering would permanently bar the bidding entity from bidding on public projects. However, entering a plea of guilty or nolo contendere to any of the crimes or equivalent federal crimes listed in the statute would result in a five year bar from the date of conviction or entrance of the plea. This new law became effective on July 2, 2010. The Act only applies to convictions or please entered after the effective date of the Act.

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Maine

Case Law

1. In *F.R. Carroll, Inc. v. TD Bank, N.A*., 2010 ME 115, 8 A.3d 646, the Maine Law Court considered the issue of consent as it applied to the possible priority of a mechanic's lien over a mortgage under Maine's mechanic's lien statutes, 10 M.R.S.A. §§ 3251 – 3269 (2009 & Supp. 2010). Although not defined, the Law Court defined consent as requiring the contractor to prove (1) knowledge on the part of the owner of the nature and extent of the work being performed on the premises; and (2) conduct on the part of the owner justifying the expectation and belief on the part of the contractor that the owner had consented to the work. The Law Court reiterated that the issue of consent is a fact-specific inquiry.

The Law Court vacated the Superior Court's grant of summary judgment to F.R. Carroll, Inc. concerning whether its mechanic's lien had priority over TD Bank's mortgage. The Law Court concluded that there was a factual dispute as to whether TD Bank had consented to Carroll's paving contractor with the mortgagor.

2. In *Cellar Dwellers, Inc. v. D'Alessio*, 2010 ME 32, 993 A.2d 1, a homeowner entered into a written plumbing contract, a written heating contract and an oral vacuum contract with a contractor. When the homeowner failed to pay, the contractor stopped working. The contractor eventually filed a mechanic's lien and then a four count complaint against the homeowner for enforcement of the lien, unjust enrichment, breach of contract and violation of Maine's Prompt Payment Act, 10 M.R.S.A. §§ 1111-1120 (2009 & Supp. 2010). The Maine Superior Court held that the homeowner had breached the contracts and had wrongfully withheld payment. The Court awarded the contractor penalties and attorney fees under Sections 1113 and 1118 of the Act.

The Maine Law Court upheld the Superior Court's holding that the homeowner had committed a material breach of the contract by failing to pay and to keep the basement clear for heating and plumbing installation. However, the Law Court concluded that the homeowner wrongfully withheld payment only on the vacuum contract, which had been fully executed by the contractor but not paid for by the homeowner. The Law Court reasoned that the contractor was entitled to penalties and attorney fees only on the breach of the vacuum contract. The Law Court concluded that, with respect to the heating and plumbing contracts, all work to date had been paid for so that no payments due were withheld, wrongfully or otherwise. As such, the Law Court concluded that the contractor was not entitled to penalties and attorney fees under the Act for the breach of the heating and plumbing contracts.

3. In *Houghton v. Koenke*, 2010 Me. Unpub. LEXIS 13 (Mar. 4, 2010), the Maine Law Court held that Maine's Home Construction Contract statute, 10 M.R.S.A. §§ 1486-1490 (2009 & Supp. 2010) did not apply to the construction of a building that way primarily used as a commercial dental office and not a residence.

4. In *Morgan v. Criterium-Mooney*, CV-07-381 (Me. Super. Ct. Cumb. Cty. Dec. 6, 2009), the Maine Superior Court considered a motion for summary judgment filed by an engineering firm that conducted a pre-purchase home inspection of the homeowner's residence. The contract between the homeowner and the engineering included a conspicuous clause, initialed by the homeowner, limiting the firm's liability for loss suffered by the client due to any cause to the inspection fee of $590. After she purchased it, the residence experienced

significant water intrusions of which no evidence was found during the inspection other than some water seepage in the basement. The homeowner filed several claims against the engineering firm, including breach of contract, negligent misrepresentation, fraudulent misrepresentation and violations of Maine's Unfair Trade Practices Act, 5 M.R.S.A. § 205-A *et seq.* (2005 & Supp. 2009).

The engineering firm sought summary judgment on several grounds including the economic loss doctrine and on the limitation of liability clause. The Superior Court dismissed the breach of contract claim holding that "the rule in Maine appears to be that an action brought on a professional services contract breached solely through allegedly negligent performance sounds in tort rather than contract." However, the tort claims survived. The Superior Court also refused to enforce the limitation of liability clause because it considered it overly broad and a *de facto* waiver of negligence, which is disfavored under Maine law. Lastly, the Superior Court concluded that the Maine Unfair Trade Practices Act did not apply home inspections because the inspector is paid whether or not he/she finds a defect. *See Adelberg v. Guber*, 1996 Me. Super. LEXIS 256 at * 13 (Aug. 2, 1996).

5. In *Barry v. Szczesny*, CV-07-350 (Me. Super. Ct. Han. Cty. Mar. 19, 2010), one friend helped another build a house on land he owned. The Superior Court found that over the course of their 20-year friendship, the parties had worked together on such projects and had, at times, paid for the help in money or returned services, or provided the help as a gift. Although the facts are not clear, the Court declined to apply Maine's Home Construction Contract Act, 10 M.R.S.A. §§ 1486-1490 (2009) because the defendant was not in the business of being a home construction contractor. The Court also rejected a claim under Maine's Prompt Payment Act, 10 M.R.S.A. §§ 1114-1118 on similar grounds, finding there were no specific terms for payment between the friends. However, the Court did conclude that both the plaintiff and defendant prevailed on their unjust enrichment claims.

6. In *Hartford Fire Ins. Co. v. Siemens Bldg. Tech., Inc.*, CV-08-368 (Me. Super. Ct. Cumb. Cty. May 27, 2010, the insurer of the owner of a building damaged by water sought to recover the money it paid by filing claims for breach of contract and negligence against the mechanical engineer who designed renovations to the building's HVAC system. The Maine Superior Court dismissed the insurer's claims because of a waiver of subrogation clause in the contract between the building owner and the architect, which covered the architect's subconsultants, including the mechanical engineer. The Superior Court noted that waivers of subrogation are favored under Maine law and are to be liberally construed.

7. In *Hawkesorth v. B&M Constr., Co.*, CV-09-149 (Me. Super. Ct. Cumb. Cty. Mar. 31, 2010), homeowners brought several claims against a general contractor and subcontractor for damages caused by water infiltration in their newly constructed home. The homeowners filed claims against the subcontract for breach of contract, negligence and negligent infliction of emotional distress. The subcontractor moved for summary judgment on the grounds that the claims were barred by the statute of limitations, that no contract existed between the parties, and that the tort claims were barred by the economic loss doctrine.

The Superior Court acknowledged that many of the claims in the case may be barred by Maine's six year statute of limitations, 14 M.R.S.A. § 752 (2003 & Supp. 2010), but concluded there was an issue of fact as to whether the statute of limitations should be tolled for fraudulent concealment. However, the Court granted the subcontractor's motion with respect to the breach of contract claim, concluding that there was no contract between the parties. The Court also concluded that the subcontractor was only an incidental beneficiary, not an intended beneficiary,

of the contract between the general contractor and the homeowners. Therefore, no third-party liability could lie. Lastly, the Court denied the subcontractors motion on the tort claims, finding that the subcontractor owed a duty to the homeowners and that there was a dispute of fact regarding the possible breach of that duty.

8. In *Addison v. Daigle*, 2010 Me. Super. LEXIS 92 (July 30, 2010), the Maine Superior Court recognized that although extrinsic, parol evidence is not admissible to vary, add to or contradict the terms of an integrated, written contract, such evidence is admissible on the issue of whether the parties intended to be bound by the terms of a written contract. In this case, a homeowner had received a proposal from a contractor to build a home for her for approximately $173,000.00. When the contractor pulled out, the homeowner had difficulty finding anyone else to build the residence. Desperate, she sought the help of a coworker who had some experience with home construction. The coworker agreed to help.

As construction progressed, the homeowner needed to secure a loan from a bank, which required a written contract. Using the proposal from the original contractor as a guide, the homeowner and her friend drafted and entered into a new construction contract to build the house for $189,500.00. When the coworker was unable to complete the house under the contract, the homeowner sued. The coworker, now defendant, alleged that the parties never intended to be bound by the contract, which the defendant contended was created only to secure bank financing. After considering extrinsic, parol evidence of intent, the Court held that the contract was enforceable because there was no contemporaneous evidence that the parties did not intend to be bound by it.

Finally, the Court rejected the homeowner's claims that the coworker had violated that Maine Construction Contract Act, 10 M.R.S.A. §§ 1486-1490 (2009 & Supp. 2010) because the coworker was not a contractor in the business of building houses and because of an exception to civil penalties under the Act for contractors who show "by a preponderance of the evidence that the violation was unintentional and a bona fide error." Because the Court found no violation of the Home Construction Act, it rejected the homeowner's claims of a violation of the Maine Unfair Trade Practice Act and for attorney fees.

9. In *Amica Mut. Ins. Co. v. Blatt*, CV-08-07 (Me. Super. Ct. Cumb. Cty. Aug. 3, 2010), the insurer of a homeowner of a residence damaged by water from a burst frozen pipe sought to recover the money it paid by filing claims for breach of contract and negligence against the architect who designed renovations to the residence. The Maine Superior Court dismissed the insurer's claims because of a waiver of subrogation clause in the contract between the homeowner and the architect. The Superior Court noted that waivers of subrogation are favored under Maine law.

10. In *Hartford Fire Ins. Co. v. Siemens Bldg. Tech., Inc.*, CV-08-368 (Me. Super. Ct. Cumb. Cty. Sept. 13, 2010), the insurer of the owner of a building damaged by water sought to recover the money it paid by filing claims for breach of contract and negligence against the mechanical engineer and mechanical contractor. The mechanical contractor then brought crossclaims for contribution and indemnity against the mechanical engineer. The mechanical engineer filed a motion for summary judgment on the crossclaims contending that (1) they were barred by Maine's statute of repose for design professionals, 14 M.R.S.A. § 752-A (2003 & Supp. 2010); (2) the crossclaim parties were not joint tortfeasors because of the absence of common liability; and (3) Maine does not recognize non-contractual indemnity.

The Superior Court denied the mechanical engineer's motion for summary judgment. Section 752-A requires that all civil actions against design professionals be commenced within 10 years of substantial completion of the contraction contract. Although the crossclaim for contribution and indemnity was not filed within that 10 year period, the underlying claim by the insurer against the mechanical engineer had been timely filed. The Court reasoned that because the "civil action" by the insurer against the mechanical engineer was timely, so was the contribution and indemnity crossclaim on which it was based. In addition, the Court concluded that the absence of common liability is not a controlling factor in determining joint and several liability, and that the policy concerns favoring contribution claims outweighs the policy concerns favoring waivers of subrogation.

11. In *Emmons v. Hometown Builders, LLC*, CV-09-046 (Me. Super. Ct. York Cty. Sept. 21, 2010), a worker on a home construction project was injured when he slipped off an icy roof to the ground. At the time of the accident, there was no staging or fall protections devices at the construction site. The worker filed suit against the homeowner, the homeowner's company, the subcontractor and the subcontractor's owner. Each of the defendants filed motions for summary judgment. Only the homeowner's company was successful.

The Court denied the motions filed by the homeowner, subcontractor and subcontractor's owner on the grounds that there were disputed material facts as to whether the injuries were caused by the absence of fall protection devices. In addition, the Court concluded that there were disputes of fact as to whether the worker was an independent contractor or an employee of the defendants. Specifically, the Court concluded that there were dispute of facts over which entity, if any, exercised control over the worker.

The Court granted the homeowner's companies motion for summary judgment, however, on the grounds that that entity had any involvement in the construction of the house. The Court rejected the effort of the worker to reverse pierce the corporate veil thereby making the corporation liable for the owner's actions. The Court concluded the owner's confusion over which entity, he or the company, owned certain tools and equipment did not provide sufficient basis to reverse pierce the corporate veil.

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12. In *Cellar Dwellers, Inc. v. D'Alessio, 2010 Me. 32, ___ A.2d ___*, the Maine Law Court held that the home owner's use of the basement for storage, despite the contractor's objection and explanation that the area need to be cleared, wrongly prevented Cellar Dwellers from rendering substantial performance with a reasonable time. Such action constituted a material breach that discharged Cellar Dwellers' obligation to perform the contract.

But, the Court went on to hold that because Cellar Dwellers withdrew from the jobsite without completing the work, the final installment of the payments under the contract never became due, despite being invoiced. Therefore, although Cellar Dwellers can collect general contract damages and interest, the Maine Prompt Payment Act (10 M.R.S.A. § 1111 *et seq.*), and the penalties, including attorneys' fees, and interest that it brings, cannot be imposed on these amounts that never came due.

13. In *Barry v. Szczesny,CV-07-350 (Me. Super. Ct., Hancock Cty., Mar. 19, 2010) (Cuddy, J.),* a case of a two neighbors working on each other's homes, the Superior Court found no violation of the Maine Prompt Payment Act (10 M.R.S.A. § 1111 *et seq.*). The Act

contemplates the existence of a written construction contract, including payment terms and invoices, and such a specific agreement was not demonstrated in the case. While the Court found an implied contract, that implied contract provided no specific terms for payment that would bring it under the Act.

In addition, the Court held that neither party was a "contractor" or "sub-contractor" within the meaning of the statute. *See* 10 M.R.S.A. § 1111(3), (8). While the Plaintiff did some electrical work, there was no evidence that Plaintiff was licensed to do so or that he held himself out to the public to be available to contract to do that work.

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Legislation

1. L.D. 1565, An Act to Amend the Laws Governing the Knowing Misclassification of Construction Workers (124th Legis. 2010). The Act authorizes the Executive Director of the Workers' Compensation Board to issue a stop-work order if a hiring agent or construction sub-contractor has knowingly misrepresented one or more employees as independent contractors, knowing failed to provide a workers' compensation insurance policy or knowingly provided false, incomplete, or misleading information to the board concerning the number of employees.

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2. Pursuant to *10 M.R.S.A. § 9724 (2009 & Supp. 2010)*, the Maine Uniform Building and Energy Code must be enforced by any municipality that has more than 2,000 residents and that has adopted any building code by August 1, 2008. Beginning July 1, 2012, the Maine Uniform Building and Energy Code must be enforced by any municipality that has more than 2,000 residents and that has not adopted any building code by August 1, 2008

The Maine Uniform Building and Energy Code can be found at http://www.maine.gov/dps/bbcs/. The purpose of the Code is to establish a uniform building code throughout the State of Maine. The Code adopts certain sections of the IBC (2009) International Building Code, the IEBC (2009) International Existing Building Code, the IRC (2009) International Residential Code, and the IECC (2009) International Energy Conservation Code.

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Maryland

Case Law

1. In *Schuele v. Case Handyman and Remodeling Services, LLC*, 412 Md. 555 (2010), the Maryland Court of Appeals determined that a trial court's decision denying a contractor's motion to compel arbitration was not an appealable decision. The Court of Appeals held that the order denying the motion to compel was not a final judgment and that a challenge to the order denying the motion to compel would be permissible only "after a final judgment has been rendered on the merits of the case." *Id.* at 576. The Court noted that if "an appellate court later determines that the controversy should have been arbitrated, then the case will be dismissed, the Circuit Court's judgment will be vacated, and [the contractor] will be free to resolve the controversy in arbitration." *Id.*

Legislation

1. *House Bill 836 / Senate Bill 551*, Preference for State and Local Business Entities in School Construction. This bill authorizes a local government to give preference first to businesses located in the county and then to other businesses located in Maryland in bidding for school construction projects that are not subject to the State's prevailing wage law. Eligible school construction projects are those valued at less than $500,000 or those in which less than 50% of the project cost is paid for by State funds. Local governments are currently not authorized to give preferences to local businesses for these projects. This bill will take effect on October 1, 2010.

2. *House Bill 1044 / Senate Bill 234, High Performance Building Act* – Applicable to Community College Capital Projects. This bill requires community college capital projects that receive State funds to comply with the State's High Performance Buildings Act. This means that any new or renovated community college building that is at least 7,500 square feet and built or renovated with State funds must be constructed or renovated as a high performance building that meets or exceeds the U.S. Green Building Council's LEED criteria for a silver rating. The requirement applies prospectively to projects that have not initiated a request for proposals for the selection of an architectural and engineering consultant on or before July 1, 2011. Community colleges, however, may apply for and receive a waiver from this requirement under the High Performance Building Act's existing waiver procedures. This bill will take effect on July 1, 2010.

3. *House Bill 168*, Architectural, Engineering, Inspecting, or Surveying Service – Indemnity Agreements – Void. Maryland law currently establishes that construction or property maintenance contracts that purport to indemnify the promisee against property damage or bodily injury caused by or resulting from the sole negligence of the promisee (or its agents or employees) are against public policy and are void and unenforceable. This bill adds architectural, engineering, inspecting, and surveying services to the list of services for which such indemnity agreements are considered void and unenforceable. The bill also clarifies that the prohibition on these types of indemnity agreements does not apply to general indemnity agreements required for surety bonds. This bill will take effect on October 1, 2010, and applies prospectively to causes of action arising after its effective date.

4. House Bill 620 / Senate Bill 597, Condominium and Homeowners Association – Common Elements and Common Areas -Implied Warranties. This bill extends the length of time of implied warranties on improvements to both a condominium's common elements and a

homeowners association's common areas. For improvements to a condominium's common elements, the bill extends a developer's implied warranty to the later of three years from the first transfer of title to a unit owner or two years from the date the unit owners, other than the developer and its affiliates, first elect a controlling majority of the board of directors for the council of unit owners. For improvements to a homeowners association's common areas, the bill extends a declarant's implied warranty to the later of two years from the first transfer of title to a lot to a member of the public or two years from the date on which the lot owners, other than the declarant and its affiliates, first elect a controlling majority of the governing body of the homeowners association. This bill also requires that certain common elements in a condominium (like roofs, exterior walls, and foundations) be designated in the declaration as common elements rather than as parts of the units to ensure that the implied warranties apply to those common elements. This bill will take effect on October 1, 2010, and applies only to a condominium or homeowners association for which a declaration, bylaws, and plat are recorded in the local land records on or after its effective date.

5. *House Bill 1290 / Senate Bill 911, Underground Facilities – Damage Prevention*. This bill alters current statutory provisions regulating the protection of underground facilities and establishes a Maryland Underground Facilities Damage Prevention Authority to hear complaints and assess civil penalties for violations. Owners of underground facilities, such as water and sewer mains, telephone, cable, and electric lines, and steam heating pipes, must become members of the existing one-call system, known as Miss Utility, and must provide for the marking of their underground facilities. Among other things, the bill alters the practices and procedures used in marking underground facility locations, specifying that colors used in marking must adhere to certain national standards. This bill will take effect on October 1, 2010.

6. *Senate Bill 382, Marine Contractors – Licensure and Regulation – Tidal Wetlands Licenses.* This bill provides for the licensure and regulation of marine contractors in Maryland by establishing a Marine Contractors Licensing Board (the “Board”) within the Maryland Department of the Environment. All marine contractors must now be licensed exclusively by the Board – instead of by the Maryland Home Improvement Commission – and must have their Board license prior to performing marine contractor services in the State, which include construction, demolition, installation, alteration, repair, or salvage activities located in, on, over, or under State or private tidal wetlands. This bill will take effect on October 1, 2010.

7. *House Bill 80, State Board for Professional Engineers*. This bill requires licensees of the State Board for Professional Engineers to demonstrate continuing professional competency as a condition of their license renewal. The continuing professional competency requirements do not apply to the first renewal of a license and are instead phased in beginning on October 1, 2012. This bill will take effect on July 1, 2010.

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Massachusetts

Legislation

1. *M.G.L. Chapter 149, Section 29*^{E} On August 10, 2010, Governor Deval Patrick signed into law Senate Bill 2577, An Act Promoting Fairness in Private Construction Contracts aka Prompt Pay Bill. The law, now codified as M.G.L. Chapter 149, Section 29E, will fundamentally change the administration and enforcement of commercial construction contracts in Massachusetts.

Here are some of the highlights of the new law that will have an immediate impact on projects once the law goes into effect.

GENERAL PROVISIONS:

- Applies to all projects of $3,000,000 or more.
- Does not apply to residential projects with fewer than 5 dwelling units.
- Applies to all contracts entered into as of November 8, 2010.
- Prohibits parties from inserting contract terms which waive or limit the new statute.

PAY-IF-PAID RESTRICTIONS:

- Subject to two exceptions described below, provisions which make payment to a contractor conditioned upon receipt of payment from a third-person who is not a party to the contract are void and unenforceable.
- A pay-if-paid provision may still be enforced only if: (1) the reason for nonpayment by the third-party is due to the nonperformance, default and failure to cure of the party seeking payment; or (2) the third-party payor becomes insolvent within 90 days of the pay request and the party seeking to enforce the pay-if-paid has taken all steps to assert and perfect a mechanic's lien and pursues all reasonable legal remedies to obtain payment.

PAYMENT APPLICATION REQUIREMENTS:

- Every contract must provide reasonable time periods within which payment applications must be:
    - submitted (30 days after work is commenced);
    - approved or rejected (15 days after submission, plus 7 additional days for each tier below the general contractor); and
    - paid (45 days after approval).

CHANGE ORDER PROCESSING

- Change Orders must be approved or rejected within 30 days after the later of commencement of the work on which the request is based or submission of the written request;

- Time period may be extended by 7 days beyond the time period applicable to the party at the tier above the party seeking the change order.

OTHER CHANGES

- Limits contract clauses that require continued performance despite nonpayment of undisputed requisitions;

- Provides statutory right to suspend work if approved payment over 30 days past due, unless non-payment is due to:

    - Dispute over quality or quantity of the work or

    - Default by the claimant after approval of the overdue payment

- Exception available only where there is prior written notice of the dispute or default and payment of all undisputed amounts;

- Any party who disputes the denial of a payment requisition or a change order may commence dispute resolution proceedings 60 day following denial;

- Contract provisions which force a party to wait until work is complete to commence dispute procedures are void and unenforceable.

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Michigan

Legislation

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

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Minnesota

Case Law

1. In *Pond Hollow Homeowners Ass'n v. Ryland Group, Inc., 779 N.W.2d 920 (Minn. Ct. App. 2010)*, the Minnesota Court of Appeals held that specific evidence establishing the prevailing standard of care is required in a professional negligence claim. Pond Hollow Homeowners Association sued the Ryland Group alleging defects concerning water table levels and drainage. Ryland brought Pioneer Engineering into the lawsuit as a third-party defendant, alleging that Pioneer's negligent work was the cause of Pond Hollow's defects. Pioneer designed, engineered, and surveyed the site where the homes were built.

A person who provides professional services is under a duty to exercise the care, skill, and diligence ordinarily exercised by those in the profession under like circumstances. Ordinarily, expert testimony is required to establish this standard. The Minnesota Court of Appeals dismissed this case because the contractor's expert report and affidavits simply claimed "the standard" was breached and failed to establish "with any precision" the applicable standard of care for engineers. The owner's expert failed to explain how to properly evaluate or recognize the water table when determining minimum building elevations, nor did he explain industry standards or refer to any contractual or industry guidelines for making such a determination. The claims against the engineer were dismissed because the contractor failed to offer evidence for this critical element of its professional negligence claim.

2. In *Sayer v. Minn. Dep't of Transp., 790 N.W.2d 151 (Minn. 2010),* the Minnesota Supreme Court held that a Technical Review Committee has the discretion to determine bid responsiveness under Minnesota's best value bidding law. Within three days after the I-35 bridge collapsed, the Minnesota Department of Transportation (MnDOT) began working to replace the bridge. The Transportation Commissioner used a design-build best-value procurement process and issued a request for qualifications from contractors interested in the project. Five qualified contractors, including Flatiron and Sayer, were selected and sent a request for proposal (RFP). Bids would be evaluated by a six-member Technical Review Committee (TRC). The commissioner later issued instructions to proposers that stated the contract would be awarded only to a proposal that met the standards established by MnDOT and described the weighted criteria by which the proposals would be evaluated. By a significant margin, Flatiron's proposal received the highest technical score. MnDOT then determined the adjusted scores for the proposals, and Flatiron still had the best score. Even though Flatiron's proposal was the highest cost proposal, its high technical score allowed it to still be the "best value" under this system.

Sayer sued, challenging the bidding process and alleging that the contract between MnDOT and Flatiron was illegal. Specifically, Sayer claimed that MnDOT used the wrong test for responsiveness. Both the District Court and the Court of Appeals found for Flatiron.

The Supreme Court explained that while traditional public bidding uses the lowest responsible bidder as the method for choosing a contractor, the Legislature enacted Minn. Stat. §§ 161.3410-3428 in 2001, which authorized the commissioner to solicit and award a design-build contract for a project on the basis of a "best value" selection process for work on trunk highways. The best-value selection process allows public agencies to consider factors other than cost in awarding contracts and allows a single contract with a contractor for both the design and construction of the project. When the Commissioner selects the best-value method, the commissioner must appoint at least five members to the TRC to review the bids. The TRC is

required to score the technical proposals using selection criteria defined in the RFP and then submit those scores to the Commissioner.

The Court concluded that the RFPs did not prohibit the use of any additional right-of-way in the project, it was only prohibited in the areas of Washington Avenue, University Avenue, and Fourth Street. The court rejected Sayer's argument that Flatiron's proposal was nonresponsive because it involved an additional right-of-way on Second Street.

The Court also addressed Sayer's contention that Flatiron's proposal was nonresponsive because it did not comply with the RFP which, according to Sayer, required a minimum of three webs per direction of traffic for concrete-box bridge designs, not three webs per concrete-box girder. The Court found that since the plain language of the RFP did not expressly require three webs per concrete-box girder or preclude designs providing for four webs per direction of traffic, there was no evidence that Flatiron's or MnDOT's reading of the RFP was unreasonable. According to the Court, Flatiron's proposal exceeded the three-web minimum included in the RFP, and thus it rejected Sayer's contention that Flatiron's proposal was nonresponsive.

3. In *re Individual 35W Bridge Litig., 786 N.W.2d 890 (Minn. Ct. App. 2010), rev. granted (Minn. Nov. 16, 2010)* held that a bridge inspector may not pursue contribution and indemnity from the bridge's designer. URS Corporation inspected the 35W bridge for the State in 2003. After the bridge collapsed on August 1, 2007, many individual plaintiffs sued URS for negligence. URS then asserted contribution and indemnity claims against the successor-in-interest to the engineering firm that originally designed the bridge in the 1960s.

The Court dismissed the contribution and indemnity claims on the grounds that the building designer did not have common liability with URS because any possible liability to the plaintiffs was destroyed by Minnesota's statute of repose, which bars claims against designers that are made more than ten years from the date of construction. Because the bridge was built in 1967, the Court ruled that the bridge designer had no potential liability after 1977, which was 36 years before URS even started inspecting the bridge.

4. In *re Individual 35W Bridge Litig., 787 N.W.2d 643 (Minn. Ct. App. 2010), rev. granted (Minn. Nov. 16, 2010)* held that the State may pursue an indemnity claim against the bridge's designer. In the contract for the original design of the 35W bridge, the bridge designer agreed to indemnify the State for claims arising out of its performance under the agreement. In August 2007, the bridge collapsed. The State passed legislation to compensate victims of the collapse and paid more than $36 million under those statutes.

The State sued the bridge designer seeking indemnity for the payments it made to the victims of the collapse. The bridge designer asked the Court to dismiss the State's claims based on a prior version of Minnesota's statute of repose, which barred claims against designers more than ten years after construction and did not contain an exception for indemnity claims. The Court found that the current version of the statute of repose applied. Because the current version of the statute of repose contains an exception for indemnity claims, the Court held that the State's claims against the bridge designer could go forward.

5. In *Studor, Inc. v. State of Minnesota, 781 N.W.2d 403 (Minn. Ct. App. 2010)*, the Minnesota Court of Appeals held that a state law banning air-admittance valves in plumbing systems was constitutional. In 2007, the Minnesota legislature banned the installation of air-admittance valves (AAVs) to regulate air pressure in plumbing systems. All plumbing systems must be vented to allow air into the system and prevent sewer gases from escaping through

plumbing systems and fixtures. An AAV is a plastic one-way valve that regulates pressure in a plumbing system by using air from inside the building instead of outside plumbing vents.

Studor sued the State, claiming that the ban violated the Equal Protection and Due Process clauses of the Minnesota and United States Constitutions, and the Commerce Clause of the United States Constitution. The Court ruled that the ban was constitutional.

The Court determined that the legislative ban had the legitimate purpose of promoting public health and safety through "properly designed, acceptably installed, and adequately maintained plumbing systems" since clear differences exist between the two systems: open-pipe systems are passive, while AAVs rely on moving parts that could malfunction. Because the ban had a legitimate purpose, no violation of constitutional rights occurred. The Court also ruled that the ban did not violate the Commerce Clause of the United States Constitution because the ban did not discriminate against a particular brand of AAV or unduly burden the flow of interstate commerce.

6. In *DeRosier v. Util. Sys. of America, Inc., 780 N.W.2d 1 (Minn. Ct. App. 2010)*, the Minnesota Court of Appeals held that an owner is not required to accept a contractor's offer to cure defective work when the offer requires the owner to pay for the corrective work. An owner purchased a lot that required substantial fill before development. The owner and a contractor, who was excavating for a nearby road, agreed that the contractor would dump excess fill from its road project onto the owner's lot for free, saving money for both parties.

The owner obtained the necessary permit to allow 1,500 cubic yards of fill on the lot and gave the permit to the contractor's foreman. The contractor, however, dumped 6,500 cubic yards of fill on the lot. When the owner complained, the contractor offered to remove the excess fill for $9,500. The owner refused and hired another contractor to remove it.

The owner sued the contractor for the cost of removing the excess fill, which was more than $20,000, and the Court awarded the owner that amount. In response to the contractor's argument that the owner's damages should be limited to $9,500 – the amount the contractor demanded to remove the fill – the Court held that a party in breach of a contract may not insist that the damaged party pay additional compensation to correct work for which the breaching party had already been fully paid. In this case, even though the owner did not pay money to the contractor, the contractor received a benefit from the parties' agreement. By demanding additional money as a condition of removing the excess material, the contractor waived its right to cure the breach of contract.

7. In *Krueger v. Zeman Constr. Co., 781 N.W.2d 858 (Minn. 2010)*, the Minnesota Supreme Court held that an employee of a business does not have standing to personally sue another company for business discrimination. The sole owner and operator of a drywall and sheetrock company entered into a subcontract to supply materials and labor for a multi-unit residential construction project. The subcontractor's owner personally performed the work, and she alleged that the prime contractor's managers sexually harassed and discriminated against her. She reported her allegations to the prime contractor's management and owners, but they did not take any action to rectify the situation. The subcontractor stopped work.

The subcontractor's owner, in both her personal capacity and on behalf of the company, sued the prime contractor for damages for business discrimination under Minn. Stat. § 363A.17. The Minnesota Supreme Court dismissed the individual claim, concluding that the owner did not have standing in her personal capacity to sue the contractor. The subcontractor, not its owner,

had a contract with the contractor. The Court reasoned that the legislature did not specifically intend "to grant to individual employees of a party to a contract the right to bring an action personally for discrimination in performance of the contract," because a contrary reading would provide "virtually no limit on the persons who can sue when sex discrimination affects the performance of a contract." The dissent argued the opposite result, reasoning that the Minnesota Human Rights Act "never mentions a contractual-relationship requirement."

8. In *Riverview Muir Doran, LLC, v. JADT Dev. Group, LLC, 790 N.W.2d 167 (Minn. 2010)*, the Minnesota Supreme Court held that a mortgagee that has paid all of the known and outstanding invoices of a lien claimant when the mortgage is recorded does not have actual notice of an existing lien and, therefore, has priority over later-filed mechanic's liens. JADT Development Group hired KKE Architects to provide architectural services for a residential development. JADT granted mortgages against the property that JADT was going to develop, and the two mortgages were recorded in March of 2005. Before the two mortgages were recorded, KKE presented 27 invoices for architectural services that it had already performed.

As part of the mortgage closing, the architect received payment for the full amount of its outstanding invoices in return for a partial mechanic's lien waiver. The invoices did not include all architectural services performed before the mortgage closing date.

The owner defaulted on its mortgages and failed to pay its architect. The architect sued to foreclose its mechanic's lien, and the banks sued to foreclose their mortgages. The trial court granted the architect's mechanic's lien priority over the banks' mortgages. That decision was overturned by the Minnesota Supreme Court.

As against a mortgagee without actual notice, a mechanic's lien cannot attach before the actual and visible beginning of improvement on the ground. Because no visible work had been completed on the property when the mortgages were recorded, the Court considered whether the banks had actual notice of the architect's lien. The Court decided that the term "without actual notice" means that the mortgagee is without knowledge of an existing lien *that is unpaid.* Although the banks knew about the architect's work, the banks did not know the architects were unpaid at the time the mortgages were recorded.

The Court decided that KKE's lien could not have priority because it was paid the full amount of its invoices when the mortgage was closed and recorded. The Court explained, "when a mortgagee has paid all known, outstanding invoices for lienable services at the time the mortgage was recorded, the mortgagee does not have 'actual notice' of an existing lien" within the meaning of the mechanic's lien statute, and it "does not matter whether the mortgagee is aware that future architectural services might be performed."

9. In *Premier Bank v. Becker Dev., LLC, 785 N.W.2d 753 (Minn. 2010)*, the Minnesota Supreme Court held that a contractor may not foreclose a blanket lien against less than all of the property subject to the lien. A developer hired a general contractor for the streets, utilities, and other site work on a 40-acre residential development with 59 lots. The bank entered into a loan agreement with the developer in September 2005 for $3.2 million for the development, secured by a promissory note and mortgage recorded in September 2005.

In February 2006, after the site contractor had begun to work, the bank entered into three separate loan agreements with a home builder for the construction of three model homes, each on its own lot in the development. The home builder executed three mortgages in favor of the bank, one for each lot. In October 2006, the bank and the developer entered into a loan

modification agreement that extended the maturity date of the September 2005 promissory note. As part of that agreement, the bank released its mortgages on the three model-home lots. The bank retained its mortgage on all other lots.

The developer defaulted on both its contract with the site contractor and on its three loans with the bank. The home builder defaulted on its loan. In February 2007, the contractor filed a $266,623 mechanic's lien against all 59 lots. The court held that the contractor's lien had priority over the bank's mortgage from the home builder on the three lots where the first mortgage had been released, but that the bank's first mortgage had priority over the contractor's lien on the remaining 56 lots.

The contractor argued that it should be allowed to collect the entire $266,623 from the three model-home lots. The bank argued that the $266,623 should be prorated equally among all 59 lots, or $4,519 per lot, which would allow the bank to recoup some of the debt secured by the second mortgages. The Minnesota Supreme Court sided with the bank, ruling that "when a lien claimant elects to file a blanket lien pursuant to section 514.09, one lien is created which encumbers the whole area improved, and the amount of the lien is spread prorata against each lot subject to the lien." The Court determined that the statute provides a lien claimant the ability to file separate liens with proportionate amounts attributable to each lot, and where a lien claimant rejects that option, the claimant does not have the right to enforce a blanket lien "that results in a disproportionate burden on a small fraction of the lots subject to the lien and benefited by the improvement."

10. In *Master Blaster, Inc. v. Dammann, 781 N.W.2d 19 (Minn. Ct. App. 2010)*, the Minnesota Court of Appeals held that a party may be bound by the decision of a court if it wrongfully fails to accept a defendant's tender of defense. Supreme Pork, Inc. purchased two pressure washers from Master Blaster, Inc., which installed them in one of Supreme Pork's Minnesota facilities (both entities were South Dakota corporations). Master Blaster hired Pipestone Plumbing and Heating, a Minnesota corporation, to install flue vents for the pressure washers. Approximately two years later, a fire erupted and Supreme Pork sued Master Blaster in South Dakota for negligence and breach of implied warranty, claiming that the venting system caused the fire. Master Blaster then sued Pipestone in South Dakota seeking indemnification, but Pipestone was dismissed because the South Dakota court lacked jurisdiction over it. Master Blaster tendered its defense of the action brought by Supreme Pork to Pipestone and Pipestone's insurer three times, all of which were refused.

The South Dakota jury found that Pipestone, as Master Blaster's agent, was negligent and had breached an implied warranty, causing 95% of Supreme Pork's damages. Master Blaster then sued Pipestone in Minnesota for indemnity. The Minnesota District Court found that Master Blaster was entitled to indemnification and defense costs from Pipestone, which was bound by the South Dakota jury's decision because of Master Blaster's repeated tenders of defense.

On appeal, Pipestone argued that it could not be bound by the South Dakota judgment because: (1) there was a conflict of interest between Pipestone and Master Blaster which precluded Pipestone from accepting the tender of defense; (2) Master Blaster did not properly represent Pipestone's interests in the South Dakota action; (3) Pipestone was disadvantaged by South Dakota's rules on the destruction of evidence; and (4) the South Dakota courts did not have jurisdiction over Pipestone.

The Minnesota Court of Appeals found that Master Blaster properly defended Pipestone's interests in the South Dakota trial. The Court also determined that there was no conflict of interest because Supreme Pork's claims against Master Blaster were solely based on a theory of vicarious liability for Pipestone's acts related to the vent system, and Pipestone admitted that it was solely responsible for that system.

The Court ruled that the interests of Master Blaster and Pipestone were fully aligned, and Master Blaster's actions throughout the trial demonstrated that it was accountable for Pipestone's interests. Because the judgment against Master Blaster fell entirely within the scope of Pipestone's duty to indemnify Master Blaster, and Pipestone had the opportunity to participate in the South Dakota case as a party or by accepting Master Blaster's tenders of defense, Pipestone could not re-litigate the issues of its liability in a Minnesota court.

11. In *Presbrey v. James, 781 N.W.2d 13 (Minn. Ct. App. 2010)*, the Minnesota Court of Appeals held that a homeowner is not liable for injury to a contractor when the homeowner did not have "detailed control" of the work. Here, homeowners hired a carpenter to replace decks on their home. On a misty day, the carpenter fell and was killed while working on the decks alone. His estate sued the homeowners for negligence.

The Minnesota Court of Appeals ruled that the homeowners could not be liable for the carpenter's death. An owner is not generally responsible for injuries to a contractor's employee. One of the exceptions to that rule is when the owner has retained control over the contractor's means and methods of performance and exercises that control negligently. The carpenter's estate argued that the homeowners retained sufficient control over the project to impose a duty of care. The Court, however, found that these homeowners did not have the necessary "detailed control" over the project to retain a duty of care. Although the homeowners inspected progress on the project and picked up discarded boards and nails, that conduct was insufficient control for the homeowners to be found liable.

The estate's second unsuccessful argument was that landowners always owe a duty of reasonable care to people on their premises and that extended to the carpenter. The courts, however, apply two exceptions to that rule: one that applies when the danger (rotted deck or rainy weather) is obvious; and a second that applies when the injured person was hired to correct the same danger that injured them (the unsound deck).

12. In *Day Masonry v. Indep. Sch. Dist. 347, 781 N.W.2d 321 (Minn. 2010)*, the Minnesota Supreme Court held that the statute of limitations on a warranty claim is triggered when an owner knows, or has reason to know, that the contractor is unable or unwilling to honor its warranties. In January 1993, a school district separately contracted with a general contractor and roofing contractor to build a new high school. Both of the contracts contained express warranties. The high school was substantially completed by September 1, 1994, but experienced numerous roof leaks almost immediately. The school made repairs to the roof in 2002 and, in 2004, hired a consultant to thoroughly inspect the roof. After the consultant recommended repairs of almost $2 million, the school wrote to the general contractor and roofing contractor on December 13, 2004, informing them of the inspection report and potential warranty claims. The school then demanded arbitration on March 13, 2006.

The contractors moved to dismiss the suit as time-barred under Minnesota's two-year statute of limitations. The Minnesota Supreme Court reiterated that the statute of limitations for breach of warranty claims begins to run when an owner discovers, or should have discovered, the contractor's refusal or inability to honor its warranty. The Court concluded that the earliest

the breach of warranty claims could have accrued was after the school sent the letters to the contractors on December 13, 2004. Because the school's demand for arbitration was made less than two years after that date, the school's claims were not barred. The Court also reviewed the school's non-warranty claims. The statute of limitations for those claims began to run upon the "discovery of the injury." The Court held that the school knew of a leakage problem in 2002, which was more than two years before it demanded arbitration. Therefore, the school's non-warranty claims were barred by the statute of limitations.

13. In *301 Clifton Place, LLC v. 301 Clifton Place Condo. Ass'n, 783 N.W.2d 551 (Minn. Ct. App. 2010)*, the Minnesota Court of Appeals held that buyers and sellers may shorten limitations period from six years to two years for claims under Minn. Stat. § 515B.4 in a document wholly separate from the contract. During the marketing of condominium units, the developer told prospective purchasers that the units would have hardwood floors, which convinced many of them to purchase their units. The purchase agreements included several exhibits and attachments, including a modification of the statute of limitations for warranty claims signed by developer and the individual purchasers. The purchase agreements also included a disclaimer that the purchaser was not relying on prior statements or representations by the development.

During construction, the contractor installed sheets of engineered wood flooring that contained layers of inferior wood and other artificial material. The condominium association sued the developer and the developer's contractor for faulty construction in the Fall of 2006.

The Court determined that testimony supported the fact that the flooring was not "hardwood" and that the developer misrepresented the materials to be used in the flooring. Although a written agreement contradicting prior misrepresentations will defeat common-law fraud, it does not defeat statutory fraud. The Court upheld the conclusion that the developer violated the Minnesota Consumer Fraud Act. Most significantly, the Court recognized that the law allows a buyer and seller to reduce the statutory six-year limitations period for statutory warranty claims to two years if the change is reflected by a document separate from the contract. Because the change was an "exhibit" expressly incorporated into the contract and was not a separate contract, the Court of Appeals concluded the exhibit did not act to shorten the limitations period to two years.

14. In *State of Minnesota v. Holmes, 787 N.W.2d 617 (Minn. Ct. App. 2010)*, the Minnesota Court of Appeals held that criminal liability for theft of proceeds requires proof of a failure to use the proceeds to pay others who contributed labor to the project while knowing those contributors had not yet been paid. The owner of a construction company was convicted by a trial court of theft of proceeds after he accepted a $5,000 down payment for a project but never began the work. The owner of the company appealed and argued that, in order to be guilty of theft of proceeds, the statute required proof that the company had failed to pay individuals who contributed to the improvement. The Court of Appeals agreed and overturned the conviction because no one had contributed labor, skills, material or machinery for the project. Therefore, the company had not failed to pay individuals who contributed to the project. Although the company's failure to perform according to the contract was wrongful, the company's owner could not be convicted of theft of proceeds.

15. In *T.E.S. Constr., Inc. v. Chicilo, 784 N.W.2d 392 (Minn. Ct. App. 2010)*, the Minnesota Court of Appeals held that a construction company's owner can be sued in a civil action and found liable for theft of proceeds even if he has not been convicted criminally for the same acts. A construction company hired a subcontractor to provide framing work. When the

framing subcontractor submitted invoices, the owner of the construction company asked the lender to make payment to another framing company that he personally owned rather than to the framing subcontractor that actually performed the work. Unpaid for its work, the framing subcontractor sued the owner of the construction company under Minn. Stat. § 514.02, which makes it a crime to steal proceeds received for contributions to the improvement of real estate. The owner of the construction company argued that he could not be personally sued under the statute because he had not been criminally convicted of violating the statute. The Court held that a criminal conviction is not a prerequisite for a civil lawsuit. Therefore, the Court allowed the case to go forward.

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Mississippi

Case Law

1. In *Architex Association, Inc. v. Scottsdale Insurance Company*, 27 So. 3d 1148 (Miss. Feb. 11, 2010), the Mississippi Supreme Court reversed and remanded the lower court's finding that no coverage existed under a general contractor's commercial general liability ("CGL") insurance policy. Architex contracted with CIS Pearl, Inc. ("CIS") for the construction of a Country Inn and Suites hotel located in Pearl, Mississippi. CIS later filed suit against Architex and its surety for negligent construction of the hotel. CIS later alleged that no rebar was placed in the foundation of the hotel, causing a total loss. Architex thereafter put its CGL carrier, Scottsdale, on notice. Architex filed a third party complaint against Scottsdale for Scottsdale's failure to defend and indemnify Architex under the CGL policy. Both Architex and Scottsdale filed motions for summary judgment, Architex alleging that there was an occurrence under the CGL policy and Scottsdale alleging that there was no occurrence and therefore no coverage under the CGL policy. The circuit court held that although it "may be time" for Mississippi courts to expand the meaning of the word "occurrence" and include construction defects, it was not at liberty to do so due to the binding precedent found in *United States Fidelity & Guaranty Company v. Omnibank*, 812 So. 2d 196 (Miss. 2002) and the Fifth Circuit's *Erie*-guess in *ACS Construction Company v. CGU,* 332 F.3d 885 (5th Cir. 2003). The lower court held that, based on this binding case law, there was no occurrence, which is based on an accident or an unintentional action, because Architex intentionally hired subcontractors to perform the work. The Mississippi Supreme Court found that the *ACS* Court's findings were inconsistent with Mississippi law and held that Architex's CGL policy "unambiguously extends coverage to Architex for unexpected or unintended 'property damage' resulting from negligent acts or conduct of a subcontractor, if not excluded by other applicable terms and conditions " of the CGL policy. The lower court erred by not considering the CGL policy "as a whole" in its consideration of whether there was an occurrence. The case was therefore remanded to the lower court to determine whether Architex's subcontractors' actions properly triggered an occurrence.

2. In *Fidelity & Deposit Company of Maryland v. Ralph McKnight & Son Construction, Inc., Tommy L. McKnight and Vonda L. McKnight*, *28 So. 3d 1282 (Miss. Feb. 25, 2010)*, Fidelity & Deposit Company of Maryland ("F&D") appealed the lower court's dismissal of its complaint for *quia timet* relief and specific performance of the terms of the indemnity agreement entered into with its principal, Ralph McKnight & Son Construction, Inc. and individual guarantors Tommy L. McKnight and Vonda L. McKnight (collectively "McKnight"). In connection with the McKnight's construction of a theater/skating rink in Kosciusko, Mississippi for C&I Entertainment, LLC ("C&I"), F&D issued payment and performance bonds naming McKnight as principal and C&I as obligee. Disputes arose between McKnight and C&I concerning the quality of construction of the project. McKnight sued C&I for nonpayment of construction balances and C&I counterclaimed for faulty workmanship. A claim was thereafter made on the performance bond by C&I, which F&D ultimately denied. C&I thereafter filed suit against F&D for breach of the performance bond and bad faith denial of C&I's claim. As a result, F&D demanded, pursuant to the terms of the indemnity agreement, that McKnight post collateral and afford F&D access to McKnight's books and records. When McKnight refused, F&D sued McKnight for *quia timet* relief and specific performance of the indemnity agreement. McKnight moved to dismiss F&D's complaint, arguing that pursuant to *Miss. Code. Ann.* § 31-5-41, F&D cannot be indemnified for its own negligence. F&D responded and filed a motion for summary judgment of its own. The lower court granted McKnight's motion to dismiss and held that the performance bond incorporated the construction contract by reference, thereby making

Miss. Code Ann. § 31-5-41 applicable. On appeal, the Mississippi Supreme Court reversed, stating that *Miss. Code Ann.* § 31-5-41 speaks for itself in that the last sentence of the statute states that it does not apply to "construction bonds". The Court held that performance bonds are a type of "construction bond" and that "[i]ncorporation by reference simply indicates that the bond and construction contract set forth 'mutually interdependent rights and obligations,' and that the two documents must be construed together."

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Missouri

Legislation

Residential property owners in Missouri who contract to make improvements to their property with the intention of selling after the improvements are completed have new obligations or duties to notify potential lien claimants of their intent to sell. Under this new Missouri law, the contractors and suppliers who make these improvements now have additional steps to take in order to preserve their lien rights.

House Bill 2058 ("HB 2058"), which is now Missouri Revised Statute 429.016, was passed by the Missouri General Assembly and then signed into law by Governor Jay Nixon on July 12, 2010. The new law, which took effect on August 28, 2010, applies to mechanic's liens asserted against certain residential real property but does not apply to liens for repairs, remodeling or additions. Most of the changes affect lien rights on residential property that is being sold. The new law relates to dwellings of four units or less, condominiums, townhouses or cooperatives regardless of the number of units, and will apply to any residential closings that occur on or after November 1, 2010.

Likely, in an effort to avoid having innocent purchasers buy residential property burdened with mechanic's liens that were not filed at closing or filed too close to closing to be discovered in the title search, these new provisions were enacted. Both owners and lien claimants will have new obligations under this law.

A property owner who intends to sell the residential property is to file with the recorder of deeds in the county where the property is located a "notice of intended sale." This document must be recorded not less than forty-five calendar days prior to the earliest calendar date the owner intends to close on the sale of the property and must include the actual date the owner intends to close. The owner must also post a copy of the notice of intended sale at the property, the property's entrance, or at a jobsite office at or near the property.

Any "claimant" seeking to file a lien on the property, must file a "notice of rights" at least five days prior to the owner's intended date of closing stated in the owner's notice of intended sale. In other words, any lien claimant—contractors or suppliers—must file a notice of rights with the recorder of deeds at least five days prior to the owner's posted sale date.

The lien claimant's "notice of rights" must "comply with 59.310 and be on a form substantially as follows:"

NOTICE OF RIGHTS

Date:	The date of the document.
Owner:	Identify Property owner, as "Grantor" by correct name
Claimant:	Identify Claimant, as "Grantee" by correct name, current address, contact persons, and current telephone number.
Property:	The legal description of the property.

Person Contracting with Claimant for Work:

Identify person or entity contracting with Claimant by correct name, current address, and current telephone number.

Persons performing work for or supplying materials to Claimant:

Claimant may, but is not obligated to, identify any persons or entities which have or will be performing work or supplying materials on behalf of Claimant for the Property. Said persons or entities must be identified by correct legal name, address, and current telephone number.

It is important to note that a lien claimant who records a "notice of rights" does not extend the time for filing a mechanic's lien. Further, only one notice of intended sale must be recorded by the property owner, even if the intended closing date is postponed to a date later than what is stated in the notice of intended sale. In other words, if the closing date changes, it doesn't affect when a lien claimant's "notice of rights" is due (it is still due at least five days before the original posted closing date). Under the new law, a lien claimant who fails to record the notice of rights will forfeit any right it has to assert a mechanic's lien against the property.

The new law also provides that anyone with an interest in the residential property can release the property from any mechanic's lien by posting security. The security can be cash, a certified check, a letter of credit, or a surety bond and should be in an amount not less than 150% of the mechanic's lien being released. Further instructions are also provided for posting the security.

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Montana

Case Law

1. In *White v. Longley*, *2010 MT 254, 358 Mont. 268, ___ P.3d ____ (2010)*, the Montana Supreme Court offered a strong rebuke to a contractor who was found liable at trial court for unsatisfactory work he performed on the plaintiffs' dream home. At trial, the plaintiffs presented evidence that the defendant had represented himself as a licensed professional engineer with substantial experience in the residential construction industry. Based upon these representations and promotional materials he had provided, the plaintiffs hired him to build their dream home near Troy, Montana.

Shortly after construction on the home commenced, issues with defendant's craftsmanship arose. Despite these issues, the defendant continued to assure plaintiffs that he was competent and that the construction would be completed in a satisfactory manner. When the problems failed to cease, the plaintiffs set up a meeting with the defendant to discuss the project. During that meeting, the defendant advised the plaintiffs to "buy out" their contract with the defendant and his company for $30,000. Plaintiffs eventually paid the "buy out" based on defendant's representation that he would fix all deficiencies in his work and winterize the house. Unfortunately for the plaintiffs, defendant did not live up to his word and he failed to fix his mistakes.

Plaintiffs eventually filed suit against the defendant and his company in district court despite the defendant's demand to arbitrate the dispute. At trial, the court, sitting without a jury, found the defendant and his company liable, jointly and severally, in the amount of $392,184.32. The amount included $100,000.00 for emotional distress and $62,500.00 to cover the costs of demolishing the "unsalvageable" home.

On appeal, the defendant argued that there was insufficient evidence to support the verdict and also argued that as a member of a limited liability company, he could not be held personally liable to the plaintiffs. The Montana Supreme Court rejected all of the defendants' arguments. The key portion of the Court's holding was its decision to uphold the exception to the general protection afforded by the limited liability statutes. Although a member of a limited liability company cannot be found liable "solely by reason of his being a member or manager" of an LLC, he may still be held liable for his own acts or omissions "to the extent those acts or omissions would be actionable in contract or tort against the member or manager if that person were acting in an individual capacity." Based on this pronouncement, the Court upheld the trial court's determination that the defendant could be held liable personally for the judgment entered in favor of the plaintiffs.

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2. In *Signal Perfection Ltd v. Rocky Mountain Bank*, 2009 MT 365, 353 Mont 237, 224 P3d 604, the Montana Supreme Court held that construction lien claims are prior and superior to bank mortgages that are recorded for the nonexclusive purpose of securing advances to pay "for the particular real estate improvement being liened." Mont Code Ann §71-3-542(4).

The developer, Signal Perfection, took out a construction loan from Rocky Mountain Bank. The Bank recorded a trust indenture on the property. Signal eventually stopped making

scheduled payments to its contractors who, in turn, filed liens and sued to foreclose on the property. The Court concluded under the plain language of Section 71-3-542(4) that the construction liens, in their entirety, have priority over the entirety of the trust indenture because the indenture secured advances were, in part, for construction.

The Court rejected the Bank's argument that its encumbrance was entitled to partial priority for the portion used to refinance the purchase of the real estate because the Bank failed to raise the argument with the lower court. (This issue is now being considered in an unrelated case before the Court, *Gaston Engineering & Surveying v. Oakwood Properties LLC*, No. DA. 10-0102 which was argued before the Court on January 19, 2011. Go to https://searchcourts.mt.gov to track the progress of this case.).

The Court also rejected the Bank's argument that its encumbrance was entitled to priority over the liens for the amounts of the liens that were attributable to labor and materials provided after the Bank had fully disbursed the loan proceeds. It stated: Section 71-3-542 "does not discuss or provide any means for partitioning encumbrances or construction liens and then assigning priority among resultant parts. Nor is there any indication how such a procedure would operate." 2009 MT 365, ¶17.

3. In *JTL Group Inc v. New Outlook LLP*, 2010 MT 1, 355 Mont 1, 223 P3d, 912, the Montana Supreme Court clarified the statute that governs when subcontractors are required to provide notice of right to claim a lien to owners. Mont Code Ann §71-3-531. JTL was a subcontractor that provided road base material, paving and other utilities for the construction of a residential subdivision. A dispute arose as to the quantity of certain material used beneath the subdivision road. JTL was compelled to file a construction lien against the property comprising the subdivision.

The subdivision developer countered JTL's suit for foreclosure of its lien by claiming, in part, that its lien was procedurally defective because JTL failed to provide notice of right to claim a lien within twenty days of commencing work to the real property owner (in this case, the developer). The developer claimed the notice was required because the subdivision was residential in nature. §71-3-531(2). JTL responded that it was exempt from the notice requirement because the project was commercial in character. §71-3-531(1)(d).

The Court held that JTL was not required to provide the notice of right to claim a lien because its lien was for the provision of materials for an internal subdivision road which attached at a time when there were no residential improvement and no property owned by individual homeowners, the persons the notice of right to claim a lien is intended to protect.

4. In *Dick Anderson Construction Inc v. Monroe*, 2009 MT 416, 353 Mont 534, 221 P3d 675, the Montana Supreme Court examined a dispute that arose after Monroe *Construction* entered a contract with Dick Anderson Construction ("DAC") to make improvements on a ranch owned by Monroe *Property*. Monroe Construction refused to pay DAC its final pay request. DAC filed a construction lien and an action to foreclose on the lien. Eventually, Monroe Construction and DAC entered arbitration. Monroe Property was not a party to the arbitration agreement and refused to participate.

The arbitration panel issued an award adverse to Monroe Construction that set the unpaid balance of the contract price due to DAC along with interest, attorneys fees and costs. In addition, the arbitrators issued findings of fact regarding foreclosure of the construction lien as between DAC and Monroe Property.

The district court, to which the award was appealed, confirmed the award. It did not address whether the arbitrators properly included attorneys fees and costs in their award. The district court entered judgment on the award including the stated amount of attorneys fees and expenses.

On appeal to the Supreme Court, Monroe Construction argued that the award of attorneys fees was erroneous because the computation of the fees contained an obvious mathematical error. The actual amount of fees was $221,893. The amount awarded was $365,078. The Supreme Court held that Monroe Construction failed to timely and properly seek to vacate the award in accordance with Montana's arbitration act. Mont Code Ann §27-5-313.

Monroe Property argued that the arbitration panel exceeded its authority when it ordered a liquidation of the breach of contract damages and when it issued findings of fact concerning the foreclosure of the construction lien. The Supreme Court held that Monroe Property had no standing to complain about the panel's authority to liquidate breach of contract damages because Monroe Property was not a party to the contract. It held, however, that the arbitration panel had no authority to make findings of fact regarding foreclosure since Monroe Property was not a party obligated to participate in arbitration. "The matter of the lien and its foreclosure remain as issues to be litigated . . .." 2009 Mont 1, ¶57.

Ironically, the foreclosure matter is back before the Supreme Court. At issue is whether DAC's lien is invalid for failing to properly identify the "contracting owner." Specifically, the case questions whether Monroe Property was the "contracting owner," whether Monroe Construction was the "agent" of the "contracting owner" for purposes of the construction lien statutes and whether a real property owner can avoid construction liens simply by using a shell corporation with no interest in the real property to contract for the improvements to the property. *Dick Anderson Construction Inc v. Monroe Property Company LLC, NO. DA 10-0440*. Go to https://searchcourts.mt.gov to track the progress of this case.

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Nebraska

Case Law

1. In *Solis v. Summit Contractors, Inc.,* 558 F.3d 815 (8th Cir. 2009), a contractor was cited for a subcontractor's OSHA violation. Summit was the general contractor for the construction of a college dormitory in Little Rock, Arkansas. Summit hired a job superintendent and three assistant superintendents, who were responsible for coordinating vendors, scheduling work for subcontractors, and ensuring that the work of the subcontractors was performed according to contract. Summit subcontracted the exterior brick masonry to All Phase Construction, who used scaffolding to perform their work. OSHA cited Summit for All Phase's violation of scaffolding safety requirements, because Summit was the "controlling" employer according to OSHA's multi-employer worksite citation policy. The Occupational Safety Health Review Commission ("OSHRC") ruled that OSHA's use of the multi-employer worksite citation policy to cite Summit for another employer's violation was improper based on language in 29 C.F.R. § 1910.12(a), stating that each "employer" shall protect his "employees" from exposure to hazards. The Eighth Circuit reversed the OSHRC, deferring to the Secretary of Labor's interpretation that contractors could be cited for subcontractors' safety violations.

Legislation

1. *The Nebraska Construction Prompt Pay Act*. The Nebraska Legislature recently enacted the "Nebraska Construction Prompt Pay Act" (LB 552). This statute puts in place several procedures intended to speed payment to contractors and subcontractors for amounts due to them on construction projects in Nebraska. It also contains new procedures for pursuing construction contracts claims against political subdivisions of the state. Legislative Bill 552 applies to construction contracts entered into on or after October 1, 2010, but does not apply to improvements of residential property consisting of four or fewer units nor contracts involving the State of Nebraska. The Act deals with construction contract payment in three principal ways: First, the Act sets deadlines for payments by owners to contractors and by contractors to subcontractors. Second, the Act limits instances in which payment may be withheld under a construction contract. Third, the Act invalidates certain contract provisions, including any waiver, release or extinguishment of any claim against a bond payment except as a condition to payment and only for amount of that payment, any provision calling for application of another state's law, or a provision that calls for the venue of any lawsuit or arbitration proceeding to be held outside the State of Nebraska.

2. *Employee Classification Act*. The Nebraska Legislature recently enacted the "Employee Classification Act" (LB 563). Legislative Bill 563 states that an individual performing construction labor services for a contractor is presumed an employee and not an independent contractor, unless: (1) an individual works free from control or direction over the performance of his services and in fact, such service is outside the usual course of the contractor's business, and the individual is customarily engaged in an independently established trade or business; (2) the individual has been registered as a contractor; and (3) the individual has been assigned a combined tax rate or is exempted from unemployment insurance coverage. Contractors must post a notice, in both English and Spanish, of an individual's right to be classified as an employee rather than an independent contractor if the above requirements are not met. Individuals may report suspected violations to an established hotline and web site. If the Commissioner of Labor finds that a contractor improperly designates an individual as an independent contractor rather than an employee, for the first offense, the contractor is fined $500 per each misclassified individual. For each subsequent offense, the contractor is fined

$5,000 for each misclassified individual. Additionally, the Commissioner and the Nebraska Department of Revenue will collect any unpaid taxes plus interest and penalties.

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Nevada

Case Law

1. *Hartford Fire Insurance Company v. Trustees of the Construction Industry, 125 Nev. 16, 208 P.3d 884 (2009).* Trustees of employee benefit trust funds brought an action in federal court against a general contractor and its public works payment bond surety to recover contributions owed to the trust funds by a subcontractor to the general contractor. The federal court certified two questions to the Nevada Supreme Court:

> 1. In order to recover against a defendant surety under [Nevada Revised Statutes ("NRS") 339.035(1)], must plaintiff trustees, who are not in a direct contractual relationship with the subcontractor, comply with the notice requirements of [NRS 3339.035(2)]?
>
> 2. In order to recover against a defendant contractor under [NRS 608.150] in a case where unpaid trust fund contributions are covered by a statutory payment bond, *see* [NRS 339.025], must plaintiff trustees, who are not in a direct contractual relationship with the subcontractor, comply with the notice requirements of [NRS 339.035(2)]?

Hartford Fire Insurance Company v. Trustees of the Construction Industry, 125 Nev. 16, 208 P.3d 884, 887 (2009).

A. The Surety's Liability

NRS 339.035, Nevada's public works payment bond statute, which is similar to the federal Miller Act (40 U.S.C. § 3131, *et seq*.), permits recovery for persons that performed work or furnished material who have not been paid in full. However, persons without a direct contract with the general contractor or subcontractor that provided the bond must give certain notice to the contractor.

In the *Hartford* case, the trusts admittedly did not perform any work or provide any material to the bonded project, and also provided no notice of their claims.

The Nevada Supreme Court determined that the trusts' relationship rendered them at best a third party beneficiary of the subcontractor's labor agreement with the relevant union. The Court concluded that the trustees, like assignees, "stood in the shoes" of the subcontractor's workers, and were therefore entitled to recover against the surety bond if the workers or trustees had given notice of their claims, as required by NRS 339.035(2). The Court concluded:

Under NRS 339.035's clear terms, a subcontractor's employees are required to provide notice to the general contractor of their claims for the subcontractor's unpaid contributions before recovering on the contractor's payment bond. Likewise, because employee-benefit trust-fund trustees are third-party beneficiaries of the subcontractor's promise to make the contributions, we conclude that they represent the employees and, thus, are permitted to made claims on the payment bond. Since they stand in the employee's shoes, they are also required to provide the contractor notice of their claims before recovering against the payment bond under NRS 339.035.

Id., 125 Nev. at __, 208 P.3d at 894.

B. The General Contractor's Liability

The general contractor argued that its liability under NRS 608.150, which renders general contractors liable for a subcontractor's unpaid contributions, was contingent upon being provided notice under NRS 339.035. NRS 608.150 states:

Every original contractor making or taking any contract in this State for the erection, construction, alteration or repair of any building or structure, or other work, shall assume and is liable for the indebtedness for labor incurred by any subcontractor or any contractors acting under, by or for the original contractor in performing any labor, construction or other work included in the subject of the original contract …

Id., 125 Nev. at __, 208 P.3d at 893-894. The Court had already determined that employee-benefit trust contributions constitute "indebtedness for labor." *Tobler and Oliver v. Board of Trustees,* 84 Nev. 438, 442, 442 P.2d 904, 906-907 (1968).

The Nevada Supreme Court was unwilling to imply the notice requirement in the public works bond statute (NRS 339.035) into the statute mandating the general contractor's liability for unpaid contributions (NRS 339.035). *Hartford, supra,* 125 Nev. at __, 208 P.3d at 894.

Thus, while the surety was not liable for the trustees' claims, the general contractor was liable.

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New Hampshire

Case Law

1. In *Alex Builders & Sons, Inc. v. Danley,* ___ N.H. ___. 7 A.3d 1219 (2010), a builder sued a homeowner for damages for materials and services provided for the construction of a new home. The builder filed a complaint for breach of contract, quantum meruit and unjust enrichment, along with a separate petition for an *ex parte* attachment. The New Hampshire Supreme Court noted that under RSA 447:2 and 447:9, a person who performs labor or furnishes materials for building or repairing a house has a lien on the property that continues for 120 days after the materials/services are provided. The statute requires that the lien be perfected within that 120 day period by an attachment on the property. RSA 447:10.

The question before the Court was whether the writ filed by the builder, which did not seek an attachment, was sufficient to secure the lien. Although the failure to strictly comply with the specific statutory provisions of perfecting a mechanics lien is usually fatal, *Rodd v. Titus Constr. Co.*, 107 N.H. 264, 266, 220 A.2d 768 (1966), the Court noted that the writ and separate petition for *ex parte* attachment, taken as a whole since filed the same day, meet the mechanics lien perfection requirements of RSA 447:10. The Court noted that the content of the pleadings was sufficient to perfect the lien, despite the fact that the description of the real property to be liened was over inclusive, naming the property where the materials/services were provided as well as other property.

2. In *Gen. Insulation Co. v. Eckman Constr.*, 159 N.H. 601, 992 A.2d 613 (2010), an insulation company sought payment from various defendants for insulation provided for a bonded school construction project. The insulation company filed a notice of claim to enforce the project's statutory payment bond in New Hampshire Supreme Court within the 90-day time period set forth in RSA 447:17. Later, the insulation company filed a petition to enforce statutory bond and to assert common law claims within the one-year time period required by RSA 447:18, which states:

Said claimant shall, within one year after filing such claim, file a petition in the superior court for the county within which the contract shall be principally performed to enforce his claim or intervene in a petition already filed, with copy to the principal and surety, and such further notice as the court may order.

The Court interpreted this language as also requiring the insulation company to provide a copy of the petition to the "principal and surety" within the same one-year period. Because the insulation company failed to provide these copies in a timely manner, the Court dismissed its statutory payment bond claims. The Court also dismissed the insulation company's common law claims for failing to plead sufficient facts and relying on conclusory statements of law.

Legislation

1. *RSA 498:2-a, Insurance Coverage Disclosure in Tort Cases*, has been enacted to provide that any time after suit for negligence and an appearance on behalf of the defendant have been filed, the named defendant, or his or her insurance carrier if he or she is insured as to the claim, must disclose only to the claimant or his or her counsel the policy limits of the policy or policies of all liability insurance applicable to the defendant as to such claim.

2. *RSA 310-A:76, II-a*, which defines "certified wetland scientist," has be amended to state that a certified wetland scientist is "person who, by reason of his or her special knowledge of hydric soils, hydrophytic vegetation, and wetland hydrology acquired by course work and experience, as specified by RSA 310-A:84, II-a and II-b, is qualified to delineate wetland boundaries and to prepare wetland maps; to classify wetlands; to prepare wetland function and value assessments; to design wetland mitigation; to implement wetland mitigation; to monitor wetlands functions and values; and to prepare associated reports, all in accordance with standards for identification of wetlands adopted by the New Hampshire department of environmental services or the United States Army Corps of Engineers or their successors, and who has been duly certified by the board."

The qualifications for certification as a wetland scientist have also been amended to define the experience necessary, in part, as "[a]ctual field mapping experience, defined as the delineation of wetland boundaries and the preparation of wetland maps; the classification of wetlands; the preparation of wetland function and value assessments; the design of wetland mitigation; the implementation of wetland mitigation; the monitoring of wetlands functions and values; and preparation of associated reports, all in accordance with standards for the identification of wetlands adopted by the department of environmental services or the United States Army Corps of Engineers or their successors." RSA 310-A:84, II-b(a)(3).

3. *RSA 48-A-a*, Lien for Unpaid Fines, was enacted to create a lien against real property for unpaid fines for housing code violations. This statute also sets forth the requirements for perfecting the lien, its priority and the potential recovery of attorneys fees.

4. *RSA 485-A:35*, Permit Eligibility; Exemption, was amended to add requirements for the renewal of state septic designer and installer permits. RSA 485-A:38, II-a also was enacted to permit expansion of structures that that do not increase the load on a sewage disposal system without approval by the New Hampshire Department of Environmental Services.

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New Jersey

Case Law

1. In *Robertet Flavors v. Tri-Form Constr., Inc.,* 2010 *N.J. LEXIS 747 (N.J. Aug. 3, 2010)*, the New Jersey Supreme Court addressed the issue of spoliation of evidence in the context of a construction defects case in which the project owner, who also served as the general contractor for the construction of its new corporate headquarters, replaced allegedly defectively installed window system and made repairs to the resulting damage without providing the defendants or their experts an opportunity to first inspect the defect and damage. Although noting that the appropriate sanction for spoliation of evidence is dependent upon a variety of factors, and thus, case specific, the court held that in this case, the appropriate sanction was dismissal of all claims against those defendants who were deprived of the opportunity to inspect the construction defect prior to it being remediated.

Robertet Flavors hired Tri-Form Construction, Inc. and its president, Robert Karabinchak, to serve as the construction manager for the construction of Robertet Flavors's new corporate headquarters. Following a competitive bidding process, Robertet Flavors retained Academy Glass, Inc. to install two separate window systems in the building, one of which was a strip-window system. Following construction, Robertet Flavors's employees noticed that water was leaking into the building through the strip-window system and causing damage. Academy Glass, which was contacted to evaluate and fix the leaks, visited the building, performed an inspection, and recommended caulking. When the caulking failed to work and further efforts to contact Academy Glass did not result in it making any repairs, Robertet Flavors filed a lawsuit in January of 2002 against Tri-Form, Karabinchak, and Academy Glass.

Robertet Flavors retained a consultant, J.A. Frezza and Associates, LLC to identify the cause of the problem with the strip-window system and to repair it. In February of 2002, Frezza removed a section of the strip windows and discovered moisture and mold. A subsequent report revealed that there was significant mold in various areas of the building and recommended that Robertet Flavors remove all of the strip windows and replace them with a new window system. The repairs were implemented in December of 2003 and completed in February of 2003. Although Tri-Form had issued a discovery demand in March of 2002 that requested formal notice of any intended, planned, or ongoing remediation, there was no evidence that Robertet or its attorney contacted Tri-Form, Karabinchak, or their counsel to advise them of the planned remediation before it was completed, and the evidence was disputed as to whether Academy Glass was so advised.

Upon application by the defendants, the trial court held that Robertet Flavors had committed spoliation of evidence and that there was clear prejudice to the defendants because their expert had not been afforded the opportunity to investigate the leaks or their cause. The trial court ruled that, as a sanction for this spoliation, Robertet Flavors's experts were barred from offering any opinion testimony against the defendants. Thereafter, Academy Glass's motion for summary judgment was then granted by the trial court and Robertet Flavors appealed. The Appellate Division agreed that there was spoliation of evidence, but held that Robertet Flavors's expert should be permitted to offer opinion testimony as to evidence and observations obtained before the repairs were made.

The Supreme Court noted that the sanction of dismissal for spoliation of evidence is a severe sanction, but one that is appropriate when the circumstances are warranted. In

determining what the appropriate sanction should be for spoliation of evidence in a construction defect case, the Court declined to rigidly apply tests used by other courts (namely a three-prong test set forth by United States Court of Appeals for the Third Circuit in *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76 (3d Cir. 1994) and a five-prong test utilized by the Supreme Court of Alabama in *Story v. RAJ Props., Inc.*, 909 So. 2d 797 (Ala. 2005)). Rather, the Court held that there are a variety of factors courts should consider, including, at a minimum:

(1) The identity of the spoliator;

(2) The manner in which the spoliation occurred, including the reason for and timing of its occurrence;

(3) The prejudice to the non-spoliating party, including whether the non-spoliating party bears any responsibility for the loss of the spoliated evidence; and

(4) The alternate sources of information that are, or are likely to be, available to the non-spoliator from its own records and personnel, from contemporaneous documentation or recordings made by or on behalf of the spoliator, and from others as a result of the usual and customary business practices in the construction industry.

The Court then stated that courts are required to balance these factors in determining the proper remedy to ameliorate spoliation of evidence, and noted that dismissal will often not be the appropriate sanction.

Ultimately, in balancing the foregoing factors in this case, the Court held that the Appellate Division correctly determined that there was a sufficient basis to permit Robertet Flavors to proceed against Academy Glass on its claims relating to conditions that were observable prior to repairs being made because Academy Glass has inspected the building at that time. However, the Court held that the claims against Tri-Form and Karabinchak relating to the strip-window system should have been dismissed because these parties never had the opportunity to make an inspection prior to the repairs being made.

Owners are confronted with a difficult dilemma when a construction project contains defects that must be repaired. On the one hand, the owner will invariably want to make necessary repairs without delay. On the other hand, the owner needs to be cognizant of its responsibility to preserve evidence in the event of a threatened or pending litigation. The *Robertet Flavors* decision makes clear that in resolving these competing interests, the owner should proceed cautiously before making any repairs and err on the side of delaying repairs (particularly where there are no life safety issues) to allow all potentially liable parties to inspect and analyze the defective condition and any attendant damage. Even where litigation has not yet been filed and is only contemplated, it is advisable that the owner notify in writing the other parties to the construction project, including, but not necessarily limited to, those that parties that had a role in creating the allegedly defective condition, that it intends to make repairs. In that same written notification, the owner should advise the parties that they will be provided with the opportunity to make a reasonable inspection of the premises and the defective condition before such repairs are implemented.

2. In *Paragon Contrs., Inc. v. Peachtree Condo. Ass'n, 2010 N.J. LEXIS 538 (N.J. June 28, 2010)*, the New Jersey Supreme Court clarified confusion engendered by its prior opinion in *Ferreira v. Rancocas Orthopedic Assocs.*, 178 N.J. 144 (2003) and held that a trial court's failure to hold the case management conferences required by the *Ferriera* decision does not toll the statutory time frames for providing an affidavit of merit to the defendants in a malpractice case. Because of the prior uncertainty over the issue, however, the Court did not apply this holding retroactively and, instead, held that a condominium association's engineering malpractice claims would not be barred by the association's failure to timely serve an affidavit of merit on the engineering firm that it had sued.

New Jersey's Affidavit of Merit Statute, *N.J.S.A.* § 2A:53A-26, *et seq.* provides that in an action for malpractice or negligence against a licensed professional, the plaintiff is required to serve an affidavit, prepared by an appropriate licensed person, indicating that there is a reasonable probability that the care, skill, or knowledge exercised or exhibited by the defendant fell outside acceptable professional or occupational standards or practices. The plaintiff is required to serve this affidavit of merit within 60 days after the defendant's answer is filed, although this time can be extended an additional 60 days where the plaintiff seeks leave and demonstrates good cause. An attorney's inadvertent failure to file within the original 60 day period will constitute good cause and entitle the plaintiff to an additional 60 days to serve the affidavit of merit. In general, failure to serve an affidavit of merit within 120 of the defendant's filing of its answer will result in dismissal with prejudice, although extraordinary circumstances or substantial compliance with the Affidavit of Merit Statute may result in a lesser sanction. In *Ferriera*, the New Jersey Supreme Court held that a special case management conference should be held in professional malpractice cases within 90 days of the service of the defendant's answer so that the parties may identify any issues relating to the plaintiff's failure to comply with the Affidavit of Merit statute and timely correct such failures within the 120 day period afforded by the statute. Subsequent decisions from the Appellate Division, however, disagreed on what effect the absence of a *Ferriera* conference had on the timing requirements of the Affidavit of Merit statute -- namely whether the failure to hold such a conference tolled the statutory time to serve an affidavit of merit. *Compare Saunders ex rel. Saunders v. Capital Health Sys.*, 398 N.J. Super. 500 (App. Div. 2008) *with Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn*, 410 N.J. Super. 510 (App. Div. 2009).

In the present case, Paragon Contractors, Inc. filed a lawsuit against Peachtree Condominium Association for payment for construction work that it had performed at the Peachtree condominium. Peachtree then filed claims against Paragon alleging that Paragon had failed to properly complete drainage work at the site, and also filed a third-party complaint against Key Engineers, Inc., which it had hired to inspect and supervise Paragon's performance. In filing its claims, Peachtree failed to note, as it was required to do, whether its action was a professional malpractice case. The trial court did not conduct a *Ferriera* conference within 90 days of Key Engineer's filing of its answer. Thereafter, on January 31, 2008, Key Engineers moved to dismiss on the grounds that Peachtree had failed to timely serve an affidavit of merit against it. Peachtree opposed the motion by asserting that the trial court's failure to hold a *Ferreira* conference tolled the time in which it had to serve an affidavit of merit. The trial court disagreed and dismissed Peachtree's claims against Key Engineering. The Appellate Division affirmed this dismissal.

On appeal, the New Jersey Supreme Court ruled unequivocally that the failure to hold a *Ferriera* conference does not toll the time frames set forth in the Affidavit of Merit statute. In doing so, the Court stated that its "creation of a tickler system to remind attorneys and their clients about critical filing dates plainly cannot trump the statute." Recognizing, however, that its

decision in *Ferreira* mandating that such conferences occur may have created confusion among lawyers and the courts as to the effect of the failure to hold such conferences, the Court declined to apply its decision in *Paragon* retroactively to Peachtree. As a result, while parties asserting professional malpractice claims going forward must comply with the timing requirements of the Affidavit of Merit statute regardless of whether the trial court conducts a *Ferreira* conference, the Court reversed the Appellate Division and held that Peachtree's claims should not have been dismissed for failure to file an affidavit of merit within the statutory proscribed time frames.

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New Mexico

Case Law

1. In *United Rentals Northwest, Inc. v. Yearout Mechanical, Inc.*, 2010-NMSC-30, *2010 N.M. LEXIS 323*, the Court held that the New Mexico Ant-Indemnity statute applied to rental contracts for the rental of construction equipment as they are contracts "relating to construction" within the context of the Act. It is not clear that the same result would be reached where the equipment rented could have a non-construction related purpose.

2. In *City of Santa Fe v. Travelers Casualty & Sur. Co.*, 2010-NMSC-10, 228 P.3d 483, the New Mexico Supreme Court considered whether a provision in a performance bond given by a contractor and accepted by a public owner could alter the six-year statute of limitations for contract actions. The Court found that since the form of the bond was prepared by the contractor and surety and was not specifically negotiated with the owner, the public owner, despite acceptance of the bond, had not agreed to a waiver of the statute of limitations. The same logic would seem to apply to payment bonds, but the public policy arguments would not be as strong where it is not a government entity that is affected by the shortened statute of limitations.

3. In *Reule Sun Corp. v. Valles*, 2010-NMSC-4, 226 P.3d 611, the New Mexico Supreme Court considered what constitutes an employee for purposes of the Construction Industries Licensing Act. In *Reule Sun*, the stucco subcontractor had filed a claim of lien for amounts it claimed were due and had brought a foreclosure proceeding to enforce the claim of lien. During discovery and a month before trial, the homeowner discovered that the employee of Reule Sun was not licensed, although Reule Sun, who contracted for the work, was. The trial court found that the person actually applying the stucco was an employee of Reule Sun, and the homeowner appealed. On appeal, the Court of Appeals agreed that, under the right to control test, the applicator was an employee, not a subcontractor. The homeowner appealed to the New Mexico Supreme Court, and the Court reversed on the basis that the Construction Industry Licensing Act only creates an exception for licensure where the person is paid wages. The applicator may have been an employee, but was paid on a piecework basis, and so, was required to have a license.

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North Carolina

Case Law

1. In *Wachovia Bank Nat'l Ass'n v. Superior Constr. Corp., No. 07 CVS 21256, 2010 WL 1655494 (N.C. Super. 2010)*, the North Carolina Business Court held that a general contractor's interim lien waiver altered the lien priority for work performed after execution of the waiver. In *Wachovia*, the contractor first furnished labor and materials to the construction project one month before the bank recorded its deed of trust. After the bank recorded its deed of trust, in connection with a payment application, the contractor executed a partial lien waiver waiving its right to file a lien for labor and materials furnished through the date of the waiver. The contractor later filed a lien for labor and materials furnished after execution of the waiver. Under N.C. Gen. Stat. § 44A-10, the priority of a claim of lien on real property relates back to the date labor or materials are first furnished to the property. The court held, however, that this lien waiver waived the contractor's right to have its lien relate back to the date of first furnishing of labor or materials. According to the court, the contractor's lien related back only to the date of the lien waiver, and the bank's deed of trust thus had priority over the contractor's lien. The contractor and the contractor's surety have appealed. The American Subcontractors Association has filed an amicus brief urging reversal of the trial court's decision.

Legislation

2. *N.C. Gen. Stat. § 44A-26*, Model Payment and Performance Bonds Required**.** The North Carolina General Assembly modified the threshold requirements for the issuance of payment and performance bonds on public construction projects. Section 44A-26 requires public contracting bodies to obtain a payment and performance bond from each contractor with a contract of more than $50,000.00 when the total amount of all contracts awarded on any one public construction project exceeds $300,000.00. North Carolina Session Law 2010-148 amended Section 44A-26 to add a new threshold amount for State Departments, State agencies, and the University of North Carolina and its constituent institutions. For construction contracts awarded by North Carolina State Departments, State agencies, and the University of North Carolina and its constituent institutions on or after October 1, 2010, a payment and performance bond is required only when the total amount of all contracts awarded exceeds $500,000.00.

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North Dakota

Case Law

1. In *Westby v. Schmidt, 779 N.W.2d 681 (2010)*, the Supreme Court of North Dakota heard the appeal of a general contractor, individually, and his corporation, both of whom were sued by the homeowner who contracted to build a house. Schmidt entered into a contract with Westby whereby Schmidt, doing business as Schmidt Construction, would construct the home for an estimated $435,362.95. During the course of the project, Schmidt incorporated his business into Schmidt Construction of Stanley, Inc. After Westby had paid Schmidt $500,321.46, and the house was only 60% complete, Westby ordered Schmidt to stop working on the house and hired Mindt Construction to finish at a cost of $219,462.68. The jury awarded Westby $239,595.14 in damages.

Schmidt argued that the trial court erred in allowing Bryan Mindt to testify as Westby's expert witness without limiting his testimony to the standards or practices of the industry. They contended Mindt's testimony was extensively based on his personal preferences, and he admitted that he was not familiar with industry standards in some instances. Mindt testified he had been in the construction business for more than twenty years and had worked on three to four hundred custom homes. The Supreme Court upheld the District Court's admission of his testimony, citing prior cases that "weakness in an expert's opinion affects credibility, not admissibility. The [district] court decides the qualifications of the witness to express an opinion on a given topic, but it is the trier of fact whose job it is to decide the expert witness's credibility and the weight to be given to the testimony." Since Mindt was clearly qualified as an expert, and since the defendants had an opportunity to cross examine him and point out the deficiencies in his testimony to the jury, it was not reversible error to allow his testimony.

Schmidt also argued that since the corporation was formed *after* the contract was entered into with Westby that it should not have been held liable for breaching the contract. The Supreme Court upheld the District Court's denial of Schmidt's Motion to Dismiss on that issue, stating:

A corporation is an artificial person. It can act only through its agents. A corporation that knowingly accepts the benefits of a pre-incorporation contract does so subject to the burdens that go along with that contract. *Ericson v. Brown, 2008 ND 57, 747 N.W.2d 34*. Schmidt Construction of Stanly, Inc., billed Westby. It received payment from Westby. The corporation is therefore bound to the contract, and was subject to perform the contract just as Gary Schmidt was bound to perform.

Since the corporation knowingly and voluntarily accepted the benefits of the contract, it was bound by the agreement.

2. In *Markwed Excavating, Inc. v. City of Mandan, 791 N.W.2d 22 (2010)* the Supreme Court of North Dakota upheld a contractual provision between the plaintiff and defendants, the city and its project manager, which precluded plaintiff from recovering damages for delays allegedly caused by the defendants. Markwed argued that the no damages for delay clause was "ambiguous and repugnant." In upholding the District Court's granting of defendants' Motion for Summary Judgment, the Court relied upon a two-prong framework to determine whether a contractual provision is unconscionable.

The first prong involves procedural unconscionability which encompasses factors relating to unfair surprise, oppression, and inequality of bargaining power. The second prong involves substantive or one-sidedness of the contractual provision in question. To prevail on a unconscionability claim, a party alleging unconscionability must demonstrate some quantum of both procedural and substantive unconscionability, and courts are to balance the various factors, viewed in totality, to determine whether the particular contractual provision is so one-sided as to be unconscionable. (internal cites and quotes omitted.)

Since the Supreme Court agreed that Markwed is a sophisticated contractor and could have protected itself against delays through a bid adjustment for the work, and the competitive bid process reflects the parties' bargaining power, the Court held Markwed was bound by the plain and unambiguous language of the clause.

3. In *RRMC Const., Inc. v. Barth, 780 N.W.2d 656 (2010)*, a contractor brought an action against a property owner to recover payment for the completed construction of an automobile dealership. Following a bench trial, judgment was entered in favor of the contractor for the balance allegedly due on an oral cost-plus contract. The defendant argued at trial, and again on appeal, that the cost-plus contract was changed, again by oral agreement, into a fixed-term contract. At trial, the parties both testified as to their interpretation of conversations regarding the completion of the project. The Supreme Court concluded that an "oral contract only can be altered with consent, and after hearing both parties' testimony and viewing the relevant evidence, the district court found Miller did not consent to change the cost-plus contract to a fixed-term contract. *N.D.C.C. § 9-09-05*. "On appeal, we do not reweigh conflicts in the evidence, and we give due regard to the trial court's opportunity to judge the credibility of the witnesses." *Edward H. Schwartz Const., Inc. 2006 ND 15, ¶ 6, 709 N.W.2d 733 (quoting Brandt, 2005 ND 35, ¶ 12, 692 N.W.2d 144).* Since the district court's determination is supported by the evidence, it did not err in finding the parties did not consent or agree the cost-plus contract was modified to a fixed-term contract. Because of our conclusion, there is no need to reach the second inquiry whether new consideration supported an agreement to modify the contract."

4. In *Skogen v. Hemem Tp. Bd. Of Tp. Sup'rs., 782 N.W.2d 638 (2010)*, landowners and their tenant brought an action against the board of township supervisors for damages which they alleged were caused by flooding occasioned by the installation of a township road adjacent to their property. They also sought an order directing a culvert be placed in the road to allow the water to drain. The adjacent land owners, the Swartouts, intervened in the suit, claiming an interest in the litigation under a joint stipulation that their property would be "impacted by the installation of any culvert." The District Court dismissed the Skogens' action by summary judgment, finding N.D.C.C. §32-12.1-03(3)(C) set forth limitations on liability of political subdivisions and precluded their action against the Board.

The Supreme Court, however, agreed with the plaintiffs that N.D.C.C. §24-03-06, which describes surface drainage requirements for construction and reconstruction of roads and ditches in North Dakota in accordance with stream crossing standards prepared by the department of transportation and state engineer, imposes a mandatory duty on a township to comply those standards. The Court declined to construe the more general language of N.D.C.C. §32-12.1-03 to negate that liability.

In reversing the dismissal on summary judgment and remanding for further proceedings, the Court decided to "harmonize N.D.C.C. §32-12.1-03 and 32-12.1-03 and construe them to authorize an action for damages under the allegation and disputed facts in this case. We

conclude there are disputed issues of material fact, and we reverse the dismissal of the Skogens' claim for damages and remand for proceedings consistent with this opinion."

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Ohio

Case Law

1. In *State, ex rel. Associated Builders & Contractors of Central Ohio v. Franklin County Board of Commissioners, No. 2008-1478, 2010 Ohio 1199, 2010 WL 1135921 (Ohio Sup. Ct. March 25, 2010)*, the Court addressed the limits of the discretion of public authorities to reject bidders. In reversing the decisions of the lower courts, the Ohio Supreme Court held that when a public authority adopts a policy establishing criteria for evaluating the eligibility of bidders on public projects, the public authority must apply its evaluation criteria in a manner consistent with sound discretion.

Franklin County (the "County") adopted its Qualitative Contracting Standards to assure to that it awarded contracts to persons who complied with applicable laws, had sufficient financial wherewithal and could perform competently and professionally. Section 8.2.4.15 of the Qualitative Contracting Standards provides that among the factors which may be considered is:

> Information that the Bidder has not been debarred from public
>
> contracts or found by the state (after all appeals) to have violated
>
> prevailing wage laws more than three times in a two-year period
>
> in the last ten years.

The Court focused on the meaning of the term "violated" as used in Section 8.2.4.15 under the facts in the record.

During the relevant period fourteen (14) complaints alleging prevailing wage violations had been filed against the low bidder for a construction contract with the County, The Painting Company. Some of the complaints resulted in findings by the State Department of Commerce ("Commerce") that any prevailing wage violation was not intentional or resulted in no liability. Under Section 4115.13(C), prevailing wage underpayments resulting from mere mistake are excused from prosecution by Commerce as violations. Other complaints resulted in settlement agreements which expressly permitted The Painting Company to disclaim any liability or wrongdoing in connection with prevailing wage laws.

In light of this, the Court found that the County had applied Section 8.2.4.15 to mean that "any noncompliance with prevailing-wage laws. . . was the equivalent of a prevailing wage violation." The Court found this interpretation to be an abuse of discretion.

The Court's analysis commenced by noting that neither the County's bid documents nor the prevailing statutes defined the word "violation." As a consequence the Court concluded that "the plain sense of the term. . .as used in Section 8.2.4.15, refers to the situation in which the director [of Commerce] makes a formal finding that a contractor or subcontractor intentionally violated the prevailing-wages laws, and all appeals are exhausted."

Finding no evidence of such "violations" in the record, the Court held that the County had misapplied Section 8.2.4.15. The Court buttressed its holding by noting that the County had further abused its discretion by apparently relying on the misapplication of Section 8.2.4.15 as the sole reason for its rejection of the bid.

2. In *State, ex rel. Gaylor, Inc v. Goodenow, No. 2010-0330, 2010 Ohio 1844, 2010 WL 1727926 (Ohio Sup. Ct. April 29, 2010)* The Ohio Supreme Court granted a writ of mandamus ordering Franklin County (the "County") to consider whether a low bid is the best bid without relying upon the conclusion that the bidder had violated prevailing wage laws. Following its decision in *State, ex rel. Associated Builders & Contractors of Central Ohio v. Franklin County Board of Commissioners*, No. 2008-1478, 2010 Ohio 1199, 2010 WL 1135921 (Ohio Sup. Ct. March 25, 2010) that the County had misapplied one of its bid criteria, the Court ordered the County to reconsider the relator's bid which had been rejected based upon the same misapplication of the same criterion.

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3. In *Meccon, Inc. v. University of Akron (2010)126 Ohio St. 3d 231, 2010 Ohio 3297, 933 N.E. 2d 231,* the Court recognized a limited cause of action that permits certain bidders to recover bid preparation costs. The *Meccon* Court's syllabus states:

When a rejected bidder establishes that a public authority violated state competitive-bidding laws in awarding a public-improvement contract, that bidder may recover reasonable bid-preparation costs as damages if that bidder promptly sought, but was denied, injunctive relief and it is later determined that the bidder was wrongfully rejected and injunctive relief is no longer available.

In its opinion, the Court noted that a disappointed bidder must first pursue injunctive relief because a timely grant of such relief will avoid damages. It is only "when the wrongfully rejected bidder pursues injunctive relief in a timely and good-faith manner but is erroneously denied the relief by the trial court . . . [that] the bidder should be able to recover the reasonable cost it incurred in the preparation of its bid." Additionally, to prove that a trial court's denial of injunctive relief was erroneous, a determination by an appellate court that the trial court erred is apparently required.

In order to be entitled to bid preparation costs under the *Meccon* case for a bidder must be a "rejected" bidder. A "rejected" bidder is a bidder whose bid was expressly passed over by the public authority in favor of another bidder or a bidder who was otherwise entitled to the contract. As noted by the *Meccon* Court, in order to be a "rejected" bidder, the bidder must show that "[b]ut for the noncompliance with the competitive-bidding laws by the public authority, the bid would have been accepted, and the contract would have been awarded to the complaining bidder."

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Oklahoma

Case Law

1. *Amundsen v. Wright*, 2010 OK CIV APP 75, __ P.3d __, holds that when an arbitration clause requires arbitration pursuant to rules or procedures that do not exist, the clause is impossible to perform and, therefore, unenforceable.

2. *Dunbar Engineering Corp. v. Rhinosystems, Inc.*, 2010 OK CIV APP 65, 232 P.3d 931, holds that when an evidentiary hearing is requested as to whether the parties have entered into an arbitration agreement, and it appears that the facts on that issue are disputed, a trial court will generally abuse its discretion by ruling on a motion to compel arbitration without an evidentiary hearing.

3. *Moran v. Edward D. Jones & Co., L.P.*, 2010 OK CIV APP 36, 231 P.3d 778, which can be applied to construction contracts, holds that arbitration clauses in investment broker contracts cannot be applied retroactively to the parties' earlier business dealings unless the arbitration clause expressly states that is the parties' intent.

4. *Willco Enterprises, LLC v. Woodruff*, 2010 OK CIV APP 18, 231 P.3d 767, holds that the Uniform Arbitration Act, adopted by Oklahoma in 2006, does not alter the previously existing six-factor test to weigh whether a party has waived the right to arbitrate. The Court did drop one factor – whether the party seeking arbitration has engaged in discovery not available in arbitration – because of the modern trend toward allowing more discovery methods in arbitration. Otherwise, the trial court still examines, *inter alia*, the timing of a motion to compel arbitration, the parties' conduct and the prejudice to the non-moving party.

Legislation

1. *S.B. 573, Retainage*: This legislation amended 15 Okla. Stat. §226, as of May 5, 2010, to limit contract and subcontract retainage clauses to no more than 5% of the payment amount due (reduced from 10%).

2. *S.B. 1012, Private Construction Prompt Payment Act*: This legislation created a new law, 15 O.S. §§ 820-821, effective May 5, 2010, that requires clear contract terms relating to time for payment in the bid documents and specifications on privately bid projects. Where such terms are omitted, the law imposes prompt payment requirements (monthly payments due within 28 days from owners to general contractors, followed by 10 days to subcontractors). When the general contract is negotiated, any subcontracts accepted through bidding must contain the same payment terms as the general contract. The law also allows contractors and subcontractors to suspend work when the payment terms are violated, if they are not in default. The law does not apply to contracts to build dwellings for four or less families.

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Oregon

Case Law

1. In *Cowan v. Nordyke*, 232 Or App 284 (2009), defendant—a home designer—designed and built a home for his own personal use giving him status as a owner-builder versus a builder-vendor who designs spec homes for immediate sale. Defendant sold the home several years later to plaintiff. The home eventually suffered water intrusion and related damages.

Plaintiff sued alleging defendant negligently designed the home. The Court granted defendant's summary judgment motion holding that Oregon law does not recognize a professional negligence tort by home designers. Plaintiff moved to amend his complaint to assert a claim of general negligence against defendant for the design and construction of the home. The Court denied the motion and plaintiff appealed.

On appeal, the Court affirmed the lower court's ruling that Oregon law does not recognize a professional negligence tort by home designers, but reversed on the lower court's ruling to deny the motion to amend. On appeal, defendant argued that (i) liability for negligence was precluded because of his status as a mere owner-builder as opposed to a professional builder required to be licensed by the Construction Contractors Board (CCB); and (ii) as an owner-builder, his only duty was the statutory duty of a seller to disclose known defects in the home to the purchaser and that this duty was sufficient to protect any subsequent purchasers.

The Court rejected both of defendant's arguments and was not persuaded by defendant's positions that (i) to hold an owner-builder liable for negligence in the design and construction of the home would open the floodgates to claims against homeowners who repair and remodel their own homes, or (ii) the buyer's contractual ability to have a professional inspection or to bargain for a warranty or lower price precluded the negligence claim.

Legislation

1. *S.B. 1045 - Ban On Using Credit History In Hiring Decisions*. On March 29, 2010, SB 1045 was signed into law making it an unlawful employment practice for most Oregon employers—including contractors and subcontractors—to use credit history in making hiring decisions or any decisions affecting current employees. The law gives Oregon employees the right to file administrative complaints or private lawsuits for alleged violations. Employees who prevail in court may recover lost wages and attorneys' fees. The law includes an exception for employers conducting credit checks for "substantially job-related" reasons, so long as those reasons are disclosed to the employee in writing.

2. *H.B. __, JV's To Be Licensed With CCB*. Effective July 1, 2010, any joint venture ("JV") bidding on an Oregon project must be separately licensed with the Construction Contractors Board ("CCB") and hold certain required endorsements at the time the JV's bid is submitted. In other words, *at the time* it submits its bid on an Oregon project, a JV entity itself must be licensed by the CCB as a contractor and possess the required endorsement(s) for the work it is bidding on. The JV must hold such license and endorsement(s) continuously while performing the work if the JV is awarded the contract.

3. *H.B. __, Employers Must Post Mandatory Meeting Restrictions Poster*. Effective January 1, 2010, Oregon employers must notify employees of restrictions on employers holding

mandatory meetings in which the employers' opinions on either political or religious issues will be addressed. While there is a recently filed lawsuit that is challenging this statute, for now it is in effect. The new law prohibits retaliation against any employee who refuses to participate in such a meeting, including meetings about unionization.

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Pennsylvania

Case Law

1. In *Trevdan Bldg. Supply v. Toll Bros., 2010 PA Super. 100, 996 A.2d 520 (2010)*, the Superior Court of Pennsylvania ruled that an unpaid materialman's right to payment was superior to the rights of a secured creditor. The materialman, Trevdan Building Supply ("Trevdan"), entered into an agreement to provide materials to a subcontractor, Houston Drywall, Inc. ("Houston"), for use in a residential construction project. Houston had contracted with Toll Brothers, Inc. ("Toll Brothers"), to perform drywall work. An important provision of the contract between Houston and Toll Brothers required Houston to certify that no mechanic's liens had been or could be asserted against the project. On September 27, 2004, Houston entered into a "Receivable Purchase Agreement" with Gulf Coast Bank and Trust Company ("Gulf Coast"). Under the Receivable Purchase Agreement, Houston sold its rights to the unpaid contract balance with Toll Brothers to Gulf Coast. Gulf Coast immediately perfected its security interest on the unpaid contract balance with Toll Brothers on October 1, 2004. On September 2, 2005, Houston ceased all operations. Trevdan insisted that Toll Brothers satisfy all of Houston's unpaid invoices for materials supplied to the residential construction project. Two and a half months later, Houston filed for bankruptcy, under which it identified the unpaid contract balance with Toll Brothers as an asset. On appeal, the Superior Court of Pennsylvania ruled that the funds owed to Trevdan were not part of the bankruptcy estate and that Gulf Coast's right to payment from Toll Brothers for Houston's unpaid contract balance was not due until Trevdan received payment from Toll Brothers for the supplies it delivered to the project.

2. In *Boro Constr., Inc. v. Ridley School Dist., 992 A.2d 208 (Pa. Commw. Ct.. 2010),* the Commonwealth Court of Pennsylvania held that a contractual prerequisite to final payment requiring a Project Certificate from the architect or construction manager precluded the contractor from receiving the final payment. The Commonwealth Court of Pennsylvania also held that a "no damages for delay" clause did not entitle the prevailing party to attorney's fees when that party lost its counterclaim. The contractor, Boro Construction, Inc. ("Boro"), entered into a contract for general construction and another for electrical construction with Ridley School District ("School District"). Both contracts included a provision that required the contractor to obtain a final Project Certificate issued by the project architect or construction manager before final payment by the school district. Boro claimed that an unnamed representative of the School District stated that the School District did not intend to pay Boro the contract balance, which Boro alleged qualified as an anticipatory repudiation. Boro argued that the School District's alleged anticipatory repudiation excused it from obtaining the Project Certificate before receiving final payment. In affirming the trial court's holding, the Commonwealth Court of Pennsylvania ruled that the law of anticipatory repudiation in Pennsylvania is well established and that only an absolute and unequivocal refusal to perform will excuse performance. The Commonwealth Court of Pennsylvania also held that the School District was not entitled to receive attorney's fees; the contract's "no damages for delay" clause only required Boro to reimburse the School District for attorney's fees if it chose to litigate an issue and lost. The School District filed a counterclaim at the trial level that Boro successfully defeated. The Commonwealth Court of Pennsylvania held that because Boro successfully defeated the School District's counterclaim that it had not "lost the litigation." Accordingly, Boro's success in defending the counterclaim precluded the School District from recovering attorney's fees.

3. In *Ira G. Steffy & Son v. Citizens Bank of Pennsylvania, No. 2481, 2010 LEXIS 3233 (Pa. Super. September 17, 2010)* the Superior Court of Pennsylvania ruled that a foreclosing bank was not unjustly enriched by an unpaid subcontractor's performance during the

construction of a warehouse. Appellee, Citizens Bank of Pennsylvania ("Citizens Bank"), loaned Macungie Crossings I, LLC ("Macungie") funds to construct a warehouse subject to a mortgage. Macungie then hired Opus East, LLC ("Opus"), to construct the facility. Appellant, Ira G. Steffy & Son, Inc. ("Steffy & Son"), entered into a subcontract with Opus to perform structural metal work. Approximately one year after entering the subcontract, Opus materially breached the agreement by failing to make payments to Steffy & Son. Opus' failure to make progress payments prevented Steffy & Son from completing the structural metal work on the warehouse. Citizens Bank stopped releasing funds to Macungie, placed Macungie in default under the terms of the loan agreement, and commenced foreclosure proceedings on the property. Information regarding the outcome of the foreclosure proceedings was not made available to the trial court. Steffy & Son claimed that it reasonably relied on Citizens Bank's representation that adequate funds would be available to complete construction at the time it entered into the subcontract. Steffy & Son further claims that Citizens Bank knew that withholding funds would jeopardize the success of the construction project, cause Macungie to default on its loan obligations, and ultimately subject Macungie to foreclosure proceedings. Steffy & Son sought a constructive trust imposed on the remaining loan amount for the value of the unpaid material and labor. In affirming the trial court's ruling in favor of the bank, the Superior Court of Pennsylvania ruled that even if Steffy & Son could demonstrate that Citizens Bank was enriched, Steffy & Son could not show that it was misled by Citizens Bank or that it had the required contractual relationship with Citizens Bank. The Superior Court further held that Steffy & Son failed to state a claim for relief under the theories of third party beneficiary status, intentional interference with contractual relations, or misrepresentation.

Legislation

1. *Construction Workplace Misclassification Act, 2009 Pa. Laws 72.* The law, which takes effect on February 11, 2011, creates strict criteria for an individual to qualify as an "independent contractor." Under the law, a person can only qualify as an independent contractor for purposes of worker's compensation, unemployment, and improper classification if all three of the following factors are met:

a. The individual has a written contract to perform such services.

b. The individual is free from control or direction over the performance of such services both under the contract of service and in fact.

c. The individual is customarily engaged in an independently established trade, occupation, profession, or business.

The Act includes a six part test to determine if an individual is customarily engaged in an independently established trade, occupation, profession, or business within the construction industry. The six factors, all of which must be met, are:

1. The individual possesses the essential tools, equipment, and other assets necessary to perform the services independent of the person for whom the services are performed.

2. The individual will realize a profit or a loss as a result of performing the services.

3. The individual performs the services through a business in which the individual has a proprietary interest.

4. The individual maintains a business location separate from the location of the person for whom the services are performed.

5. The individual:

   i. previously performed the same or similar services for another person in accordance with paragraphs 1, 2, 3, and 4, and while free from direction or control over performance of the services, both under the contract of service and in fact; or

   ii. holds himself out to other persons as available and able, and in fact is available and able to perform the same or similar services in accordance with paragraphs 1, 2, 3, and 4 while free from direction or control over performance of the services.

6. The individual maintains liability insurance during the term of his contract of at least $50,000.

Violations of the Act subject "[a]n employer or an officer or agent of the employer" to civil as well as criminal penalties. A first time offender is subject to a fine of up to $1,000 for a negligent violation of the law and a $2,500 fine for each subsequent violation. Intentional misclassifications are criminal misdemeanors.

2. *Permit Extension Act, 2009 Pa. Laws 46.* The Permit Extension Act ("Act") automatically grants the holders of delineated permits, including many construction and land use permits, an extension to the government approval. In Philadelphia, however, the permit holder must provide the issuing agency with notice of its intent to extend the permit. Additionally, the permit holder must pay a fee equal to half of the original application fee, up to a $5,000 limit. Under the Act, the expiration dates of permits that were approved on or after January 1, 2009, are extended until July 1, 2013. If the approved permit was unexpired as of July 10, 2010, the remaining time is added to the July 1, 2013, extension date. If the permit expired between January 1, 2009, and July 6, 2010, the Act reinstates the permit.

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Rhode Island

Caselaw

1. *Public Works Bid Challenges.* A case recently decided by the Rhode Island Supreme Court highlights again the hurdles faced by disappointed bidders who seek to mount a bid challenge on public projects in Rhode Island. *H.V. Collins Company v. Williams,* 990 A.2d 845, involved a bid challenge brought by the low bidder on an approximately $20Million project to construct a new state police headquarters. The low bidder submitted its bid 2 minutes late. The public authority's representative opened the bid nonetheless and recorded it. However, the next day his superior, the purchasing agent, rejected the bid as untimely filed. On summary judgment the Trial Court upheld the purchasing agent's action and rejected the bid challenge. The Rhode Island Supreme Court, in *dicta*, concurred with the Trial Court's conclusion that the purchasing agent had acted well within his statutory discretion in rejecting the bid the next day. But it dismissed the appeal on grounds of mootness, noting that the contract had been awarded to the next lowest bidder, and construction of the project was nearing completion at the time of oral argument on appeal.

While this case does not make new law, it does serve to highlight the hurdles faced by disappointed bidders who seek to mount a bid challenge on public projects in Rhode Island. In *Truk Away of Rhode Island v. Macera Bros. of Cranston, Inc.*, 643 A.2d 811 (RI 1994), a case cited by the *H.V. Collins* court, the Rhode Island Supreme Court reversed the decision of a Trial Court to enjoin a public works bid award. In so doing, it betrayed an extremely hostile attitude toward public works bid challenges, and expressed "[its] firm belief that government by injunction save in the most compelling and unusual circumstances is to be avoided." It then took the extraordinary step of announcing that, in the event of any such future injunction, it would require that under Rule of Civil Procedure 65(c) the party seeking injunctive relief *shall* give security for payment of such costs and damages as my may be incurred by the party found to have been wrongfully enjoined. *Id.* at 816. In Rhode Island Rule 65(a), as is common in other jurisdictions, speaks in discretionary and not mandatory terms, and otherwise permits a trial court wide discretion in deciding whether to require a bond.

The approach taken by H.V. Collins in pursuing its bid challenge is similar to that taken by many other disappointed bidders in Rhode Island since the *Truk Away* case was decided. Likely out of concern about incurring potential liability on the now mandaroty injunction bond given the novelty of the legal issue presented and uncertainty of its ultimate disposition, it dropped its claim for injunctive relief and proceeded to summary judgment on a count for declaratory judgment. In the meantime the awarding authority awarded the contract to the next lowest bidder. But that set H.V. Collins up for failure, because it appeal was highly vulnerable to dismissal based upon a finding of mootness, which is what happened. The lesson for parties bringing bid challenges in Rhode Island is that if you are in for a dime you are in for a dollar. If you intend to bring a successful bid challenge, it is imperative that you seek injunctive relief, that you be prepared to post an injunction bond, and that you halt the award of the contract to your competitor.

Legislation

Public Works Bonding Statute. For many years Rhode Island statutory law has required that on state or municipal public projects with a contract price in excess of $50,000, the contractor awarded the project shall be required to file a payment and performance bond in a sum not less than fifty (50)% of the contract price. R.I. Gen. Laws §37-13-14 (incorporating by

reference R.I. Gen. Laws §37-12-1 *et. seq.*). This law was enacted long before the Rhode Island Legislature specifically authorized the use of the construction management at-risk ("CMAR") approach to project delivery on public projects. This created a conundrum for public owners procuring projects on a CMAR basis, who desired to avoid paying for a double layer of bonding (both at the Construction Manager and trade contractor levels). On its face R.I. Gen. Laws §37-13-14 appeared to mandate that public owners bond the Construction Manager, especially since R.I. Gen. Laws §37-12-1 specifically references bonding awards to construction managers as well as to general contractors.

1. However, in a 1996 case the Rhode Island Supreme Court created doubt on this issue. In *Accent Store Design, Inc. v. Marathon House, Inc., et. al.,* 674 A.2d 1223, a subcontractor sued a Rhode Island public authority which had failed to secure the (presumably) statutorily required bond from the contractor. The Court threw out the claim, on the grounds that R.I. Gen. Laws 37-13-14 does not create a private right of action to bring such a suit. In so doing, the Court stated that: "[s]trictly construed, § 37-13-14 *neither prohibits the waiver of a bond* nor provides a remedy if a bond has not been obtained." As a consequence public owners in Rhode Island would sometimes not require the Construction Manager to post a bond in order to avoid a double layer of bonding and the associated added costs. Instead, they would rely upon the more limited protection offered by the posting of payment and performance bonds by the major trade contractors.

Recently the Rhode Island Legislature has responded to the uncertainty created by the *Marathon House* case, by amending R.I. Gen. Laws 37-13-14 to specifically provide that "[w]aiver of the bonding requirements of this section is expressly prohibited."

Apprenticeship Requirements on Public Works Project. In 2009 the Rhode Island Legislature enacted a new statute, §37-13-3.1, entitled "State public works contract apprenticeship requirements", which reads as follows:

Notwithstanding any laws to the contrary, all general contractors and subcontractors who perform work on any public works contract awarded by the state after passage of this act and valued at one million dollars ($1,000,000) or more *shall employ apprentices required for the performance of the awarded contract.* The number of apprentices shall comply with the apprentice to journeyman ratio for each trade approved by the apprenticeship council of the department of labor and training. (emphasis added)

Its enactment has created considerable confusion. Organized labor and the Rhode Island Department of Labor and Training maintain that the statute requires that all contractors and subcontractors working on state projects valued at $1,000,000 or more must employ apprentices registered with a state approved apprenticeship program. Yet this has never been a requirement in Rhode Island on any state public works project. Open shop (non-union) contractors and sub-contractors argue that the wording of the statute is ambiguous and circular. They argue that the statute requires them to employ apprentices "required for the performance of the awarded contract" - but that because no other state law requires the use of apprentices on state contracts, the statute is rendered meaningless and has no impact. The uncertainty created by this poorly worded statute is likely to result in litigation and either interpretation by the Rhode Island courts, or clarifying revisions by the Rhode Island Legislature.

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South Carolina

Caselaw

1. In *Midwest Midwest Dredge & Excavating, Inc. vs. Bay Point Homeowner's Ass'n, Inc.*, *2007 WL 7141921 (D.S.C. May 17, 2007) (opinion published in 2010*), contractor brought action in July 2001 against HOA for failure to pay for dredging work at a private marina. The contract required completion by March 15, 2001. Surety provided performance bond. HOA filed Answer and Counterclaim in August 2001. Contractor subsequently filed for bankruptcy in Indiana. State court dismissed action filed by Contractor in December 2001. HOA granted relief from automatic stay in May 2004 to pursue claims against Contractor and Surety. Case restored to active roster September 2005. HOA granted leave to amend its Answer. In its Amended Answer, HOA asserted third party claim against Surety to recover under performance bond. Surety removed case to federal court.

Surety argued that S.C. Code § 15-3-530 (establishing a three year statute of limitations for actions brought upon a contract) governed and that HOA's claim expired three years after HOA declared contractor to be in default.

The HOA argued language in the Bond stating that, "A[ny] suit under this bond must be instituted before the expiration of two (2) years from the date on which final payment under the Contract falls due," extended the statue of limitations until two years after final payment becomes due. HOA argued that final payment was not yet due under the contract so the statute of limitations had not yet run. The district court disagreed. stating, "A statute of limitations generally begins to run on the date a cause of action accrues, and a breach of contract action usually accrues at the time a contract is breached or broken . . . plaintiff's interpretation would allow suits to be postponed indefinitely, for no good purpose, and to be brought in some cases at the virtually unlimited pleasure of the plaintiff." The court further found that default of the Contractor was "the trigger" for Surety's liability to the HOA.

The HOA also argued that the performance bond was a sealed instrument and that the twenty year statute of limitations of S.C. Code Ann. § 15-3-520 applied. The court found that the Surety's impress or stamped seals were not used. Above the signature lines on the performance bond are the words "signed and sealed this 22nd day of December 2000." Just below the company names and above the signatures of the president of Contractor and the Attorney-in-Fact of Surety was the word "(Seal)" for each company. The body of the performance bond lacked any express language evidencing an intent that it be under seal. The court also found that "a twenty year limitations period would serve no purpose in the context of a performance bond for the completion of contractual work which was scheduled to take less than six months to complete." The court also found that the context under which the term "(Seal)" appears did not make it evident that the parties intended to create a sealed instrument. The bond form includes the notation "(Seal)" to reflect the location where the corporate seal is to be affixed if the parties desire to create a sealed instrument. No seal was affixed by either party. The court found a lack of intent to create a sealed instrument. The court also noted that the Power of Attorney illustrated how the surety evidences its seal by including an official stamp by the signatures.

2. In *Ezzo v. Smith*, *No. 2009-UP-391 (S.C. Ct. App. 2009),* the Plaintiffs purchased a partial completed single family residence, which was 80% to 85% complete at the time of purchase. The Plaintiffs purchased the residence "as is." The Plaintiffs subsequently entered

into a contract with Contractor to complete construction. The contract amount was for $136,000 with work and payment divided into five phases.

The Plaintiffs paid in the Contractor in advance the full payments for Phase 1, 2, and 4. However, Plaintiffs only paid 90% of Phase 3 because they alleged that Contractor failed to complete the phase. In Plaintiffs ultimately paid the Contractor $123,000.00, which was 90% of the contract amount. The Plaintiffs withheld the remaining contract balance, alleging not all the work had been completed and concerns regarding the Contractor's payments to subcontractors and vendors.

The Contractor told Plaintiffs that they needed to pay the total contract price before he was going to complete the construction. The Plaintiffs responded by listing the items that needed to be completed prior to payment. Contractor refused to complete the work without payment. The Plaintiffs then responded asking that Contractor have two mechanics liens removed, correct electrical problems, and provide window screening.

Plaintiffs initiated the action related in small claims court, which was then transferred to the court of common pleas. After a bench trial, the trial court issued a form order finding in favor of the Plaintiffs in the amount of $11,000. Contractor appealed.

On appeal, the issues were the trial court erred in: (1) ruling the Contractor breached the contract because the Plaintiffs' antecedent breach of the contract excused Contractor's nonperformance; and, (2) in calculating damages? The Court of Appeals affirmed, holding that there was evidence to support the trial court's determination that the Plaintiffs had the right to withhold funds.

The contract contained several provisions which allowed for withholding of payments. The contract further provided that stated that final payment was to be made when the work has been completed, the contract fully performed, and a Certificate of Occupancy was issued. Furthermore, the contract also stated that final payment was not due until contractor provided owner with a release of all liens or receipts for payment by subcontractors and vendors, or a bond to indemnify the owner from mechanics liens.

The court found that the Plaintiffs had provided evidence that, at the time work stopped, the Contractor had not completed any of the five phases, some work was defective, as well and several subcontractors and vendors had not been paid. Accordingly, the court found there was sufficient evidence to support the trial court's determination the Plaintiffs had grounds to with hold some of the payments and that Contractor was in breach of the contract. The Court of Appeals affirmed the trial court's order, but slightly reduced the amount of damages.

3. In *Wright. v. Hiester Constr. Co.*, *2010 WL 2943665 (S.C. Ct. App., Jul. 21, 2010)*, Homeowners executed a construction contract with a Contractor to build a home. Contractor agreed to assume "full responsibility for acts, negligence or omissions of all of his subcontractors and their employees and for those of all other persons doing work under a contract for him." Contractor was also required to maintain liability insurance to cover workers' compensation and other personal injury claims and "for property damage that may arise out of work under this Contract, whether caused directly or indirectly by [Contractor] or directly or indirectly by a subcontractor." The Homeowners were contractually obligated to maintain liability insurance and property damage insurance at their own expense "on the work at the site to its full insurance value including interests of Owners, Contractor and subcontractor against fire, vandalism, and other perils ordinarily included in extended coverage." Finally, the parties

agreed to waive "all claims against each other for fire damage" covered by the property damage insurance that the Homeowners were to maintain on the construction site.

Contractor began construction in March 2001 and subcontracted certain woodwork staining to a Subcontractor. On September 29, 2001, after the Subcontractor spent several days staining wood, a fire erupted, destroying the home. The Homeowners filed suit against both the Contractor and Subcontractor, alleging that the Subcontractor's workers caused the home fire by discarding staining rags within the home, which in turn caused the fire.

Both the Contractor and Subcontractor disputed the Homeowners' allegation regarding the cause of the fire, contending that regardless of cause, the construction contract allocated risk of fire damage to the Homeowners and the Homeowners' insurance carrier. Contractor and Subcontractor further contended that the Homeowners and their insurance carrier expressly waived any subrogation claim against both parties under the parties' contract.

The jury returned a verdict for the Contractor and Subcontractor. The Homeowners moved for judgment notwithstanding the verdict and in the alternative, for a new trial. The South Carolina Court of Appeals affirmed the trial court's denial of both motions.

The Court of Appeals held that the trial court properly: (1) allowed the defendants' reference to the Homeowners' insurance since the trial judge acted within his discretion with the Court of Appeals expressly recognizing that the Homeowners were contractually obligated to carry liability and property damage insurance; (2) denied the Homeowners' request to bifurcate the trial and their request that insurance evidence be presented only if the jury found the defendants to be liable; (3) instructed the jury regarding the concept of subrogation; (4) refused to find that Contractor was liable to the Homeowners as a matter of law; (5) found that the parties' contract contained an enforceable waiver of subrogation rights; (6) refused transcripts of recorded statements from Subcontractor's employees since these statements were not properly admissible under the South Carolina Rules of Evidence; (7) refused to allow expert testimony as to cause of origin of the fire since the tendered expert did not do a thorough investigation; (8) excluded parol evidence regarding the parties' intents regarding the contract; (9) applied the parties' subrogation waiver to Subcontractor; (10) refused to replay all trial evidence for the jury due to the length of time such presentation would take; and, (11) presented an appropriate verdict form to the jury. The Court of Appeals found that the Homeowners failed to properly preserve objections pertaining to Contractor's counsel's closing arguments and jury instructions; consequently, these matters could not be reviewed by the Court of Appeals. Finding no reversible error, the Court of Appeals affirmed.

4. In *Builders Mutual Ins. Co. v. R Design Constr. Co.*, *No. 07-1890 (D.S.C. May 21, 2010)*, owner hired Contractor to supervise construction of a condominium project. Contractor hired a Subcontractor to perform the framing work. The Owner's engineer inspected the Project and found four defects in the structural framing that must be corrected. Three months after the engineer's inspection, in July 2005, the Subcontractor quit. In October 2005, the Contractor also quit. Between July 2005 and October 2005, the Contractor did not hire another subcontractor to correct the defective framing work. The owner's engineer inspected the building after the Contractor quit and found thirty-eight defects, which included the four defects found in the original inspection.

Owner commenced a lawsuit in state court against the Contractor and Subcontractor and Contractor cross-claimed against the Subcontractor. Contractor's CGL carrier filed the

instant declaratory judgment action in federal court, seeking a declaration that the CGL policy did not provide coverage for the alleged construction defects.

The state court entered a judgment in favor of the Owner. The state court entered judgment in favor of the Contractor on its cross-claim against the Subcontractor, finding thirty-one construction defects were attributable to the Subcontractor's negligence. The state court also found that damage occurred to the structure after the Subcontractor and Contractor stopped work. This damage included framing failure and water intrusion resulting from the deterioration of the sheathing and framing.

The federal court concluded that the CGL policy did not provide coverage because there had been no property damage caused by an occurrence. There was no coverage because the trial court had found there were thirty-one defects before the Contractor and Subcontractor left the project and that this faulty workmanship did not constitute an occurrence. The federal court also found that to the extent the faulty workmanship cause damage to other parts of the structure, such damage was not caused by an occurrence. The court found that the numerous defects were discovered early in construction process and could have been corrected. Moreover, the Contractor and Subcontractor knew about these defects and should have known that if the defects were left uncorrected damage would occur. Thus, there was nothing accidental or unexpected about the damage. The court stated that allowing coverage under the facts in the case would "encourage contractors to avoid or to prolong correction of faulty work discovered during the construction process." Accordingly, the court declared that the CGL policy did not provide coverage and the insurer did not have to indemnify the Contractor.

5. In *Owners Ins. Co. v. Santee Stucco Sys., No. 09-3022 (D.S.C. May 19, 2010),* owner hired a Contractor to construct a home. The Contractor hired a Subcontractor to install the exterior insulation and finish system ("EIFS") for the home. Six years later, the Owner placed the house on the market. A prospective buyer hired an engineer to inspect the property and perform tests. At that time, the Owner discovered defects in the home's EIFS cladding, which allegedly had allowed moisture to enter the home and damage parts of the home including the structure, flooring, windows, doors and decking. The prospective buyers agreed to purchase the house. Owner established an escrow account of $200,000 to fund the house repairs. The Owner subsequently hired the original Contractor and Subcontractor to repair the residence. The Contractor was paid $84,625.90 from the repair escrow, including an amount of $1,887.58 for lumber and materials to replace sheathing and framing that had been water damaged.

Owner commenced a lawsuit in state court against the Contractor, Subcontractor and EIFS manufacturer. Subcontractor's CGL carrier ("Insurer") filed the instant declaratory judgment action in federal court, seeking a declaration that the CGL policy did not provide coverage as to certain acts or omissions of the Subcontractor.

Insurer moved for summary judgment. While the Insurer conceded that the damage alleged in the state court action constituted an "occurrence," the Insurer contended that the "your work" exclusion in the Policy precluded coverage for the alleged property damage with the exception of the $1,887.58 expended for lumber and materials to replace sheathing and framing that had been water damaged.

The federal court agreed with the Insurer, finding that the costs of the removal and replacement of the EIFS product was not recoverable under the policy exclusions. The court

declared that the only damage covered by the CGL policy was the $1,887.58 expended for lumber and materials to replace sheathing and framing that had been water damaged.

6. In *Jessco, Inc. v. Builders Mut. Ins. Co., No. 08-1759 (D.S.C. Sept. 22, 2009),* contractor entered into a contract with the Owner to construct a home. The home was in a low lying lot. The Contractor was responsible for complying with all building and zoning codes as well as homeowner's association ("HOA") requirements. When the HOA reviewed the building plans, it suggested that a landscape architect or engineer design the appropriate site drainage. The HOA also expressed concern over the adequacy of the floor elevation height. The Contractor understood that this concern arose from the ability to connect into the municipal sewer system. To address this concern, the Contractor modified the plans to include electrical service for a sewage lift station.

After the certificate of occupancy was issued, the Owner began to notice construction defects. The Owner filed a lawsuit against the Contractor and several subcontractors after the problems persisted and the Contractor failed to correct the problems. The Owner's complaint alleged three primary defects: (1) the residence was constructed at an improper elevation causing problems with sewage drainage and the sewage pump installed by the Contractor did not correct the problem and was in violation of HOA requirements and applicable code requirements; (2) the lot was improperly graded to allow drainage thus causing flooding of the lot; and, (3) there were further defects as outlined in a contract addendum and certified letters to the Contractor. The Owner and Contractor subsequently arbitrated the underlying litigation and the arbitrator issued an award in favor of the Owner.

Contractor failed to notify its CGL carriers until approximately two and one-half year after the lawsuit was commenced. The CGL carriers denied any duty to defend the Contractor. The Contractor filed a declaratory judgment action, seeking a declaration of the rights and obligations of the parties pursuant to the insurance contracts.

The court found that there was no occurrence in regards to the damages associated with the lift station because the Owners did not allege, or experience, any property damage as a result of the lift station. Therefore, the Contractor was not entitled to coverage for the lift station claim under the CGL policies. The court further found that if there had been an occurrence related to the lift station, the damage would not be covered due to the "your work" exclusion.

Next, the court found that there was no occurrence in regards to the damages associated with the incomplete punch list. In his award, the arbitrator found that the incomplete punch list items were predominately cosmetic issues and minor repairs. Moreover, the Owners did not allege any property damaged due to the Contractor's improper performance of the minor punch list items. Therefore, there was no occurrence under the policies and no coverage.

Next, the court addressed the improper grading. As a result of the improper grading, the Owners had claimed that water infiltrated their garage and covered the driveway. The court examined the arbitration testimony regarding the flooding. During the arbitration, experts testified that the primary reason for the flooding was the overall condition of the property. In particular, the experts found that the lot's location next to a wetland, which was at full capacity due to increased runoff from development, was the primary cause of the flooding of the Owner's yard. Based on the expert testimony, the arbitrator found the Contractor's work was not the legal proximate cause of the flooding of the Owner's lot; however, the arbitrator did assign some degree of fault to the Contractor because the Contractor acknowledged that the siting and elevation of the house was the Contractor's responsibility. The arbitrator awarded the Owner

$10,000 for damaged due to the lot flooding, but did not specify in the award whether any of the award was attributed to damage to the house due to water intrusion.

The court found that flooding of the lot constituted "property damage" as defined by the policies. The court further found that the flooding constituted an "occurrence" as defined by the policies because it was a result of continuous exposure to substantially the same harmful conditions, namely the adjacent wetlands and ineffective grading. As a result, the Contractor was obligated to pay the Owners for flooding, such as water damage suffered by the Owner's garage. On these facts, the court found there was coverage for the claims related to the flooding.

Finally, the court addressed the Contractor's failure to timely notify the insurance carriers. The court first noted that the insurers had the burden of proof to show that the Contractor's failure to notify the insurers of the underlying litigation substantially prejudiced the insurers' rights. While the court stated that the Contractor failed to notify the insurers as soon as reasonably possible, the court found that the insurers failed to meet their burden of showing they were substantially prejudiced by the Contractor's delay.

7. In *CG 22 94 10 01. Builders Mutual v. Kalman, No. 07-CV-3609, slip op. (D.S.C. Dec. 8, 2010)(J. Duffy),* Homeowner entered into standard AIA A107 construction contract with Contractor for construction of residence. Contractor constructed residence and obtained Certificate of Occupancy. Thereafter, Contractor transferred residence to Homeowner. Shortly after occupying residence several construction defects and faulty workmanship was observed throughout the home. Contractor failed to remedy defects and Homeowner filed suit alleging negligence, breach of contract, breach of express and implied warranties and unfair trade practices.

Contractor's carrier insured contractor for a one year period after construction contract was signed until approximately six (6) weeks after Certificate of Occupancy was issued. The policy defined occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policy contained a "your work" exclusion, which did not apply to work performed on the Contractor's behalf by a subcontractor. However, the policy also contained endorsement CG 22 94 10 01, which removed the subcontractor's exception to the "your work" exclusion.

Carrier brought declaratory judgment action in United States District Court against Homeowner, Contractor and another carrier alleging that it had no duty to defend or to indemnify. The court found that allegations in the Complaint alleging faulty workmanship resulting in significant water damage to the residence were an "occurrence" under South Carolina law and the policy citing *Auto Owners v. Newman,* 684 S. E. 2d 541 (S.C. 2009). While construction defects are not, in themselves sufficient to constitute an "occurrence" where there is water intrusion resulting in wood rot, staining and mold growth there is "property damage" beyond the defective work product itself.

The District Court further found that while there was property damage within the initial grant of coverage, the "your work" exclusion and the endorsement removing the subcontractor's exception from the "your work" exclusion precluded coverage for the underlying property damage claims. This is the first case in the country interpreting endorsement.

8. *Liberty Mut. Ins. Co. v. J. T. Walker Indus., Inc*., No. 08-CV-2043, slip op. (D.S.C. *March 30, 2010) (J. Seymour)* is another case addressing several issues of first impression, the

United States District Court ruled that under the terms of a general commercial liability policy, the insurer rather than the insured had the right to control settlement under the policy. Insurer brought action predicated on five (5) underlying state court actions against window manufacturer alleging windows were defective. Insurer sought a declaration on several issues including: (1) that that Insurer had right to control settlement; (2) whether single policy must cover property damage spanning multiple policy periods; (3) whether Insurer's had the right to seek contribution on pro rata basis of allocation of payments based on time on risk; and, (4) allocation of insured's deductible to multiple time on risk carriers.

The court found that the wording of each of the policies indicated the carrier had the authority to control settlement decisions at its discretion. Further, all policies triggered by progressive damages claims provide coverage for that claim stating "the policy in effect at the time of the injury-in-fact covers all the ensuing damages [and] [c]overage is also triggered under every policy applicable thereafter."

The court further found that the carrier had the right to seek contribution for defense and settlement costs against the non-contributing carrier pro rata based on the length of time the risk was covered. The issue of allocation of an insured's deductible to multiple time on risk carriers was certified to the South Carolina Supreme Court. Finally, whether the carrier had acted in bad faith in settling the underlying claims was not obviated by the court's finding that the carrier had the right to control the settlement.

Crossman Communities of N.C. v. Harleysville Mut. Ins. Co., Civil Action No. 2004-CP-26-84. Appeal from Horry County Common Pleas. Trial court found that faulty work performed by subcontractors with resulting property damage to work of subcontractors that was not faulty as a result of repeated exposure to same harmful conditions was an "occurrence" within meaning of commercial general liability policy**.** Issue: Whether non-settling carriers are entitled to set off for amounts paid by settling carriers. Prejudgment interest not awarded.

9. In *Sloan v. Greenville Hosp. Sys., 694 S.E.2d 532 (S.C. 2010),* Plaintiffs brought three declaratory judgment actions against the Greenville Hospital System and its chairman (the "Hospital"), which challenged the Hospital's procurement of construction contracts. Specifically, Plaintiffs contended that the Hospital was a "governmental body" of the State, as defined by the South Carolina Consolidated Procurement Code, S.C. Code Ann. § 11-35-10, et seq. (the "Procurement Code"), and was thus subject to the provisions of the Procurement Code.

The Procurement Code provides that a "governmental body" is "a state government department, commission, council, board, bureau, committee, institution, college, university, technical school, agency, government corporation, or other establishment or official of the executive or judicial branch." S.C. Code Ann. § 11-35-310(18). Plaintiffs contended that the Hospital constituted a state government board under this definition.

The trial court and the South Carolina Supreme Court disagreed, holding that the Hospital was a "political subdivision" of the State. Under the Procurement Code, a "political subdivision" is defined as "all counties, municipalities, school districts, public service or special purpose districts." S.C. Code Ann. § 11-35-310(23). While the Hospital did not fit clearly into either category, the Court emphasized the Hospital's focus on serving local needs, and held that the Hospital most closely resembled a "special purpose district" under the definition of a "political subdivision."

The significance in the distinction between the "governmental body" and "political subdivision" categorization is that it determined the procurement requirements for the Hospital. While "governmental bodies" are subject to the requirements of the Procurement Code, "political subdivisions" may promulgate their own procurement policies, so long as the codes "embody sound principles of appropriately competitive procurement." S.C. Code Ann. § 11-35-50.

As an alternative argument, Plaintiffs contended that the Hospital's procurement procedures violated this statutory requirement. Specifically, Plaintiffs challenged the Hospital's omission of a competitive sealed bidding requirement, as well as the Hospital's threshold project amounts of $100,000 and $350,000 to trigger application of the policy (in contrast to the Procurement Code's $25,000 threshold). Plaintiffs' position was that the Hospital had the burden of creating procurement requirements which closely reflected those in the Procurement Code.

The Court disagreed, holding that Plaintiffs bore the burden of showing that the challenged provisions violated the requirements of § 11-35-50, which they failed to do. The Court emphasized that the purpose of § 11-35-50 was to grant flexibility to local governments in determining their own competitive procurement procedures. The Court refused to impose a blanket requirement for sealed competitive bidding or maximum threshold, as such requirements would effectively strip local governments of this flexibility.

10. In *Shirley's Iron Works, Inc. v. City of Union*, *693 S.E.2d 1 (S.C. Ct. App. 2010),* the City entered into a contract with a general contractor to construct a municipal building for approximately $875,000 (the "Project"). The City did not require the contractor to furnish a payment bond. The contractor entered into various subcontracts, including agreements with the plaintiff subcontractors ("Subcontractors"). The Subcontractors claimed they performed their work under the subcontracts and that the contractor failed to pay them in full. The Subcontractors filed an action against the City and contractor, alleging violation of the Subcontractors' and Suppliers' Payment Protection Act ("SSPPA"), negligence, quantum meruit, and third party beneficiary status arising from contractor's failure to pay all monies owed to them and the City's failure to secure a payment bond from the general contractor on a construction project. The issue before the court was whether the SSPPA, S.C. Code Ann. § 29-6-210 et seq., provides a subcontractor a private right of action against a governmental entity for failure to ensure a contractor is properly bonded.

The court held that where a governmental entity hires a contractor to construct a building but fails to require the contractor to provide a labor and material payment bond, subcontractors who were not paid by the contractor can sue the governmental entity both in tort and contract (as third party beneficiaries). the Court found that where a subcontractors' claim is brought under S.C. Code Ann. § 29-6-250 as a tort, it is properly asserted according to the South Carolina Supreme Court's holding in *Sloan Constr. Co. v. Southco Grassing, Inc.*, 659 S.E.2d 158 (S.C. 2008). Thus, because the Subcontractors' tort claim alleged negligence arising out of the City's breach of its duty to require the contractor to provide a bond, the court held that the Subcontractors were entitled to proceed under the SSPPA. However, the City's liability is limited to the remaining balance on the general contract that had not been paid at the time the Subcontractors notified the City of the contractor's non-payment.

11. *In the Matter of Bid Protest: Spartanburg-TRB Front Office Phase 1 Modular Office/Wall System, State Project H59-N518-JM*, *(Aug. 7, 2009),* agency took bids for a modular wall panel system. The second low bidder protested the award of the contract to the low bidder,

claiming the apparent low bidder did not hold the appropriate contractor's licenses and was therefore not responsible.

The low bidder argued that installation of the pre-fabricated moveable wall panels was not "contracting work" and that no contractors' license was required to perform the work. The CPOC conferred with the South Carolina Contractor's Licensing Board. The Licensing Board advised the CPOC that the Board had adopted the position that the installation of ceiling height moveable modular wall panels does constitute construction as contemplated by the Contractor's Licensing Act. However, this Board also advised that a manufacturer does not need to possess a contractor's license to provide and install the wall panel system as long as the manufacturer uses a licensed contractor to perform the installation and the cost of the manufacturer's product is more than 51% of the total cost of the work.

The manufacturer presented testimony that the cost of the manufactured wall panels was at least 75% of the total cost of the work and the manufacturer subcontracts the installation of the panels to others. Accordingly, the CPOC determined that the manufacturer could offer to provide the work without possessing a contractor's license as long as the panels were installed by a licensed installation subcontractor. The bid form had not required the bidders to list an installation subcontractor.

The second low bidder also argued that the apparent low bidder had listed an electrical subcontractor that was not properly licensed and therefore the low bidder was not responsible on that basis. The manufacturer produced the quote for its electrical subcontractor showing that the electrical work was less than $5,000.00. A mechanical contractor's license is not required when the total cost of the electrical work is less than $5,000.00. The CPOC therefore determined that the listed electrical subcontractor was not required to hold a mechanical contractor's license. Therefore, the CPOC held that the low bidder's bid was responsible and denied the protest.

12. *In the Matter of Bid Protest: Orangeburg Vocational Rehabilitation Center Truck Entrance, State Project H73-9587-PG*, *(Oct. 9, 2009),* Apparent low bidder failed to acknowledge an addendum on its bid. Another bidder protested the notice of award, claiming the low bidder's bid was nonresponsive due to the failure to acknowledge the addendum. The CPOC reviewed the application Procurement Code Section, S.C. Code Ann. §11-35-1520 (13), which provides that a bidder's failure to acknowledge an addendum is a minor informality under the following conditions: (1) if the bid, on its face, clearly indicates that the bidder received the addendum and the bidder states under oath that it received the addendum; or (2) the addendum has no effect on price or quality or merely a trivial or negligible effect on quality.

In this solicitation, the addendum only modified a detail on a drawing. The CPOC examined the modification and found that the change was merely a change in form not substance and had no effect on price or quality. Accordingly, the low bidder's failure to acknowledge the addendum was a minor informality under the Procurement Code and the CPOC denied the Protest.

13. *In the Matter of Bid Protest: Wateree River Correctional Institute Farm Dairy Expansion Milking Center Project, State Project N047-9674-MJ-C*, *(Nov. 2, 2009).,* manufacturer submitted a protest, stating that it was protesting the decision of the project's architect not to list the manufacturer as an approved supplier for the metal building for the project. The project was advertised for bids on September 7, 2009 and bids were to be received on October 8, 2009. The manufacturer submitted its protest on October 9, 2009.

The CPOC dismissed the protest because the protest failed to state a claim and because the protest was untimely. The protest failed to state a claim because the agency's architect had not violated any duty as required by the solicitation or the Procurement Code. The solicitation required that all requests for substitutions and approved equals be submitted in writing at least ten days prior to the date of the bid. The supplier had failed to submit its written request for approval in the time period set forth in the bidding documents.

The CPOC also found that the protest was untimely. The Procurement Code requires that all protests of solicitations be made within 15 days of the issuance of the solicitation documents. In this matter, the solicitation documents were issued on September 7, 2009. The supplier should have been aware of its product was not listed in the original solicitation documents. The supplier did not was filed a protest until October 9, 2009, more than a month after the solicitation. On these facts, the CPOC dismissed the protest.

14. *In the Matter of Bid Protest: Trident Technical College HVAC & Mechanical Systems Indefinite Delivery Contract, State Project H59-D582-PG*, *(Nov. 19, 2009),* Agency solicited bids for indefinite delivery contract. The bidding documents required a bid bond in the amount of $7,500.00. The low bidder submitted a bid bond in the amount of 5% of the bid. The agency determined that the bid bond was deficient and found the apparent low bidder's bid was nonresponsive. Low bidder protested the agency's determination.

The bidder and its surety thought that the bid bond was proper and were unaware that the bid bond had been deemed insufficient until the Notice of Intent to Award was posted. The Procurement Code provides that "a bidder who fails to provide bid security in the proper amount must be given on working day from the bid opening to cure the deficiencies." S.C. Code Ann. § 11-35-3030(1)(c). At the protest hearing, the agency testified that it did not notify the bidder that the agency considered the bid bond deficient any time prior to posting the Notice of Intent to Award. Therefore, the agency did not give the bidder the opportunity to cure the deficiency in the bond within one working day of the bid opening as required by the Procurement Code. The CPOC determined that the bidder was not given the opportunity to cure the deficiency in the bond amount as required by S.C. Code Ann. § 11-35-3030(1)(c), cancelled the Notice of Intent to Award and remanded the matter back to the agency with so that the agency could award the contract in a manner that complied with the provisions of the Procurement Code.

15. *In the Matter of Bid Withdrawal: South Carolina Criminal Justice Academy CJA Village Construction Phase I & II, State Project N20-9607-DC, (Jan. 14, 2010),* After the bid opening, the apparent low bidder realized it had made a mistake in its bid and notified the agency and the CPOC of the mistake the same day as the bid. The low bidder stated that it had discovered a data entry error in their bid takeoff in the amount of $635,582. The CPOC requested the bidder to provide supporting documents. The supporting documents showed that the bidder had used a price for the tensile fabric structure that was unrelated to the structure.

The Procurement Code allows a bidder to withdraw an inadvertently erroneous bid upon written determination by the CPOC that withdrawal is appropriate under the facts of the case. The procurement regulations further provide that a bidder may request to either correct or withdraw a bid and provide documentation that the bidder's mistake was clearly and error and will cause the bidder a substantial loss. The CPOC found that the bidder had mistakenly keyed in a wrong price in its bid and that the error would cause the bidder to sustain a substantial loss. Under these facts, the CPOC determined that it was appropriate to allow the bidder to withdraw its inadvertently erroneous bid without forfeiting its bid bond.

16. *South Carolina Department of Metal Health Crafts Farrow Building #16 Chiller Replacement, State Project J12-9714-DC, (Feb. 24, 2010),* Another bid withdraw request, arose from a project that required the bidder to submit a price for base bid one and base bid two. Base bid two was to include all the work in base bid one plus additional work that was not included in base bid one. The apparent low bidder made a mistake on its bid form and only listed the price of the additional work for base bid two. The bidder requested to be allowed to correct the error or in the alternative, to withdraw its bid.

The Procurement Code allows correction of bid mistakes under certain circumstances; however, the intended bid price must be evident on the face of the bid. The CPOC found that there was no way to determine the intended bid price from the face of the bid. The CPOC next determined whether was appropriate to allow the bidder to withdraw its bid. The CPOC found withdrawal appropriate as the mistake was clear on the face of the bid and would cause the bidder a substantial loss.

17. *In the Matter of: South Carolina Department of Juvenile Justice Demolition & Recycle Project, RFQ10-2000051164*, *(Apr. 28, 2010).,* Agency requested the CPOC to cancel the award of a contract because the agency had inappropriately applied the resident vendor preference in determining the low bidder. S.C. Code Ann. § 11-35-1524(5) provides that resident vendor preferences to do apply to acquisition of services related to construction. The CPOC found that the project clearly fell within the definition of construction and that it was error to apply resident vendor preferences for the purposes of making an award. Accordingly, the CPOC found that it was appropriate to cancel the Notice of Award because the agency had committed administrative error and the error was discovered prior to contract performance.

18. *In the Matter of Bid Protest: South Carolina School for the Deaf and the Blind Multi-handicapped School New Construction/Herbert Center Renovation, State Project H75-9542-JM, (Jun. 7, 2010).,* Apparent low bidder failed to acknowledge an addendum on its bid and the agency declared the bid nonresponsive. The apparent low bidder protested the agency's determination, arguing that its failure to acknowledge the addendum was a minor informality. The bidder also claimed that its failure to acknowledge the addendum should be excused because the agency's architect had not provided the addendum to the bidder.

The CPOC reviewed the application Procurement Code Section, S.C. Code Ann. §11-35-1520 (13), which provides that a bidder's failure to acknowledge an addendum is a minor informality under the following conditions: (1) if the bid, on its face, clearly indicates that the bidder received the addendum and the bidder states under oath that it received the addendum; or (2) the addendum has no effect on price or quality or merely a trivial or negligible effect on quality.

The apparent low bidder argued that since its listed subcontractors who had acknowledge the addendum, the requirements of S.C. Code Ann. §11-35-1520 (13)(d)(I) were satisfied. The CPOC disagreed. Even though the subcontractor's quotes indicated the receipt of the addendum, the quotes were not a part of the bidder's bid. Nothing on the face of the bid clearly indicated that the bidder had received the addendum. Therefore, the bid did not meet the statutory criteria even though the bidder had submitted a sworn statement that it had received the addendum subsequent to the bid opening. The CPOC noted that the integrity of the competitive bid system would be compromised if bidders were allowed to get "two bites at the apple" by acknowledging an addendum independent of the bidder's bid.

The CPOC then reviewed whether the addendum had no effect on price or quality or merely a trivial or negligible effect on quality. Testimony at the hearing established that the addendum did affect price. Therefore, the CPOC found that the apparent low bidder did not meet any of the criteria set forth in S.C. Code Ann. §11-35-1520 (13).

Next, the CPOC reviewed the bidder's argument that its failure to acknowledge the addendum was the fault of the agency's architect. The CPOC rejected this argument, finding that it was the bidder's responsibility to ascertain prior to bidding whether it has received the addendum. Moreover, the duty to acknowledge an addendum is solely the duty of the bidder. Therefore, the CPOC found the agency's determination that the bidder's bid was nonresponsive was proper and dismissed the protest.

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South Dakota

Case Law

1. In *Bowes Construction, Inc. v. S.D. DOT*, 2010 S.D. 99, ___ N.W.2d ___, a subcontractor hired to produce aggregate material for several state highway asphalt paving projects brought suit against the Department of Transportation for alleged breach of contract and breach of good faith and fair dealing, where the subcontractor had been forced to purchase and mix quarry rock to the aggregate it produced in order to meet the DOT specifications. The subcontractor alleged that the DOT had misapplied the ASTM standard and the tests designed to measure the durability of aggregate and its susceptibility to freeze and thaw cycles (the sodium sulfate soundness test). The Supreme Court noted that an approved subcontractor can sue the DOT directly under S.D.C.L. §31-2-34 for alleged breach of contract. However, the Court affirmed the trial court's judgment in favor of the State, without reaching the question of breach, where the subcontractor had failed to prove that the DOT's particular application of the sodium sulfate test (which differed somewhat from the ASTM standard) had caused the rejection of the aggregate or that its aggregate would have otherwise met the standard. Without such proof, the contractor could not establish that it had sustained any damage causally related to any alleged breach to support its claim.

Legislation

1. *S.L. 2010, ch. 194, §1*. Adopting the 2009 Uniform Plumbing Code in South Dakota, amending S.D.C.L. §36-25-15.

2. *S.L. 2010, ch. 73, §2*. Amending S.D.C.L. §11-10-6 to adopt the 2009 Edition of the International Building Code in South Dakota.

3. *S.L. 2010, ch. 31*. Repealing several chapters related to the procurement of goods and services by state governmental entities, including S.D.C.L. ch. nos. 5-18, 5-19, 5-20, and 5-23, enacting S.D.C.L. ch. nos. 5-18A – Public Agency Procurement – General Provisions; 5-18(B) – Procurement of Public Improvements; 5-18(C) – Procurement by Local Government Units; and 5-18(D) – Procurement by State Agencies.

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Tennessee

Case Law

1. In *Porter v. City of Clarksville*, No. M2009-00884-COA-R3-CV, 2010 Tenn. App. LEXIS 40 (Tenn. Ct. App. Jan. 25, 2010), the plaintiff filed suit after the City issued two stop work orders preventing him from completing construction of his new residence. The Tennessee Court of Appeals affirmed the trial court's dismissal, holding that the Governmental Tort Liability Act did not remove the City's immunity from suit based on the stop work orders.

2. In *Opinion No. 10-27, 2010 Tenn. AG LEXIS 22 (Tenn. AG March 8, 2010)*, the Attorney General addressed (1) whether a city can require a special school district to pay building permit and plan review fees for school construction within the city limits; and (2) whether the special school district must conform with the planning and zoning regulations of the city for school district-owned property within the city limits. The Attorney General determined that the answers depend on the provisions of the private act creating the special school district and the local planning and zoning regulations.

3. In *Bolon Custom Kitchens v. Parman*, No. M2009-00495-COA-R3-CV, 2010 Tenn. App. LEXIS 174 (Tenn. Ct. App. Mar. 5, 2010), the Tennessee Court of Appeals affirmed the trial court's ruling that a materials supplier had a valid materialman's lien. The Court of Appeals determined that the supplier was a prime contractor under Tenn. Code Ann. § 66-1-101, and consequently the supplier was entitled to service of a Notice of Completion before its lien rights could be affected. The Court of Appeals also determined that the lien filed by the supplier was valid despite its lack of a jurat.

4. In *Construction Crane & Tractor, Inc. v. Wirtgen America, Inc.*, No. M2009-01131-COA-R3-CV, 2010 Tenn. App. LEXIS 213 (Tenn. Ct. App. Mar. 24, 2010), the Tennessee Court of Appeals held that the statutory provision prohibiting manufacturers from terminating relationships with dealers without cause was inapplicable to the parties because the operative agreement between the parties pre-dated the 1999 amendments to the Tennessee Dealer Protection Act, Tenn. Code Ann. § 47-25-1301 *et seq.*, prohibiting such terminations.

5. In *Gazlay v. Tulsi Associates*, No. E2008-02490-COA-R3-CV, 2010 Tenn. App. LEXIS 256 (Tenn. Ct. App. Apr. 8, 2010), plaintiff subcontractor sued contractor and the owner of the hotel that contractor built for breach of contract. Contractor cross-filed against the hotel owner. The trial court entered a joint settlement judgment against both defendants, and based this judgment on the terms of an earlier settlement agreement between the defendants. The Tennessee Court of Appeals reversed, holding that the trial court erred in its interpretation of the earlier settlement agreement.

6. In *Gerulis v. Jacobus*, No. M2009-00886-COA-R3-CV, 2010 Tenn. App. LEXIS 285 (Tenn. Ct. App. Apr. 23, 2010), the plaintiff buyers contracted with the defendant construction company for the purchase of a home, and amended the contract to provide for the construction of a garage. A subsequent letter provided that the buyers would pay for the garage within 30 days of closing. The trial court determined that (1) this letter clarified the amendment by setting a time for performance, and (2) the buyers' failure to pay within 30 days was a breach of the agreement that relieved the construction company of its contractual obligations. The Tennessee Court of Appeals found that the parties did not mutually assent to the letter, and therefore the trial court erred in relying on it. The Court of the Appeals nevertheless affirmed the trial court's determination that the construction company was relieved from its contractual

obligations because a reasonable time for performance was 90 days from closing, and the buyers' failure to tender payment within 90 days was a material breach.

7. In *Albright v. Tallent*, No. E2009-01983-COA-R3-CV, 2010 Tenn. App. LEXIS 327 (Tenn. Ct. App. May 12, 2010), the plaintiff sued her neighbors for building a fence which impacted her driveway right-of-way. The trial court found that the fence was a spite fence with no useful purpose, but concluded that it was being constructed on defendants' property and therefore ruled for defendants. The Tennessee Court of Appeals affirmed, but modified the trial court's order to require defendants to construct a fence of the same style and character as the other fences on their property.

8. In *Usher v. Charles Blalock & Sons, Inc.*, No. E2009-00658-COA-R3-CV, 2010 Tenn. App. LEXIS 417 (Tenn. Ct. App. June 30, 2010), the plaintiff filed claims against the State with the Tennessee Claims Commission and against the road contractor allegedly responsible for negligent road construction where the plaintiff's father died in a one vehicle accident. Initially, the jury awarded the plaintiff $2,000,000, apportioning fault 25% to plaintiff and 37.5% each to the State and road contractor. Regarding the claim against the State, the trial court went against the advice of the jury, which merely served in an advisory capacity on that claim, and dismissed the claim. Moreover, the trial court granted judgment not withstanding the verdict in favor of the road contractor. The trial court held that (1) the plaintiff failed to carry the burden of proof with respect to the applicable standard of care for the construction at issue; (2) the plaintiff failed to prove a breach of duty; and (3) the decedent was at least 50% at fault for speeding through a construction zone in foggy conditions. The Tennessee Court of Appeals affirmed the trial court judgment in favor of the State, but remanded the case for a new trial as to the road contractor because a reasonable juror could have found that the decedent was less than 50% at fault for the accident.

9. In *Berkeley Park Homeowners Ass'n v. Tabor*, No. E2009-01497-COA-R3-CV, 2010 Tenn. App. LEXIS 455 (Tenn. Ct. App. July 20, 2010), the Tennessee Court of Appeals affirmed the trial court's determination that the defendant construction company was in contempt of a 2006 mediated settlement agreement governing the construction of a house in plaintiffs' development. The Court of Appeals rejected the defendant's argument that the parties reached a subsequent agreement that superseded the 2006 agreement.

10. In *Matlock v. Rourk*, No. M2009-01109-COA-R3-CV, 2010 Tenn. App. LEXIS 457 (Tenn. Ct. App. July 20, 2010), a homeowner and a contractor reached a mediated settlement agreement providing that the homeowner would pay the contractor $14,000 for home renovations. The homeowner paid $11,000 and refused to pay the rest. The contractor sued for deficiency. The homeowner argued the mediation procedure was unfair and did not comply with the requirements of Supreme Court Rule 31. The Tennessee Court of Appeals affirmed the trial court's grant of summary judgment to contractor.

11. In *Williams v. Estate of Hollingsworth*, No. E2009-01410-COA-R3-CV, 2010 Tenn. App. LEXIS 536 (Tenn. Ct. App. July 26, 2010), plaintiffs originally sued the owners of neighboring land for property damage caused by excavation, logging, and road construction conducted on the neighboring land. The parties ultimately entered into an agreed settlement in 2004. In 2005, plaintiffs returned to court to enforce the settlement order against one of the neighboring landowners. The trial court found violations and awarded damages to the plaintiffs, and the Tennessee Court of Appeals affirmed.

12. In *Hershey v. Cathey*, No. M2009-01887-COA-R3-CV, 2010 Tenn. App. LEXIS 475 (Tenn. Ct. App. July 26, 2010), the Tennessee Court of Appeals affirmed the trial court's decision ordering defendant homeowners to remove their fence. The homeowners erected a fence without having obtained proper approval, and the fence was in violation of restrictive covenants.

13. In *Clairborne Hauling, LLC v. Wisteria Park, LLC*, No. E2009-02667-COA-R3-CV, 2010 Tenn. App. LEXIS 519 (Tenn. Ct. App. Aug. 16, 2010), the plaintiff contracted to perform the excavating and grading, including sewer installation, for a residential subdivision that the defendant was developing. The contract called for substantial completion by April 5, 2007, and provided for a penalty of $500 per day if completion extended past May 31, 2007. The defendant terminated the contract in August 2007, and the ground stated for termination was failure to finish on time. But the defendant did not secure approval of its sewer plans until June 8, 2007. After sending "prompt pay notice," the plaintiff sued on the invoices and change orders outstanding at the time of termination. The defendant counterclaimed for $500 per day penalties. The trial court determined that the defendant was guilty of the first material breach and awarded damages to the plaintiff, including attorney fees under the Prompt Pay Act, Tenn. Code Ann. § 66-34-602. The Tennessee Court of Appeals affirmed.

14. In *E & J Construction Co. v. Liberty Building Systems, Inc.*, No. E2009-01403-COA-R3-CV, 2010 Tenn. App. LEXIS (Tenn. Ct. App. Aug, 27, 2010), the plaintiff alleged numerous theories for recovery against the defendant, including breach of contract, for leaks resulting from a metal building purchased from the defendant and erected by the plaintiff. The trial court granted the defendant a directed verdict on all of the plaintiff's claims. The Court of Appeals reversed the directed verdict on the plaintiff's breach of contract claim where the defendant may have violated an express warranty in the contract because the building leaked even though the plaintiff installed it as directed by the defendant.

15. In *Century Fire Protection, LLC v. Fowlers' Holdings, LLLP*, No. E2009-02199-COA-R3-CV, 2010 Tenn. App. LEXIS 575 (Tenn. Ct. App. Sept. 16, 2010), the plaintiff claimed the defendants failed to pay money due under a contract after the plaintiff delivered materials and installed a fire protection system on the defendants' property. The trial court determined the plaintiff was entitled to recover monetary damages and enforced a materialmen's lien obtained against the defendants. The Court of Appeals affirmed the judgment holding that the evidence did not preponderate against the trial court's findings.

16. In *East Tennessee Grading, Inc. v. Bank of America, N.A.*, No. E2009-02250-COA-R3-CV, 2010 Tenn. App. LEXIS 595 (Sept. 27, 2010), the plaintiff sought to enforce a lien for excavation and roadwork done in a residential development against interests held by Bank of America pursuant to a deed of trust and amended deed of trust on the same 6.36 acres of property. The Court of Appeals affirmed the judgment of the trial court, which held: (1) Bank of America had priority over plaintiff as to 1.9 acres because plaintiff had not filed its Notice of Lien timely to maintain priority to Tenn. Code Ann. section 66-11-112; and (2) the plaintiff had priority over Bank of America as to 4.46 acres because plaintiff's Notice of Lien was filed before the amended deed of trust in favor of Bank of America was filed.

17. In *Hagan v. Phipps*, No. M2010-00002-COA-R3-CV, 2010 Tenn. App. LEXIS 606 (Tenn. Ct. App. Sept. 28, 2010), the Tennessee Court of Appeals reversed the trial court's grant of summary judgment to an unlicensed builder who built the home at issue and sold it to the plaintiff. The court determined that there were genuine issues of material fact regarding agency, whether the defendant engaged in activities that constituted contracting within the Contractors

Licensing Act, Tenn. Code Ann. section 62-6-102, and whether the defendant knew he was acting in violation of the Contractors Licensing Act.

18. In *APAC-Atlantic, Inc. v. Morton*, No. E2009-02612-COA-R3-CV, 2010 Tenn. App. LEXIS 639 (Tenn. Ct. App. Oct. 12, 2010), the Tennessee Court of Appeals affirmed the trial court's award of default judgment to a plaintiff supplier in a suit against a defendant contractor. The trial court concluded that the defendant was not entitled to relief because the defendant's failure to respond to the complaint was not due to mistake or excusable neglect, and, in any event, the defendant failed to make a showing of a meritorious defense.

19. In *Federal Insurance Co. v. Winters*, No. E2009-02065-COA-R3-CV, 2010 Tenn. App. LEXIS 652 (Tenn. Ct. App. Oct. 18, 2010), the Tennessee Court of Appeals reversed the grant of summary judgment by the trial court in a claim arising from a fire that destroyed a home. The plaintiff insurer brought suit against the defendant roofer the insured had hired to replace their roof, whose subcontractor caused the fire that destroyed the home. The court held that under contract law the defendant had a non-delegable duty to see that the work he was contractually obligated to perform was done in a careful, skillful, and workmanlike manner.

20. In *Kampert v. Valley Farmers Cooperative*, *No. M2009-02360-COA-R10-CV, 2010 Tenn. App. LEXIS 657 (Tenn. Ct. App. Oct. 19, 2010)*, the Tennessee Court of Appeals held that the proper venue for a case involving the breach of a construction contract is in the county named in the forum selection clause of the contract rather than in the county where the construction took place. The court reasoned that the trial court erred in ruling that the venue selection clause in the construction contract could not be enforced because the underlying action was transitory in nature.

21. In *Davis v. McGuigan, 325 S.W.3d 149 (Tenn. 2010)*, the Supreme Court of Tennessee overruled the longstanding rule that an appraisal is an opinion that cannot form the basis of a fraudulent misrepresentation claim. Instead, the court held that an opinion of value may provide the basis for a fraudulent misrepresentation claim. Furthermore, the Court concluded that third-parties may reasonably rely on representations in an appraisal even if the appraisal provides that it is not to be relied on by third parties for any reason whatsoever where: (1) their reliance on the appraisal would have been reasonable; (2) the appraiser intended or had reason to expect that the terms of the appraisal would be repeated to the party claiming reliance; and (3) the appraiser intended or had reason to expect the appraisal would influence the party's conduct in deciding to proceed with the course of action that led to production of the appraisal. Based on these determinations, the Court reversed the Court of Appeals holding that genuine issues of material fact precluded summary judgment.

22. In *Prestige Land Co. v. Brian Mullins Excavating Contractors, Inc.*, *No. E2009-02609-COA-R3-CV, 2010 Tenn. App. LEXIS 673 (Tenn. Ct. App. Oct. 29, 2010)*, Brian Mullins Excavating Contractors, Inc ("Contractor") placed the lowest bid to build a commercial shopping center on land owned by Prestige Land Company ("Developer"). At the time of the bid, the Contractor was unaware that it made a unilateral mistake by placing a bid that was 10% lower than the estimated costs of construction. As a result, the Contractor failed to complete the project because it ran out of money. The Developer sued for breach of contract, and the Contractor counterclaimed for fraud and other claims. The trial court entered a judgment in favor of the Contractor, but the Court of Appeals vacated that judgment, finding no clear and convincing evidence of fraud by the Developer.

23. In *Phelps v. C & C Construction Co., LLC*, *No. M2010-00228-COA-R3-CV, 2010 Tenn. App. LEXIS 700 (Tenn. Ct. App. Nov. 9, 2010)*, the Court of Appeals affirmed the trial court's ruling in favor of a property owner in an action arising out of the construction of a duplex on the owner's property. The property owner reached an agreement with a contractor to build the duplex. The contractor was paid in accordance with the agreement, but failed to pay the plaintiff provider of construction financing. In a previous grant of summary judgment, the court concluded that the contractor and plaintiff were in a joint venture. As such, the court held the plaintiff's cause of action against the property owner was precluded because no separate agreement existed between the plaintiff and the property owner requiring payment directly to the plaintiff.

24. In *Faulkner v. Tom Emmett Construction Co.*, *No. E2010-00361-COA-R3-CV, 2010 Tenn. App. LEXIS 720 (Tenn. Ct. App. Nov. 18, 2010)*, the plaintiff homeowners sued the defendant construction company for the cost to remove and replace and allegedly defective driveway after refusing to pay $8,000 of an $18,000 contract for the construction of the driveway because they were dissatisfied with the workmanship of the driveway. The defendant filed a counterclaim for the remaining $8,000 asserting that the driveway was properly constructed. The trial court concluded that any problems with the driveway were insufficient to require removal and replacement. The Court of Appeals agreed with the trial court, but held that because there was a problem with how the concrete on one portion of the driveway had been poured, the plaintiffs were not required to pay any of the $8000 outstanding on the contract.

25. In *Dillard Construction, Inc. v. Havron Contracting Corp.*, *No. E2010-00170-COA-R3-CV, 2010 Tenn. App. LEXIS 732 (Tenn. Ct. App. Nov. 23, 2010)*, the plaintiff demolition subcontractor sued the defendant contractor for failure to pay $91,100 for work performed by the plaintiff's subcontractors. The Tennessee Court of Appeals affirmed the ruling of the trial court and held that (1) the defendant, while not having a contract with the plaintiff, was required by quantum meruit to pay plaintiff $91,100 for work performed by plaintiff's subcontractors; (2) the defendant was not entitled to an offset against that judgment for damage done to electrical equipment by plaintiff's subcontractor; (3) the plaintiff was entitled to recover attorney's fees from defendant under an implied indemnity theory; and (4) the plaintiff was not entitled to recover the attorney's fees that it incurred in defending against the claims of its subcontractor.

26. In *Ray Bell Construction Co., Inc. v. State*, *No. E2009-01803-COA-R3-CV, 2010 Tenn. App. LEXIS 737 (Tenn. Ct. App. Nov. 24, 2010)*, the Tennessee Court of Appeals affirmed the claims commissioner's award of $2.5 million to the plaintiff. The case concerned an alleged breach of contract involving the incentive clause of a Tennessee Department of Transportation ("TDOT") road construction contract. Before the Claims Commission, TDOT argued that the contract language was clear in prohibiting an extension, alteration, or amendment of the incentive clause. The Claims Commission disagreed and found that the plaintiff was entitled to a modification of the incentive provision based on admissible parol evidence. Agreeing with the Claims Commission, the Court of Appeals held that "a definite latent ambiguity exist[ed] for which parol evidence not only [was] admissible, but frankly, absolutely necessary in both understanding and deciding the issues in this case."

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27. In Kay and Kay Contracting, Inc. v. Tennessee Dept. of Transp., No. E2009-01769-COA-R9-CV, 2010 WL 2553657 (Tenn. Ct. App. June 25, 2010), the Tennessee Court of Appeals held that a statute removing the State's sovereign immunity for breach of contract did not permit a contractor to assert a "pass-through" claim against the State on behalf of a subcontractor. This was an issue of first impression in Tennessee, which turned primarily on the language of the statute itself: "If we allow pass-through claims, then we are allowing a party to sue the State and prosecute the claim of a different entity that has no contractual relationship with the State. This is contrary to the clear and unambiguous language of the statute requiring a written contract between the claimant and the State before the State can be sued for breach of contract." The Court conspicuously pointed out that its opinion did not extend to the validity of pass-through claims in other contexts.

28. In *Lee Masonry, Inc. v. City of Franklin*, *No. M2008-02844-COA-R3-CV, 2010 WL 1713137 (Tenn. Ct. App. Apr. 28, 2010),* two trade contractors sued the City of Franklin for damages caused by delays and disruptions to their work. The City raised three defenses: (1) the "no damages for delay" provisions in the contracts; (2) untimely notice of claims by the contractors; and (3) the contractor's acknowledgment and acceptance of time extension change orders without a reservation of rights to seek increased compensation.

The Tennessee Court of Appeals rejected the City's reliance on the "no damages for delay" provisions because the delays complained of were within the control of the City. The untimely notice defense also was rejected because the City had ongoing knowledge of the delays and knew that the delays would be costly to the contractors. It was reasonable under the circumstances of the case for the contractors to have determined that the City was no longer requiring formal adherence to the notice provisions of the contracts. The Court also rejected the argument that the contractors waived their right to delay damages by acknowledgment and acceptance of time extension change orders without a reservation of rights. Under the circumstances of the case, the change orders did not represent a meeting of the minds with respect to the effect of the change orders. Consequently, the change orders did not constitute an accord and satisfaction.

29. In *Campbell v. Teague*, *No. W2009-00529-COA-R3-CV, 2010 WL 1240732 (Tenn. Ct. App. Mar. 31, 2010),* the Tennessee Court of Appeals upheld a substantial damage award to the purchasers of a defective home. The Court found ample evidence to support the trial court's award of consequential damages and damages under the Tennessee Consumer Protection Act. The Court also rejected an argument by the builder that the purchasers' waived any warranties on the home. The language relied on by the builders did not expressly notify the purchasers that they were waiving any warranties. Also, the inclusion of a one-year builder's warranty was not sufficient to waive the warranties implied in law.

30. In *John Allen Construction, LLC v. Hancock, et al.*, *No. W2008-02785-COA-R3-CV, 2010 WL 1240680 (Tenn. Ct. App. Mar. 31, 2010),* the trial court had entered judgment for breach of contract in favor of a contractor and awarded a portion of the damages sought. The judgment did not, however, address the contractor's action for enforcement of a mechanic's lien. Thus, the judgment from which the parties had appealed was not a final order and the Court of Appeals did not have subject matter jurisdiction under Tenn. R. App. P. 3(a). Quoting a prior case with similar facts, "the decree should provide that the amount due on the contract is a lien on the property and if the debt is not paid within a certain time, should order the clerk to sell the property and pay the debt and costs out of the proceeds."

31. In *E.W. Stewart Lumber Co. v. Meredith Clark & Assocs., LLC*, *No. M2009-01089-COA-R3-CV, 2010 WL 334634 (Tenn. Ct. App. Jan. 28, 2010),* the Tennessee Court of Appeals was asked to determine the scope of protection afforded under Tenn. Code Ann. § 66-11-146, which immunizes owners of "residential real property" from the lien of a remote contractor or supplier. The statute defines "residential real property" as "a building consisting of one (1) dwelling unit in which the owner of the real property intends to reside or resides as the owner's principal place of residence, including improvements to or on the parcel of property where the residential building is located." Tenn. Code Ann. 66-11-146(a)(1).

The owner in Stewart Lumber had purchased ten acres of land in 1975 at 1085 Meriwether Road, where he built a house and continued to reside. In 2008, he subdivided the land into two five acre parcels and built a house for his son on the westerly five acres, which became 1095 Meriwether Road. When a supplier on the newly constructed house sought to enforce a mechanic's lien against the property, the owner moved to dismiss the action under Tenn. Code Ann. § 66-11-146 as a prohibited lien against residential real property.

The Court disagreed with the owner's position and permitted the lien enforcement action to proceed. The lien was not a lien against residential real property, as defined under the statute, because the owner did not intend the use the home at 1095 Meriwether Road as his principal residence. In order to be immune from the lien of a remote supplier, the home must have been either intended for use as the owner's residence or on the same parcel of property as the owner's residence. Because the land had been subdivided and the owner's residence was located on the parcel at 1085 Meriwether Road, the residential real property statute did not apply.

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Legislation

1. *Tenn. Code Ann. § 66-11-150*, No Lien on Residential Real Property by Unlicensed Contractor. Effective July 1, 2010, the Tennessee General Assembly added Section 66-11-150 to the Mechanics' and Materialmen's Lien Law, which provides that no lien shall be available on residential real property to any person or entity that performs residential construction, including home improvement, if that person or entity is not licensed as required under the Contractor's Licensing Act of 1994, Tenn. Code Ann. §§ 62-6-101, *et seq.*

2. *Tenn. Code Ann. § 66-34-104*, Retention of portion of contract price in escrow – Applicability – Mandatory compliance. Tennessee's Prompt Pay Act requires that all retainage withheld on projects where the amount of the prime contract is $500,000 or more be deposited in a separate, interest bearing, escrow account with a third party. Compliance with this requirement is mandatory and may not be waived by contract. Violation of this requirement was already a Class A misdemeanor, subject to a fine of $3,000 per day. The Tennessee General Assembly has now added a new provision to Section 66-34-104 that makes "the party withholding the retained funds" responsible for paying "the owner of the retained funds" an additional $300 per day for each day that such funds are not deposited into an escrow account.

3. *Tenn. Code Ann. §§ 62-6-101*, *et seq.*, *Contractors Licensing Act* – New provisions regarding masonry contractors. Tennessee law previously required only prime contractors and electrical, mechanical and plumbing contractors and subcontractors on projects of $25,000 or more to be licensed. Effective January 1, 2011, masonry contractors performing

work on projects where the total cost of the masonry work exceeds $100,000, materials and labor, also must be licensed. Further, although Tennessee practices reciprocity with certain states as to contractor licensing requirements, an amendment to Section 62-6-111 will eliminate reciprocity with regard to masonry contractors that meet the $100,000 threshold mentioned above.

4. *Tenn. Code Ann. § 62-6-119, Bid documents* – Required disclosures by bidders – New provisions regarding masonry contractors. Effective July 1, 2010, Tennessee's bidding laws will require that the name, license number, expiration date and license classification for proposed masonry contractors appear on the outside of all bid envelopes where the masonry portion of the project being bid exceeds $100,000. This requirement previously applied only to bidders on prime, electrical, plumbing, HVAC and vertical closed loop geothermal heating and cooling contracts of $25,000 or more.

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Texas

Case Law

1. In *Black + Vernooy Architects v. Smith*, the Austin Court of Appeals affirmed a judgment holding an architecture firm liable for a percentage of personal injury damages following the collapse of a balcony designed by the firm. The firm had contracted with a homeowner to design and provide contract administrative services for the construction of the balcony using a standard American Institute of Architects form agreement, which included a "nonconstruction responsibility" of the firm to "visit, to familiarize, to determine, to inform[,] and to endeavor to guard" the homeowner from defects and deficiencies in the work. Despite numerous site visits during construction by an architectural intern of the firm and review of photographs of the progress by a firm architect, the firm failed to notice numerous serious defects in the construction, including the contractor's failure to attach the balcony railings to the home, attachment of the balcony supports to the home with nails rather than bolts, use of thin metal clips rather than welding to attach supports to their baseplates, failure to install a rim joist, and other structural defects. Following completion of construction, the balcony collapsed during use, severely injuring two guests of the homeowners. The jury determined that the construction defects were apparent and obvious from the photographs reviewed by the architect and found the firm liable for a percentage of the damages. The firm appealed the judgment, arguing that the firm owed no duty to the homeowner's guests injured in the collapse. The court of appeals affirmed the finding of a duty, holding that "while [the architecture firm] is not a guarantor or insurer of the general contractor's work," the firm did take on contractual duties and could thus be "held liable, not for the general contractor's negligence, but for a breach of its *own* duty as a 'provider of information.'" The court further held that the duty extended to third-party visitors of the homeowner under a risk and foreseeability analysis. The court expressly limited its holding to the facts of the case. *(Black + Vernooy Architects v. Smith, ___ S.W. 3d ___, 2010 WL 5019659 (Tex. App.–Austin Dec. 8, 2010))*

2. In a thorough consideration of public policy considerations regarding the interaction of contractual conditions and covenants with statutory lien rights and lien-release procedures, the Texas Supreme Court in *Solar Applications Engineering, Inc. v. T.A. Operating Corp.* held that contractual language obligating a general contractor to provide a lien-release affidavit prior to final payment on the contract constituted a covenant and not a condition, overruling the court of appeals and reinstituting the judgment of the trial court. The construction contract provided that final payment would be made "if" the owner of the property was "satisfied" that the work had been completed and that the contractor's obligations had been fulfilled, and further provided that the contractor's application for final payment must include a lien-release affidavit. The supreme court found that, although the satisfaction provision was a condition due to the use of the conditional language "if," the lien-release provision did not itself contain conditional language and the contract was therefore ambiguous with respect to whether the lien-release requirement was a covenant or a condition. Considering the public policy behind Texas' statutory scheme regarding construction liens and the release of such, and noting that an interpretation as a condition would work a forfeiture against the contractor (which had substantially completed construction) and a windfall to the owner (which was also found to have breached the contract), the supreme court found the lien-release provision to be a covenant and reinstated the trial court's judgment against the owner for its failure to make final payment on the contract. *(Solar Applications Eng'g, Inc. v. T.A. Oper. Corp., ___ S.W.3d ___, 54 Tex. Sup. Ct. J., 2010 WL 4910135 (Tex. Dec. 3, 2010))*

3. In *In re Kvaerner*, the Houston Court of Appeals conditionally granted mandamus compelling the trial court to set aside an order overriding the location of arbitration of a construction dispute as determined by the arbitration administrator. The parties to the dispute had entered into a subcontract regarding construction of a processing facility, which contract provided for arbitration of disputes before the American Arbitration Association ("AAA") under its Construction Industry Arbitration Rules pursuant to the Federal Arbitration Act. After a dispute arose and suit was filed, one party successfully moved to compel arbitration. Arbitration proceedings were instituted and AAA determined, after inquiry to the parties, that the arbitration would take place in California. The trial court then issued a new ruling ordering arbitration to take place in Houston. The party favoring the California location filed a petition for writ of mandamus from the court of appeals to overturn the trial court's new ruling. Finding that the trial court was "simply without authority to review the validity of arbitrators' interlocutory rulings" and noting that the Construction Industry Arbitration Rules expressly afforded AAA the power to make a "final and binding" determination of locale, the court of appeals held that the trial court had usurped the authority of the AAA and abused its discretion by ruling on the location of the arbitration. The court of appeals found that the trial court's action contravened the fundamental policy of deference to contractual dispute resolution and that there would be no adequate remedy by appeal, and therefore conditionally granted the petition and directed the trial court to vacate its order. *(In re Kvaerner, 324 S.W.3d 891 (Tex.App.–Houston [14 Dist.] 2010))*

4. In *Fresh Coat, Inc. v. K-2, Inc.*, the Texas Supreme Court found that a subcontractor hired to install a synthetic stucco exterior insulation and finishing system ("EIFS") on a number of homes was a "seller" of the EIFS for purposes of Texas' statutory products liability indemnification scheme, that the EIFS was a "product" for that same purpose, and that the contractor was entitled to indemnification from the manufacturer of the EIFS for the contractor's settlement with the general contractor notwithstanding the subcontractor's contractual liability to the general contractor. Following the purchase and installation of EIFS by the subcontractor, several homeowners filed suit against the general contractor, subcontractor, and manufacturer alleging defects in the EIFS and resulting water damage to their homes. The defendants each settled with the homeowners and the subcontractor also settled with the general contractor. The subcontractor then sought indemnity from the manufacturer with regard to both settlements and was awarded judgments on both amounts in the trial court. On appeal, the court of appeals affirmed the judgment as to indemnity for the settlement with the homeowners, but overturned the judgment as to the settlement with the general contractor, reasoning that because the subcontractor was independently liable for indemnity to the general contractor under its subcontract, the subcontractor was not entitled to statutory indemnity. The supreme court found that the EIFS fell within the definition of "product" under Texas' statutes regarding manufacturer indemnification of sellers and that the subcontractor fell within the definition of "seller." The supreme court then considered a statutory exception to indemnification for "any loss caused by the seller's negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product, for which the seller is independently liable." The supreme court held that the statutory exception was intended to be limited to losses "caused by the seller's tortious and otherwise culpable act or omission for which the seller is independently liable." Because the contractual indemnity under the subcontract did not involve culpability and there was no issue before the court as to whether the subcontractor installed the EIFS correctly, the supreme court found that the subcontractor was entitled to statutory indemnity from the manufacturer for both settlements, and reinstated the judgment of the trial court. *(Fresh Coat, Inc. v. K-2, Inc., 318 S.W.3d 893 (Tex. 2010))*

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5. In *McKinney & Moore, Inc. v. City of Longview*, 2009 WL 4577348 (Tex.App.—Houston [14th Dist.] December 8, 2009, pet. denied), the General Contractor was not allowed to recover damages resulting from the Owner's pre-construction soil investigation which was apparently determined to be "inadequate". The General Contractor contacted the Owner on numerous occasions requesting adjustments to the Contract based on the delays experienced by the General Contractors because of the Owner's lack of diligence in performing the soil investigation. The Owner denied these requests and made final payment to the General Contractor – which the General Contractor accepted only after it had issued a letter to the Owner requesting to be compensated for the delays experienced with the Project. The Contract governing the relationship between the Owner and General Contractor contained a clause prohibiting any of the General Contractor's claims which were made after final payment was accepted. The General Contractor argued that the final request for an adjustment to the contract to the Owner deemed the Owner's final payment as "not truly a final pay request" pursuant to the Contract. The Court of Appeals ruled against the General Contractor and granted the Owner's Summary Judgment Motion on the General Contractor's claims for additional payment under the contract. In *dicta*, the Court stated that the General Contractor's request for payment was for "100%" of the final balance which was due and owing under the Contract and that the General Contractor had the opportunity to reject final payment and pursue claims for additional construction-related costs – but that it failed to do so.

6. In *C.C. Carlton Indus., Ltd. V. Blanchard*, 311 S.W.3d 654 (Tex.App.—Austin April 9, 2010, no pet.), a group of homeowners successfully sued a homebuilder and a developer for nuisance. The homebuilder, while building the subdivision for the developer, caused damages to various homeowners' homes, including, but not limited to, foundation damage, cracks and plumbing damages. The Jury awarded the homebuilders over $200,000.00 in damages. On appeal, the homebuilder and developer argued that the expert utilized by the homeowners should have been struck because he was not a licensed engineer. The Court of appeals disagreed, holding that there was no abuse of discretion in the trial court in admitting the evidence. The Court reasoned that although the expert was not an engineer, the expert had thirty-five years of residential construction experience. Additionally, the expert was a licensed master plumber and properly inspector. In addition to claims regarding the expert utilized by the homeowners, the homebuilder and developer also challenged the sufficiency of the evidence. The homebuilder and developer argued that the construction activities were not abnormal because the construction had been authorized by the City and was therefore not considered to be a nuisance. The Court of Appeals disagreed with this argument. The Court pointed to evidence that the homebuilder used heavy construction equipment just 20 feet from one of the homes and also that the homebuilder used high wattage construction spotlights to ensure that construction could progress "around the clock". The Court also did not agree with the argument asserted by the homebuilder and developer that the City permit prohibited nuisance liability. The Court held that even in the presence of a City permit authorizing construction, "the manner in which [a defendant] performs its [construction] activity may give rise to an action for nuisance."

7. One major construction case to keep an eye on in Texas is *Allen Keller Co. v. Foreman*. The Supreme Court of Texas heard oral argument in this case in December 2010, and a judgment is likely to be rendered later this year or early 2012. In *Allen Keller Co.*, the Foremans brought a wrongful death and survival action after their daughter drowned when the car in which she was a passenger veered off a bridge and into a river. The Foremans brought the action against Allen Keller Co. alleging it created an unreasonably dangerous condition that proximately caused their daughter's death. The Owner of the bridge (Gillespie County) contracted with Allen Keller Co. to perform flood and erosion control work at the bridge where the accident occurred. Among other things, the contract called for the construction of a

concrete pilot channel to reroute drainage from the roadside into the river at a point away from the concrete headwalls of the bridge. After Allen Keller Co. completed its work—and pursuant to the project's plans and specifications—a fifteen-foot gap was left between the guardrail and the embankment. It was through this gap that the car the Foremans' daughter was driving slid into the river below. Allen Keller Co.'s work was inspected and accepted by Gillespie County and it paid Allen Keller for the work. After the accident occurred, the Foremans timely filed suit against multiple defendants, alleging premises defect and negligence claims. However, only their premises defect claim against Allen Keller Co. remains in the case in front of the Texas Supreme Court. At issue in the case is whether a contractor that performed work on state property owes a continuing duty to the public for dangerous construction conditions that are accepted by the state, and that the contractor is contractually required to build.

8. Another important construction-related case currently pending before the Texas Supreme Court is *Mastec North America, Inc. v. El Paso Field Services, L.P.*, 317 S.W.3d 431 (*Tex.App.—Houston [1st Dist.], September 20, 2010 pet. Filed*). In *Mastec*, the Contractor submitted a bid and was awarded a pipeline replacement Project. The bid included language which required the Contractor to visit the jobsite to become familiar with the work. Further, the bid included language to the effect of the Contractor performing sufficient due diligence pertaining to the site's existing conditions. The Owner of the Project, however, also claimed to have exercised due diligence in performing a pipe and line locate analysis and purported to find pipes and utility lines which the Contractor would ultimately have to cross in performing its work. According to the terms of the Contract, the Contractor was required to confirm the site locations found by the Owner and to accept all responsibility for any damages to existing pipelines or utility lines. Apparently, the Owner did not do a sufficient job investigating the pipeline and utility line crossings and, as a result, the Contractor's work was significantly delayed. After a trial on the merits, the jury awarded the Contractor over $4.5 million in damages against the Owner. However, the trial court granted the Owner's JNOV, reasoning that the contract's differing site conditions clause precluded the Contractor from recovering any damages against the Owner as a matter of law. The Court of Appeals reversed the judgment of the trial court. The Court of Appeals based its holding on the Owner's failure to adequately disclose the location of the underground pipe line and utility line crossings which was discovered only "during the performance of the [contractor's] work" and that the contractor could not reasonably have … discovered [the lines] until extensive work was performed." In its holding, the Court stated that "[the contractor] was not in as good a position as [the owner]… to gather critical information concerning underground foreign crossings in [the owner's] own pipeline corridor and to judge the sufficiency" of the documents used to solicit the contractor's bid. The Court further concluded that the Contractor was not precluded from recovering against the Owner even in the face of a differing site conditions clause because the "owner was in a better position to know whether its specifications were sufficient for its intended scope of work and the contract evidence[d] that the owner made positive assurances concerning the reliability of those specifications." As mentioned, this case is currently pending before the Texas Supreme Court and a judgment is likely to be rendered in late 2011 or early 2012.

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9. *Solar Applications Eng'g, Inc. v. T.A. Operating Corp*., *327 S.W.3d 104, 109 (Tex. 2010)* dealt a dispute between an owner and a general contractor, the owner cited language in a the contract claiming that the general contractor forfeited its rights under the contract by failing to provide a lien release when it supplied its final pay application. The owner claimed that submission of that lien release was a condition precedent to final payment. The

Supreme Court reviewed the contract and found there to be no definitive conditional language such as 'if', 'provided that', 'on condition that', or some similar phrase of conditional language that must normally be included. Because no conditional language was used and another reasonable interpretation of the contract was possible, the terms were construed as a covenant in order to prevent forfeiture. The clause was interpreted to be a covenant rather than a condition precedent.

10. *In Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London, 327 S.W.3d 118, 123 (Tex. 2010)* the Texas Supreme Court held that a general contractor's claim against an excess insurer was defeated because the contractual exclusion found in the policy applied to the breach of contract claim and the exception for liability the insured would have absent its contract is inapplicable. The general contractor argued that the contractual liability exclusion did not apply because the general contractor's liability arose from its own breach of contract and not from another's liability that the general contract assumed.

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Legislation

The Texas Legislature meets in regular session in each odd-numbered year. As such, there was no legislation enacted into law in 2010. The 82nd Texas Legislature, which began meeting in January of 2011, is expected to take up many issues pertinent to the construction-industry including, but not limited to, indemnification, immigration, alternative delivery systems, as well as important issues relating to contractors performing public work. An analysis of construction-related legislation passed in the Texas legislature and signed into law by the Texas Governor in the 2011 will be available in next year's Construction Law Case and Legislation Update.

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Utah

Case Law

1. In *Deer Crest Associates I, LC v. Silver Creek Development Group, LLC ,* 222 P.3d 1184 (Utah 2009), two developers entered into a contract governing the construction of a condominium project. The agreement included a mandatory arbitration clause that provided that all disputes would be decided by arbitration and that demand for arbitration had to be filed within thirty days of the dispute having arisen. One of the developers terminated the agreement for the other party's alleged failure to comply with the terms of the agreement and filed suit. The court ordered the parties to arbitrate and stayed the suit until the completion of the arbitration. Due to the lapse in the thirty-day period for arbitration, the arbitrator dismissed the claim. The original developer returned to the court and attempted to lift the stay and litigate its claims.

The Utah Court of Appeals held that: (1) the developer had no right to litigate its claim and had waived its right to mandatory arbitration because parties waive their right to resolution through the courts when they agree to arbitrate; and (2) that a thirty-day demand period was not unreasonable, even though this period was shorter than the applicable period under the statute of limitations, because the developers had willingly entered into the contract.

2. In *Hutter v. Dig-It, Inc.,* 219 P.3d 918 (Utah 2009), a subcontractor filed a lien against private property that had been registered with the state, despite the subcontractor's failure to file a preliminary notice. The building permit and the state registry were both incomplete because they did not show the entire current address of the property owners. The owners sought to obtain from the subcontractor a voluntary release of he lien. When they could not obtain a voluntary release, they filed a Petition for Civil Wrongful Lien Injunction.

The Utah Supreme Court held that: (1) the incomplete entry of information into the state registry met the content requirements of the notice of commencement; (2) the notice of commencement was not invalid because the owners failed to verify complete accuracy within the fifteen-day filing period; (3) the date the notice of commencement was filed with the state registry was the date that the building permit was received by the state's designated agent; (4) even though the lien was not enforceable, it was not a "wrongful lien" under the Wrongful Lien Injunction Act.

3. In *Davencourt at Pilgrims Landing Homeowner's Ass'n v. Davencourt at Pilgrims Landing, LLC,* 221 P.3d 234 (Utah 2009), the owners of units in a planned unit development experienced structural problems relating to faulty construction. After petitioning the builder and the developer to correct these defects through the development's owner's association, the association filed suit, being unable to correct the defects with the funds it had in reserve.

The Utah Supreme Court held that: (1) the economic loss rule is still applicable under Utah law, because allowing a non-party to pursue tort recovery would frustrate the economic expectations of contracting parties, further reiterating that the rule was created to promote the obligations and expectations created by contract; (2) while the developer and the builder did not owe the association an independent duty because they had greater access to information about the project, the developer did have a limited fiduciary duty to the association such that the association could assert a claim for negligence against the developer; (3) the developer and the builder did not owe association an independent duty to act without negligence in construction; (4) Utah does recognize a cause of action for breach of the implied warranty of workmanlike manner and habitability in the sale of a new residence, a duty previously recognized by the

other forty-nine states; and (5) the trial court erred in dismissing the association's breach of express warranty claims based on the merger doctrine because warranties related to the quality of construction are collateral to the conveyance of title and survive any deed conveying the property.

In order to establish a breach of the implied warranty of workmanlike manner or habitability a party must show (1) the purchase of a new residence from a defendant-builder/developer-vendor; (2) the residence contained a latent defect; (3) the defect manifested itself after purchase; (4) the defect was caused by improper design, material, or workmanship; and (5) the defect created a question of safety or made the house unfit for human habitation, and (6) the claim must be brought within six years of the date of completion of the project or abandonment of construction

4. In *Encon Utah, LLC v. Flour Ames Kraemer, LLC,* 622 Utah Adv. Rep. 23 (Utah 2009), the Utah Department of Transportation ("UDOT") contracted with a general contract to construct the Legacy Parkway. The general contractor then subcontracted with a subcontractor for the manufacture and installation of bridge girders for the project. UDOT partially terminated the project, as a result, the general contractor terminated the subcontractor's subcontract. Consequently, the subcontractor sued the general contractor and the general contractor's sureties to recover damages under the termination provision of the subcontract.

In finding for the subcontractor, the Utah Supreme Court held that: (1) the termination provision of the subcontract, rather than the termination provision in the prime contract, governed the subcontractor's compensation in the event of early termination; (2) the pro rata cap in the subcontractor's termination provision only applied to overhead and profit; and (3) the subcontractor's claim against the general contractor's payment bond accrued on the subcontractor's last day of work, rather than the last day of unpaid work, for limitations purposes.

5. In *Traco Steel Erectors, Inc. v. Comtrol, Inc.,* 222 P.3d 1164 (Utah 2009), a subcontractor entered into separate subcontracts with a general contractor on separate jobs. The subcontractor eventually abandoned both jobs after disputes with the general contractor arose. The general contractor then completed the work and transferred additional costs for completion to the subcontractor. The subcontractor sued the general contractor for amounts unpaid for work completed. The general contractor counterclaimed for damages incurred.

The Utah Supreme Court found for the general contractor, holding that: (1) the subcontractor had the obligation to marshal evidence underlying the damages award and failed to do so, and (2) the trial court, employed the proper method of determining the measure of actual costs incurred by accepting a valuation of labor based on information provided in an edition of *R.S. Means Building Cost Construction Data* that was later adjusted.

Legislation

1. *H.B. 0045, State Construction Code Adoption Act***.** This bill adopts the State Construction Code in accordance with the Utah Uniform Building Standards Act. The Code draws from the 2009 International Building Code, the 2008 National Electric Code, the 2009 International Residential Code, the 2009 International Energy Conservation Code, and the 2009 International Fuel Gas Code, as well as others. These codes are included with some revision.

The code was adopted after S.B. 211 ("Building Codes Amendments," 2009) modified the powers and duties of the Utah Uniform Building Code Commission and the Fire Prevention Board, authorizing them to recommend building codes for to the Legislature for adoption. This bill was passed in conjunction with H.B. 0183, and H.B. 0308 (see below).

This bill takes effect on July 1, 2010.

2. *H.B. 0183, Construction and Fire Code Related Amendments*. This bill modifies the Utah Fire Prevention and Safety Act and the Utah Uniform Building Standards Act to address the process for adopting and modifying a state construction code or state fire code. This bill clarifies the enforcement of the state fire code, adoption of the state fire code and the creation of an advisory committee. This bill also addresses the adoption of amendment process for a state construction code. Additionally, this bill provides funding for education relating to the codes, including continued education.

This bill takes effect on July 1, 2010.

3. *H.B. 0308, State Fire Code Adoption Act.* This bill adopts the State Fire Code in accordance with the Utah Fire Prevention and Safety Act. This bill adopts the 2009 International Fire Code, excluding appendices, and the 2008 National Fire Protection Association, NFPA 96, Standard for Ventilation Control and Fire Protection of Commercial Cooking Operations, with some exceptions.

This bill takes effect on July 1, 2010.

4. *S.B. 0013, State Construction Contracts and Drug Alcohol Testing*. This bill modifies the Utah Procurement Code to address requirements for drug and alcohol testing for state construction contracts. This bill requires state construction contracts impose requirements for drug and alcohol testing, while providing some exemptions.

A contractor entering a contract with the state must have and maintain a drug and alcohol policy during the period of the construction contract, must conspicuously post notice of the policy, and must conduct random testing under the policy if there are 10 or more individuals who are directly related to the work and in a safety sensitive position.

This bill enacts U.C.A. § 63G-6-604 and takes effect on July 1, 2010.

5. *S.B. 0107S03, Lien Amendments*. This bill modifies provisions relating to mechanic's liens. Significant changes that result from this bill relate to owner bankruptcy, notice of intent to file a notice of completion, and liens against owner-occupied residences.

When this bill takes effect, if an owner files for bankruptcy within the normal 180-day period following the filing of a Notice of Lien in which the lien must foreclose, the action shall be filed within 90 days after the automatic stay in the bankruptcy proceeding is lifted or expires.

This bill changes a notice of intent to file a notice of completion into a notice of intent to obtain final completion and modifies a provision related to its finding. This provision applies to owners of nonresidential construction projects registered with the state or contractors that are registered with the state.

Also, this bill bars a person otherwise qualified to file a lien from maintaining a lien on an owner-occupied residence under certain circumstances, including if the general contract is no more than $5,000.

This bill amends *U.C.A. § 38-1-11, 38-1-40, 38-11-107, 38-11-110, and 38-11-204*.

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Virginia

Case Law

1. *Universal Concrete Prod. Corp. v. Turner Constr. Co.,* 595 F.3d 527 (4th Cir. 2010). After a commercial construction project's owner became unable to finance the Project, the concrete subcontractor sued the general contractor for payments owed. The prime contractor, who hadn't been paid by the Owner, relied upon the subcontract's pay-when-paid clause to defend against the subcontractor's claims. The U.S. District Court for the Eastern District of Virginia granted prime contractor summary judgment, and subcontractor appealed to U.S. Court of Appeals for the Fourth Circuit, asserting that the subcontract's incorporation of the prime contract's payment provisions created ambiguity in the subcontract's pay-when-paid clause, rendering the clause unenforceable.

After first recognizing that Virginia courts will enforce pay-when-paid clauses when such provisions are unambiguous, the Fourth Circuit concluded that nothing in the prime contract, whose provisions flowed down to the subcontract, created any ambiguity regarding the pay-when-paid clause in the subcontract. In addition, the Fourth Circuit distinguished two out-of-state cases cited by subcontractor. Unlike those cases, which based their decisions on their respective states' purported desire to protect subcontractors, Virginia's case law evidences a strong policy in Virginia of upholding parties' "'freedom to contract' – an interest which directly conflicts with a paternalistic desire to protect one contracting party over the other."

2. *Comstock Potomac Yard, L.C. v. Balfour Beatty Construction, LLC,* 694 F.Supp.2d 468 (E.D. Va. 2010). The federal court upheld the developer's assessment of liquidated damages against the general contractor, noting that the purpose of a liquidated damages provision is to obviate the need for the nonbreaching party to prove actual damages. The Court also rejected several arguments made by the contractor against the enforcement of the liquidated damages provision. First, the facts did not substantiate contractor's claim that developer could put portions of the project to their beneficial use. As a result, enforcement of liquidated damages did not constitute a penalty. Second, developer's failure to comply strictly with substantial completion terms of contract was immaterial to overall performance of the contract and did not excuse contractor from liquidated damages provision. Third, the court held that the contract's notice-of-claim requirements did not apply to developer's right to liquidated damages; instead, the court read the contract as imposing liquidated damages automatically upon contractor's failure to meet specified milestones. Finally, the court determined that developer's recovery of liquidated damages and damages for defective work did not constitute double recovery. Damages for defective work go beyond those contemplated by liquidated damages clause and are not delay damages, but rather are the result of poor workmanship and abandonment of project before completion.

3. *United States f/u/b/o Damuth Svcs., Inc. v. Western Surety Co.,* 368 Fed.Appx. 383 (4th Cir. 2010). After a subcontractor on a Miller Act project diverted funds intended for its material supplier to pay other debts, supplier and subcontractor entered into an agreement under which subcontractor would pay supplier according to a set schedule. According to the agreement, however, supplier agreed not to inform the general contractor of subcontractor's payment problems, because supplier was concerned that subcontractor needed "to continue doing business" in order to satisfy the debt owed to supplier. After subcontractor failed to make the agreed payments, supplier filed a Miller Act suit against the general contractor's payment bond.

The U.S. District Court for the Eastern District of Virginia granted summary judgment to the payment bond surety, and the Fourth Circuit affirmed. The Court noted that, due to supplier's agreement to remain silent regarding subcontractor's diversion of funds, equitable estoppel barred supplier's payment bond claims. The court held that, as part of the agreement, supplier engaged in practices which went beyond "mere silence" and therefore constituted misleading representations. In addition, subcontractor's diversion of funds violated Virginia criminal law, and supplier's agreement to remain silent regarding the diversion consequently barred its claims under the doctrine of unclean hands.

4. *Artistic Stone Crafters, Inc. v. Safeco Insurance Company of America,* ___ F.Supp.2d ___, 2010 WL 2977894 (E.D.Va. July 27, 2010). Subcontractor sued general contractor for payment for certain extra work subcontractor claimed to have performed. Subcontractor argued that during the project it had performed extra work in reliance on general contractor's "operations manager's" assurances that the change order process was held up by "clerical problems," and that subcontractor should proceed with the work and payment would eventually follow. No change order was ever issued; likewise no payment was forthcoming.

Once the extra work had been completed, and before receiving payment for that work, subcontractor executed a release of "all claims" and "right to lien" for payment of the subcontract balance amount. Applying Virginia law, the U.S. District Court for the Eastern District of Virginia found the release terms to be clear and unambiguous, thereby barring subcontractor's claim for the extra work performed before the release date.

The court went on to find that under Virginia law, the assurances of the contractor's "operations manager" did not amount to a waiver of the subcontract's written change order requirement. In so ruling, the court relied on the lack of evidence that contractor intended to waive the written change order requirement, as well as evidence that no payments were made for work in the absence of a written change order. The court also noted that subcontractor's only evidence in support of its claims was that the contractor's "operations manager" purportedly represented that "clerical errors" had delayed timely issuance.

5. *Attard Industries, Inc. v. United States Fire Insurance Co.,* 2010 WL 3069799 (E.D.Va. Aug. 5, 2010). The subcontract between the mechanical and plumbing subcontractor and a lower-tier subcontractor included a jury waiver clause "for any and all disputes arising out of or related to performance of this Subcontract." The subcontract did not reference a surety or the possibility that a payment bond would be issued in connection with the mechanical and plumbing work. In addition, the payment bond did not include a jury waiver clause, nor did the bond incorporate the subcontract at issue or refer to the subcontract. When the lower-tier subcontractor demanded a jury trial on its payment bond claim, the surety moved to strike the jury demand, citing the subcontract clause.

The federal district court ruled the surety did not have a right to enforce the jury waiver provision in the subcontract. The court first explained that the established principle that a surety "stands in the shoes" of its principal diminished when the principal's right to be enforced (here, a jury waiver) is not related to the principal's liability to the claimant, but to the process or procedure relating to the adjudication of that liability.

Second, in response to the surety's analogy to enforcement of subcontract arbitration clauses effectively doing away with jury trial rights, the court explained the strong federal policy in favor of arbitration disappears in the absence of an arbitration clause, and consequently the strong federal policy against jury trial waivers operates free of any such countervailing policy.

Third, in assessing whether there has been a jury trial waiver, the court noted that federal courts will indulge every reasonable presumption against waiver of fundamental constitutional rights, and will not presume acquiescence in the loss of those fundamental rights.

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Washington

Case Law

1. In *Williams v. Athletic Field, Inc., 228 P.3d 1297, ___ Wn. App. ___ (2010)*, the Washington State Court of Appeals held that a corporation's claim of lien was invalid, but not frivolous, for failure to comply with the statutory attestation requirement.

In this case, Williams contracted with Athletic Field, a corporation, to perform site preparation work on Williams' property. A dispute arose on the project, and eventually Athletic Field was terminated. On behalf of Athletic Field, LienData USA, Inc., a lien filing service, recorded a mechanic's lien (RCW 60.04) against Williams' property for $276,825. The claim of lien included an attestation clause which identified Athletic Field as the claimant and LienData as the agent for claimant. The attestation clause was signed by Rebecca Southern, an employee of LienData, but Southern failed to note that she was signing on behalf of LienData. Instead she signed as "the claimant [ ] or attorney of the claimant," when in fact she was neither. Beneath Southern's signature was a notary's acknowledgment with the following operative language "SUBSCRIBED and SWORN to before me this 1st day of December, 2004." Besides identifying LienData as the agent for the claimant, the attestation clause (including acknowledgment) was identical in form to the sample attestation clause appearing in RCW 60.04.091(2).

Prior to Athletic Field foreclosing on its claim of lien, Williams filed a frivolous lien action against Athletic Field pursuant to RCW 60.04.081. Williams argued that the lien was invalid and frivolous because the attestation on the lien claim was not signed by the lien claimant or its attorney, and therefore failed to comply with RCW 60.04.091. The superior court agreed, and ordered the lien released. The superior court also awarded Williams its attorney fees, as required by RCW 60.04.081.

In 2006, the Washington Court of Appeals reversed, holding that RCW 60.04.091(2) plainly states that the attestation clause must be signed by "the claimant or some person authorized to act on his or her behalf." In dicta, the court of appeals noted that the attestation clause "barely" met substantial compliance under RCW 60.04.091. Though Southern was not the claimant or its attorney, "the attestation clause clearly identifies her as an 'agent of the claimant' as permitted by the statute." The court of appeals also noted that even if the lien were invalid, it would still not be frivolous under RCW 60.04.081.

On reconsideration, Williams argued for the first time that the lien was invalid because the acknowledgment section of the attestation clause failed to comply with RCW 64.08, as required by RCW 60.04.091(2). Persuaded by this new argument, the court of appeals withdrew its 2006 opinion, and issued a new opinion in March 2010 holding the lien invalid. The court of appeals echoed its previous opinion that any authorized agent of the lien claimant may attest to the validity of the lien. However, the court found that the lien claim was invalid because the attestation clause failed to satisfy the requirements of a corporate acknowledgement, namely that: the form signed by Southern failed to identify her as an officer or employee of LienData, failed to characterize the subscription as the free and voluntary act of LienData, and failed to set forth Southern's authority to act on behalf of LienData. Therefore, because the attestation failed to include a corporate acknowledgment that substantially complied with RCW 64.08.070 or RCW 42.44.100(2), the court declared Athletic Field's claim of lien invalid.

However, the court of appeals held that Athletic Field's lien clam was *not* frivolous, because the question of "who may attest to a claim of lien" and "the form of acknowledgment for a corporate agent attesting to the lien" were "subject to legitimate legal debate." And, because the subject appeal involved a frivolous lien proceeding rather than a lien foreclosure action, the court of appeals ruled that the superior court erred in releasing the lien and awarding fees to Williams, and instead awarded Athletic Field its attorney fees for the appeal and the superior court proceedings.

This case serves as a harsh reminder that parties claiming the benefit of a mechanic's lien must strictly comply with the lien statute, and Washington courts will invalidate any claim of lien that fails to clearly satisfy the statutory requirements. At the same time, this case reinforces that Washington courts will rarely grant a frivolous lien motion, especially when the case involves a matter of first impression regarding a legitimate dispute over the interpretation of the lien statute.

The impact of this ruling on pending Washington lien claims could be significant. Since most lien claims are filed using the sample form in RCW 60.04.091(2), many pending liens may be invalidated by the *Williams* case. However, many questions remain as to the scope and impact of the *Williams* decision, including whether the sample attestation and acknowledgment appearing in RCW 60.04.091(2) is invalid for use in all liens, just claims of lien on behalf of a corporation, or just under the narrow set of circumstances presented in this case. Legitimate arguments for each position can be made.

On May 17, 2010, Athletic Field filed a petition for review with the Washington Supreme Court (No. 845557), so it is very likely the holdings in this case will be further defined, or reversed, in the coming year. In the meantime, lien claimants can no longer feel safe by just copying the sample claim of lien form in RCW 60.04.091(2). Parties filing new liens should be sure that their claims of lien satisfy the attestation and acknowledgment requirements of RCW 60.04.091(2) and RCW 64.08.

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West Virginia

Case Law

1. In *Ramey v. Contractor Enterprises, Inc.,* 693 S.E.2d 789 (W.Va. 2010), the Supreme Court of Appeals of West Virginia addressed "deliberate intent" claims brought under W.Va. Code § 23-4-2(d)(2)(ii). Plaintiff was a highwall drill operator at a mine site and was seriously injured when he fell over the 80-foot high wall. Plaintiff filed suit against his employer claiming that he was exposed to a specific unsafe working condition without proper training or safety equipment and with knowledge that the unsafe condition presented a high degree of risk and a strong probability of serious injury or death. The court affirmed the entry of summary judgment in favor of the employer because the plaintiff failed to present any evidence of the defendant's actual knowledge of any unsafe working conditions or that the defendant intentionally exposed the plaintiff to a known unsafe working condition. Instead, the evidence indicated that the hazardous condition occurred because plaintiff deviated from his employer's ground control plan, and that plaintiff's own actions were the cause of the injury.

2. In *White v. AAMG Constr. Lending Ctr.,* No. 35286 (W.Va. September 16, 2010), the plaintiff homeowner brought a claim against its construction lender alleging that the bank had a duty, in both contract and tort, not to distribute any money from the construction loan to the contractor building the house until the house was inspected and the inspector confirmed that the work for which payment was requested was complete and in place. The lower court granted summary judgment in the bank's favor on both the tort and contract claims. The Supreme Court of Appeals of West Virginia reversed the judgment as to the contract claim, holding that a jury could find that the bank had breached its duties under the loan agreement to inspect and pay only for work complete, despite language in the loan agreement providing that those provisions were solely for the protection of the bank and were not meant to benefit the homeowner.

3. In *Ruckdeschel v. Falcon Drilling Co.*, 693 S.E.2d 815 (W.Va. 2010), plaintiff was killed in an explosion and fire that occurred at a well site. Plaintiff brought claims against Falcon Drilling, the driller of the well, Texas Keystone, the owner of the well site, and Halliburton, the party responsible for placing the well in an operating state. Halliburton settled with the plaintiff but also asserted cross claims against Texas Keystone for contractual indemnification and contribution. Texas Keystone filed a Motion to Dismiss arguing that 1) the work order containing the indemnity language which Halliburton was relying on was not signed and was therefore unenforceable and 2) even if the work order was enforceable, Halliburton's claims against Texas Keystone were governed by the arbitration clause. The Supreme Court of Appeals reversed the entry of summary judgment finding that the circuit court did not definitively determine whether a binding contract existed between the parties or whether the claim for indemnification fell within the scope of the arbitration provision. The Court affirmed that Halliburton was not entitled to contribution or implied indemnity because the right to contribution between joint tortfeasors can only be invoked in litigation and a good faith settlement extinguishes the right of a non-settling defendant to seek implied indemnity unless the non-settling defendant is without fault.

4. In *Maxum Indem. Co. v. Westfield Ins. Co.,* 2011 U.S. Dist. LEXIS 7230 (S.D. W.Va. Jan. 25, 2011), plaintiff was killed while working for a general contractor on a construction project in West Virginia and asserted a "deliberate intent" claim under W.Va. Code §23-4-2(d)(2)(ii) against the general contractor and subcontractor. Maxum, the insurer for the subcontractor on the project, settled with the plaintiff. Thereafter, Maxum filed a declaratory judgment action seeking an order declaring that the subcontractor had no duty to indemnify the

general contractor and seeking equitable contribution from the general contractor's insurers. In ruling on the cross motions for summary judgment, the court found that because the subcontractor was admittedly at least partially negligent in plaintiff's accident it was required to indemnify the general contractor under the language of their agreement and the "clear and definite" standard was inapplicable since this was not a case of the general contractor's sole negligence. The court further predicted that West Virginia courts would allow indemnification of "deliberate intent" claims arising under W.Va. Code §23-4-2(d)(2)(ii). The court finally held that Maxum also was not entitled to equitable contribution from the general contractor's insurers because to hold otherwise would negate the indemnity contract between the parties.

5. In *Simpson-Littman Constr., Inc. v. Erie Ins. Prop. & Cas. Ins. Co*, 2010 U.S. Dist. LEXIS 95378 (S.D. W.VA. Sept. 13, 2010), a homeowner hired Simpson-Littman to build a home. After completion, cracks appeared throughout the home allegedly as a result of the subcontractor's defective site preparation and soil compaction. The homeowner sued for breach of contract and negligence. Simpson-Littman's carrier denied coverage on the basis that the damage was not caused by an "occurrence." The court rejected this argument and ruled that the soil settlement allegedly caused by the subcontractor's negligence constituted an "occurrence" and the subcontractor work exception to the "your work" exclusion applied. The court allowed the case to proceed on the sole factual issue of whether the property damage occurred during the policy period.

Legislation

1. *W.Va. Code § 21-1B-8*, *Verifying Legal Employment Status of Workers***.** Effective June 9, 2010, this statute provides penalties for employers who do not produce records on their employees, i.e., valid driver's licenses or immigration work permits, within 72 hours of a West Virginia Division of Labor audit. Employers will be guilty of a misdemeanor and assessed a fine of $100 per worker per each day that they fail to produce the applicable records, with increased penalties for subsequent violations.

2. *W.Va. Code §21-1C-2, West Virginia Jobs Act*. Effective June 9, 2010, this revision to the West Virginia Jobs Act provides that for all state and local tax-funded projects worth more than $500,000 contractors must hire 75% local workers. Local workers are defined as anyone who lives in West Virginia or in any county outside West Virginia if any portion of that county is within 50 miles of the border of West Virginia.

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Wisconsin

Legislation

1. *2009 Wisconsin Act 28, 2009-11 Biennial Budget* Bill (effective January 1, 2010). Wisconsin has considerably broadened existing public entity bidding obligations for securing bidder compliance with "prevailing wage" payment requirements, creating different obligations depending on the type of project being bid or negotiated:

- local government - Wis. Stat. § 66.0903 (municipalities), § 60.47 (towns), § 61.55 (villages);

- state agency (except for state highway and bridge projects) - Wis. Stat. § 16.855;

- publicly-funded private construction projects - Wis. Stat. § 66.0904 (except four family or smaller residential and Milwaukee Riverwalk projects); and

- state highway and bridge projects bid by the Wisconsin Department of Transportation - Wis. Stat. §66.0903(2).

These regulations now require that prevailing wage rates be paid on projects where a "completed facility is acquired, leased, or dedicated to a local governmental unit or state agency;" projects "undertaken by one local governmental unit or state agency under contract for another local governmental unit or state agency"; sanitary sewer and water main projects turned over to a local governmental unit or state agency; and road and bridge projects for local governmental units. *See* Wis. Stat. § 66.0903(2)(a)-(d).

Under the new Administrative Rules, a "public works project" is more broadly defined as "erection, construction, remodeling, repairing, or demolition building or work under contract with a Wisconsin state agency or local governmental unit, including alterations, printing and decorating, and not including service and maintenance work, warranty work, and work under a supply and installation contract." Wis. Admin. Code DWD §290.01(17) (2009). Note, however, that projects with labor provided by unpaid volunteers, projects involving minor service work and maintenance, warranty work or work under a supply and installation contract need not include prevailing wage payment compliance. Wis. Stat. §66.0903(5)(b) and (c)(municipal projects); §66.0904(5)(b) and (c) (publicly funded private construction projects).

"Minor service and maintenance work" is now statutorily defined as:

a project of public works that is limited to minor crack filling, chip or slurry sealing, or other minor pavement patching, not including overlays, that has a projected life span of no longer than five years; cleaning of drainage or sewer ditches or structures; or any other limited, minor work on public facilities or equipment that is routinely performed to prevent breakdown or deterioration. Wis. Stat. § 66.0903(1)(dr).

For municipal projects of public works and publicly funded private construction projects, "minor service and maintenance work" also includes the depositing of gravel on an existing gravel road applied solely to maintain that road and road shoulder maintenance. *Id.*

The threshold contract amounts triggering prevailing wage payment requirements have been significantly reduced to $25,000 or more for municipal and state projects, Wis. Stat.

§66.0903(5), and are now mandated for publicly-funded private construction projects receiving $1,000,000 or more in public funding assistance. Wis. Stat. §66.0904(2).

Reporting requirements now include:

• Monthly submission of individual records or submission of collective bargaining agreements.

• Wisconsin's Department of Workforce Development (DWD) must post compliance records or agreements on its Internet site.

• A penalty for frivolous requests to examine prevailing wage records.

• Exceptions or waivers included in contracts related to employment of apprentices must be posted by DWD.

DWD may debar a contractor if it is determined by a conviction or civil judgment of a Wisconsin court, a finding of any Wisconsin state agency or local

governmental unit, a finding of the Department, or via admission from the contractor that the contractor:

• Failed to pay an employee the proper prevailing wage rate;

• Failed to pay an employee the required overtime compensation;

• Induced any employee to give up, waive, or return any part of the proper prevailing wage rate; or

• Falsified, deliberately destroyed, or failed to keep required payroll records on a project. Wis. Stat. § 66.0904(10).

Contractors, subcontractors, or agents who, in good faith commit a minor violation may not be subject to debarment. Debarment orders for minor violations will be determined on a case-by-case basis. *Id.*

On the date a contractor submits a bid or completes negotiations with a state agency or local governmental unit, the contractor must disclose the name of any other construction business which the contractor, or a shareholder, officer, or partner of the contractor, owns or has owned within the preceding three years if both of the following apply:

a) the contractor, or a shareholder, officer, or partner of the contractor, presently owns or has owned, within the preceding three years, at least a 25% interest in the other construction business; and

b) the Department has determined that the other construction business failed to pay the prevailing wage rate or required overtime compensation to any employee at any time within the preceding three years. Wis. Stat. §66.0904(10(d).

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Wyoming

Case Law

1. In *Excel Constr., Inc. v. HKM Engineering, Inc.*, 2010 WY 34, 228 P.3d 40, the Wyoming Supreme Court rejected a request to modify Wyoming's application of the economic loss doctrine. In *Excel*, a general contractor sued HKM Engineering, project engineer and project manager for a town water and sewer system, for negligence, negligent misrepresentation, tortious interference with contract, and breach of the duty of good faith and fair dealing. It was undisputed that HKM only had a contract with the Town of Lovell and had no contractual relationship with the general contractor, Excel Construction. Because HKM and Excel were not in privity of contract with one another, HKM moved to dismiss Excel's negligence-based claims based on the Wyoming Supreme Court's adoption of the economic loss rule. The district court granted HKM's motion to dismiss, prompting an appeal by Excel.

On appeal, Excel argued that the Court should modify its wholesale adoption of the economic loss rule by allowing contractors to bring claims against project engineers for negligence and negligent misrepresentation. The Court declined the invitation to modify its earlier holdings, stating: "The Court continues to believe that parties to a construction contract have the opportunity to allocate the economic risks associated with the work, and they do not need the special protections of tort law to shield them from losses arising from risks, including negligence of a design professional, which are inherent in performance of the contract."

Excel also appealed the lower court's dismissal of Excel's tortious interference with contract claim. On this issue, the Court focused on the fact that HKM was the agent of the Town of Lovell and there had been no allegations that HKM had acted outside the scope of its agency. The Court then noted that, "It has long been the rule in this state and elsewhere that a claim for intentional interference with contract cannot survive if it involves an assertion that an agent for one party to the contract interfered with it." Since it was undisputed that HKM had acted at all times as the agent of the Town, HKM could not be held liable for tortious interference of the Excel-Town of Lovell construction contract.

In its final attempt to obtain relief from the lower court's order of dismissal, Excel argued that there was a triable issue as to whether or not HKM breached a duty of good faith and fair dealing. On this issue, the Court initially noted that since HKM had no contractual relationship with Excel, there was no applicable implied covenant of good faith and fair dealing. Notwithstanding this pronouncement, the Court then analyzed whether HKM owed a duty of good faith to Excel under its contract with the Town of Lovell. At issue was whether the following clause from HKM's EJCDC design contract with the Town imposed an additional obligation towards Excel:

Neither ENGINEER's authority or responsibility under Article 9 or under any other provision of the Contract Documents nor any decision made by ENGINEER in good faith either to exercise or not exercise such authority or responsibility or the undertaking, exercise, or performance of any authority or responsibility by ENGINEER shall create, impose, or give rise to any duty in contract, tort, or otherwise owed by ENGINEER to CONTRACTOR, and Subcontractor, any Supplier, any other individual or entity, or to any surety for or employee or agent of any of them.

The Court ruled that the provision did not create an obligation on HKM to act in good faith in all decisions affecting the contractor, but rather limited the exculpatory language

contained in the provision to claims that do not involve an element of bad faith. Unfortunately for Excel, it did not plead any causes of action against HKM that involved an element of bad faith and therefore all of its claims were subject to dismissal.

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FEDERAL UPDATE

Environmental Law

January to May 2010 Federal Environmental Update

Lead Renovation Repair and Painting Program Rule. The EPA's Lead Renovation, Repair and Painting Program Rule ("RPP"), under the authority of Section 402(c)(3) of the Toxic Substances Control Act (TSCA), went into effect April 22, 2010. Pursuant to this rule, all contractors performing renovation, repair, and painting projects that disturb lead-based paint in homes, child-care facilities and schools built before 1978 are be required to be certified and follow certain work practices to minimize and prevent lead contamination. To obtain certification, contractors must take an eight-hour training course from an EPA-approved training provider. These training providers are listed by the EPA at the following website: http://www.epa.gov/opptintr/lead/pubs/toolkits.htm. This certification must be renewed every 5 years.

The general premise of the RPP is that certain work practices must be observed, which are best summed up by these three simple procedures: (1) Contain the work area; (2) Minimize dust; and (3) Clean up thoroughly. According to the EPA's "Renovation, Repair and Painting (RRP)" website, contractors performing projects that will disturb lead-based paint should also:

- Provide a copy of your EPA or state lead training certificate to your client.
- Tell your client what lead-safe methods you will use to perform the job.
- Learn the lead laws that apply to you regarding certification and lead-safe work practices beginning April 22, 2010.
- Ask your client to share the results of any previously conducted lead tests.
- Provide your client with references from at least three recent jobs involving homes built before 1978.
- Keep records to demonstrate that you and your workers have been trained in lead-safe work practices and that you follow lead-safe work practices on the job. To make recordkeeping easier, you may use the sample recordkeeping checklist that EPA has developed to help contractors comply with the renovation recordkeeping requirements that took effect April 22, 2010.
- Read about how to comply with EPA's rule in the EPA's Small Entity Compliance Guide to Renovate Right[.]
- Read about how to use lead-safe work practices in EPA's *Steps to Lead Safe Renovation, Repair and Painting*[.]

EPA has the authority to authorize states to administer its own RPP program in lieu of the EPA's RPP program. As such, the following states have received authorization by EPA to do so: Wisconsin, Iowa, North Carolina, Mississippi, Kansas, Rhode Island, Utah, and Oregon. More information on the rule is available from the EPA at: www.epa.gov/lead/pubs/renovation.htm.

New Permitting Requirement Regarding Greenhouse Gas Emissions. On May 13, 2010, the EPA announced a final rule from large sources emitting greenhouse gases ("GHG"), specifically: carbon dioxide ("CO_{2}"), methane ("CH_4"), nitrous oxide ("N_2O"), hydrofluorocarbons ("HFCs"), perfluorocarbons ("PFCs"), and sulfur hexafluoride ("SF_6"). Originally proposed in October 2009, the EPA received over 450,000 comments from the public regarding the proposed rule.The large sources that must comply with this rule, such as power plants and oil refineries, are responsible for approximately 70 percent of GHG emissions from stationary sources.

These large sources will be subject to the first permitting requirement for GHG emissions. According to EPA's press release, the rule will become effective for these large sources in January 2011, "when Clean Air Act permitting requirements for GHGs will kick in for large facilities that are already obtaining Clean Air Act permits for other pollutants [*i.e.*, nitrogen oxides or particulate matter]." More specifically, facilities increasing emissions by at least 75,000 tons per year will be required to include GHG requirements in its permit obtained under the New Source Review Prevention Significant Deterioration ("PSD") and Title V Operating Permit programs. In July 2011, these permitting requirements will expand to cover: (1) all new facilities with GHG emissions of at least 100,000 tons per year and (2) significant modifications to existing facilities that result in a GHG emissions increase of at least 75,000 tons per year. The permit obtained by operators of these large facilities must demonstrate the use of best available control technologies to minimize GHG emissions.

EPA estimates that the July 2011 GHG emission thresholds in this final rule will result in approximately 900 additional permitting actions for new and modified large sources of GHG. The final rule, an executive summary, and a timeline for implementation of the rule are available at: http://www.epa.gov/nsr/actions.html.

In addition, EPA provided notice that it will propose another rulemaking to address PSD requirements for sources with less than 75,000 tons a year of GHG emissions before July 2012.

EPA Introduces Effluent Limitation Guidelines and New Source Performance Standards for Stormwater from the Construction and Development Industry. On December 1, 2009, EPA published national clean water standards for the construction and development industry. These clean water standards include effluent limitations guidelines ("ELGs") and new source performance standards ("NSPS") to control the discharge of pollutants from construction sites. Effective February 1, 2010, all national Pollutant Discharge Elimination System ("NPDES") permits for construction sites over one acre issued by the EPA or state programs must incorporate a range of erosion and sediment control measures to control pollutants in stormwater discharges from these sites. Additionally, EPA set a numeric effluent limit of 280 nephelometric turbidity units ("NTU") on the allowable level of turbidity in stormwater discharges for certain large construction sites, which is to be implemented as follows:

- On August 1, 2011, all construction sites disturbing 20 or more acres of land at one time must comply with the turbidity effluent limit. [1]

[1] Please note that the December 1, 2009 *Federal Register* notice contained incorrect compliance dates for the turbidity limitation for sites disturbing 20 or more acres at one time, where both the preamble and the rule incorrectly state the effective date as August 2, 2010. The correct date is August 1, 2011, as corrected and published by the EPA in the March 8, 2010 *Federal Register*.

- On February 2, 2014, all construction sites disturbing 10 or more acres of land at one time must comply with the turbidity effluent limit.

At present, EPA issues Construction General Permits ("CGP") for construction activities in four states, the District of Columbia, and in some U.S. territories and tribal areas. Set to expire on June 30, 2011, EPA will update the CGP to include these new clean water standards for the construction and development industry. The remaining 46 states must incorporate the new clean water standards into any new construction general permits issued 60 days after the effective date of the Final rule, *i.e.*, February 10, 2010. In addition, the new clean water standards apply to state or EPA individual permits. As such, the respective implementation dates of the new clean water standards will vary from state to state depending on when and what kind of permit is issued.

According to the EPA's Fact Sheet on the Final Rule, these changes are "projected to reduce the amount of sediment discharged from construction sites by about 4 billion pounds each year, at an annual cost of about $953 million, once fully implemented." Moreover, EPA predicts the cost of implementation of the Final rule will be $8 million in 2010, $63 million in 2011, and $204 million in 2012, costs due to both the phase-in period for the numeric effluent limit for turbidity and the timing of state construction general permit renewals. Additional information and updates regarding this Final Rule are available at www.epa.gov/guide/construction/.

Looking Ahead: EPA to Begin Process to Develop Post-Construction Stormwater Rule On December 28, 2010, EPA announced in the *Federal Register* that it planned to solicit public input regarding its plan to begin a rulemaking to address stormwater discharges stemming from developed and redeveloped sites after construction is complete. In that public notice, EPA specifically requested information on the following preliminary regulatory considerations:

- Expand the area subject to federal stormwater regulations;

- Establish specific requirements to control stormwater discharges from new development and redevelopment;

- Develop a single set of consistent stormwater requirements for all MS4s;

- Require MS4s to address stormwater discharges in areas of existing development through retrofitting the sewer system or drainage area with improved stormwater control measures; and

- Explore specific stormwater provisions to protect sensitive areas.

From January through March 2010, EPA held six "listening sessions" in Chicago, San Francisco, Denver, Dallas, and Washington D.C. for the public to comment on these preliminary regulatory considerations. To monitor this proposed rulemaking, information is available at: http://cfpub.epa.gov/npdes/stormwater/rulemaking.cfm#information.

Looking Back: Green Job Impacts Resulting From the 2009 Federal Stimulus Bill. The American Recovery and Reinvestment Act 2009 (Pub. L. No. 111-5)("ARRA") has had a significant impact on the construction industry, specifically in regards to Clean Energy, *i.e.*, "Green" Jobs. For example, on January 20, 2010 Department of Labor ("DOL") Secretary Hilda Solis announced the State Energy Sector Partnership and Training Grants, 34 green job training

grants valued between two to six million dollars, totaling $187 million dollars. According to the DOL's press release, these grants "are designed to teach workers the [technical and occupational] skills required in emerging industries, including energy efficiency and renewable energy." The DOL's press release states that the goals of the grant are to:

- Create an integrated system of education, training and supportive services that promotes skill attainment and career pathway development for low-income, low- skilled workers leading to employment in green industries.

- Support states in implementing a statewide energy sector strategy including governors' overall workforce visions, state energy policies and training activities that lead to employment in targeted industry sectors.

- Build and strengthen partnerships dedicated to building a skilled clean energy workforce.

- Develop new partnerships with other agencies receiving Recovery Act funds to support strategic planning and implementation efforts.

See www.dol.gov/opa/media/press/eta/eta20100078.htm. The DOL reports that as of January 2010, the ARRA had provided approximately $500 million to fund projects to train workers for careers in the energy efficiency industries. Additional information regarding these grants is available at: www.doleta.gov/pdf/SESP_Summaries.pdf.

On a related note, American Wind Energy Association announced on January 26, 2010 that the U.S. wind energy industry installed a record 9,922 megawatts of capacity in 2009, signifying an 18% increase from the 2008 capacity of 8,425 megawatts. According to American Wind Energy Association officials, this increase was largely due to the incentives provided by the ARRA. Prior to the ARRA, the American Wind Energy Association was predicting as high as a 50% drop in capacity from 2008 to 2009.

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Rules and Regulations

Federal

1. *75 Fed. Reg. 9129* (March 1, 2010): *Small Business, Small Disadvantaged Business, HUBZone, and Service-Disabled Veteran-Owned Protest and Appeal Regulations*: This proposed rule would make a number of changes to size protest and appeal rules. Proposed changes would: clarify the effect, across all small business programs, of initial and appeal eligibility decisions on the procurement in question; increase the amount of time SBA has to render formal size determinations; require that SBA's Office of Hearings and Appeals (OHA) issue a size appeal decision within 60 calendar days of the close of the record, if possible; increase the amount of time SBA has to file NAICS code appeals; alter the NAICS code appeal procedures to comply with a Federal Court decision; clarify the contracting officers must reflect final agency eligibility decisions in federal procurement databases and goaling statistics; clarify how a contracting officer assigns a NAICS code and size standard to multiple award procurement; and other changes.

2. *75 Fed. Reg. 14059* (March 23, 2010): *Federal Awardee Performance and Integrity Information System*: This final rule, effective April 22, 2010 amends the FAR to implement the Federal Awardee Performance and Integrity Information System. The system is designed to improve the Government's ability to evaluate the business ethics and expected performance quality of prospective contractors and protect the Government from awarding contracts to contractors that are not responsible sources.

3. *75 Fed. Reg. 19168* (April 13, 2010): *Use of Project Labor Agreements for Federal Construction Projects*: This final rule, effective May 13, 2010, amends the FAR to implement Executive Order 13502. The Executive Order encourages federal agencies to consider use of a project labor agreement, as appropriate, on large-scale construction contracts, where the total cost to the Government is $25 million or more, in order to promote economy and efficiency in federal procurement. A project labor agreement is a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project.

4. *75 Fed. Reg. 38683* (July 2, 2010): *Registry of Disaster Response Contractors*: This final rule, effective August 2, 2010, adopts, without change, the interim rule requiring establishment and maintenance of a registry of disaster response contractors willing to perform debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities. Contracting officers are required to consult the registry during market research and acquisition planning. The disaster Response Registry is located at www.ccr.gov.

5. *75 Fed. Reg. 39414* (July 8, 2010): *Reporting Executive Compensation and First Tier Subcontract Awards*: This interim rule, effective July 8, 2010, amended the Federal Acquisition Regulation (FAR) to require contractors to report executive compensation and first-tier subcontract awards on contracts expected to be $25,000 or more, except classified contracts, and contracts with individuals. Reported information is now publicly available on a website maintained by the Office of Management and Budget (www.usaspending.gov) in accordance with the *Federal Funding Accountability and Transparency Act* (31 U.S.C. 6101).

6. *75 Fed. Reg. 53153* (August 30, 2010): *American Recovery and Reinvestment act of 2009 (the Recovery Act) – Buy American Requirements for Construction Material*: This final rule, effective October 1, 2010, converts the interim rule published at 74 Fed. Reg. 14623

(March 31, 2009) to a final rule with changes. This final rule prohibits the use of funds appropriated for or otherwise made available by the Recovery Act for any project for construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States. Section 1605 of the Recovery Act mandates application of the Buy American requirement in a manner consistent with obligations under international agreements. Least developed countries continue to be treated as designated countries per congressional direction. Section 1605 also provides for waivers under certain circumstances.

7. *75 Fed. Reg. 60258* (September 29, 2010): *Termination for Default reporting*: This final rule, effective October 29, 2010, amends the FAR to revise the contractor performance information process. The rule establishes procedures for contracting officers to provide contractor information to the Federal Awardee Performance & Integrity Information System (FAPIIS) module of the Past Performance Information System (PPIRS). The rule sets forth requirements for reporting defective cost or pricing data, and terminations for cause or default and any amendments. This information is intended to assist contracting officers in making informed source selection and award decisions.

8. 75 Fed. Reg. 62258 (October 7, 2010): *Women-Owned Small Business* ***Federal*** *Contract program*: This final rule, effective February 4, 2011, amends CFR part 127, entitled "The Woman-Owned Small Business Federal Contract Assistance Procedures," and implements procedures authorized by the Small Business Act (Pub. L. 85-536, as amended) to help ensure a level playing field on which Women-Owned Small Businesses can compete for Federal contracting opportunities.

9. *75 Fed. Reg. 7723* (December 13, 2010): *Notification of Employee Rights Under the National Labor relations Act*: This interim rule, effective December 13, 2010, amends the FAR to implement Executive Order (EO) 13496. The EO requires contractors and subcontractors to post a notice that includes employee rights under the National Labor Relations Act, 29 U.S.C. 151 *et seq*. The required notice may be obtained from the U.S. Department of Labor. (http://www.dol.gov/olms/regs/compliance/EO13496.htm)

10. *75 Fed. Reg. 77727* (December 13, 2010): *HUBZone Program Revisions*: This final rule, effective January 12, 2011, amends the FAR to: (1) Require a HUBZone small business concern to be a HUBZone small business concern both at the time of its initial offer and at the time of contract award; (2) Require that HUBZone concerns report pre-award material changes that could affect HUBZone eligibility; and (3) Allow waiver of the 50 percent requirement. [For general construction or construction by special trade contractors, a HUBZone small business must spend at least 50 percent of the cost of contract performance incurred for personnel on its own employees or subcontract employees of other HUBZone small business concerns.]

11. *75 Fed. Reg. 77737* (December 13, 2010): *Small Disadvantaged Business Self-Certification*: This interim rule, effective December 13, 2010, Allows small disadvantaged businesses to self-represent their SDB status to prime contractors in good faith when seeking Federal subcontracting opportunities. The rule is intended to remove the cost of compliance on SDB contractors seeking SBA certification.

12. *75 Fed. Reg. 77739* (December 13, 2010): *Uniform Suspension and Debarment requirement*: This interim rule, effective December 13, 2010, amends the FAR to require that suspension and debarment requirements flow down to all subcontracts except contracts for the

acquisition of commercially available off-the-shelf items. and in the case of contracts for the acquisition of commercial items, first-tier subcontracts only. This requirement is intended to protect the Government against contracting with entities at any tier who are suspended, debarred, or proposed for debarment.

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Case Law

No Class Action Arbitration Without Contractual Basis

1. The United States Supreme Court issued a ground-breaking decision on arbitration, considering the question whether imposing class arbitration on parties whose arbitration clauses are "silent" on that issue is consistent with the Federal Arbitration Act. In a 5-3 opinion delivered by Justice Alito, the court found that, "[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." The Court held that, in this case, the arbitrators had exceeded their authority in permitting class arbitration. As a consequence, the Court took the unusual step of vacating the arbitration award. The Court further held that class arbitration was not permitted under these facts and reversed the result. *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., 130 S.Ct. 1758 (2010).*

Challenge to Arbitration Agreement for the Arbitrator to Decide

2. The Plaintiff in the case, Rent-a-Center employee Antonio Jackson, claimed that the binding arbitration agreement he signed when he started work was unconscionable, because he had no alternative but to sign it if he wanted the job. In a 5-4 split decisions, the Court held that certain challenges to arbitration agreements must be decided by arbitrators, and not judges. Justice Scalia reasoned that Jackson had consented to have disputes settled by arbitration, and it made "no difference" that the dispute at issue happened to be about the enforceability of the arbitration agreement itself. "Under the FAA, where an agreement to arbitrate includes an agreement that the arbitrator will determine the enforceability of the agreement, if a party challenges specifically the enforceability of that particular agreement, the district court considers the challenge, but if a party challenges the enforceability of the agreement as a whole, the challenge is for the arbitrator." *Rent-a-Center, West, Inc. v. Jackson, 130 S.Ct. 2772 (2010).*

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Legislation

2010 Federal Construction/Procurement Update

Small Business Jobs and Credit Act of 2010. On September 27, 2010, the Small Business Jobs and Credit Act of 2010 (the "Act") was signed into law. The goal of the Act is to give a needed boost to small businesses, in turn creating new jobs and increasing economic activity.

To do so, the Act first makes available a $30 billion fund to encourage lending by community banks to small businesses. Under the Act, the maximum loan sizes for certain categories of U.S. Small Business Administration ("SBA") loans are increased. This access to more credit and, thus more working capital, is aimed at encouraging small businesses to expand their operations and to create new jobs.

The Act also attempts to address some of the challenges that small businesses face in the federal contracting arena. Under the Act, agencies are given the discretion to set aside part(s) of large multiple award contracts for small businesses to prevent those large multi-part contracts from being awarded solely to large corporations. Furthermore, the Act has added provisions which place a greater responsibility on large federal contractors to promptly pay subcontractors by creating penalties for prime contractors who pay their small business subcontractors late or pay them an amount less than the contract price. Prime contractors who pay their subcontractors late or pay them less than the full amount due are required to justify those actions to the contracting officer.

The Act also includes some tax incentives for small businesses including an extension of small businesses' ability to immediately expense capital investments, an extension of bonus depreciation, tax relief for cellular phone deductions, an increased deduction for certain start-up expenses, and other tax incentive provisions.

The full text of the Small Business Jobs and Credit Act of 2010 can be found at http://www.gpo.gov/fdsys/pkg/PLAW-111publ240/pdf/PLAW-111publ240.pdf.

False Claims Act - Impact on Contractors

Many areas of the construction industry have benefitted from Congress passing the American Recovery and Reinvestment Act of 2009. Unfortunately, the ARRA also brought with it the temptation of fraud.

One method the government uses to combat this fraud is the False Claims Act, 31 U.S.C. §§ 3729-3733 (the "FCA"). The FCA allows a private party with knowledge of fraudulent activity to alert the federal government to the activity. The government will then either sue the wrongdoer itself, or it will give the whistleblower authority to sue on behalf of the government. The potential reward to a whistleblower is great--up to 30% of the award plus statutory attorneys' fees.

Recent changes to the FCA, made applicable through the 2010 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, enacted on March 23, 2010, make it easier for a whistleblower to maintain an FCA action, even in areas outside of healthcare. Prior to the recent amendments, a whistleblower could only bring an action if it was an original source of the information and if the fraudulent activity had never previously been disclosed to the public.

Under the new amendments, however, these limitations have been relaxed, allowing information that previously would have been barred as publicly disclosed to satisfy the requirements for maintaining an FCA action.

The FCA is stringent, and a contractor will want to avoid facing an FCA suit at all costs. Contractors should take steps to identify areas where fraud may arise and to create compliance programs to deal with potential issues. It is important to note that liability can exist even where the contractor does not directly submit a false claim to the government. A contractor can be liable for acts of its employees and for unknowingly passing along inaccurate or fraudulent invoices from subcontractors. The burden is on the contractor to ensure that all information submitted to the government is accurate. Federal contractors should also be imminently familiar with all proposals, contracts, and other project documents to insure that all invoices or other claims for payment are accurate. Any overpayments should be corrected immediately, as liability under the FCA may exist for failure to return overpayments.

If a contractor suspects that it may have engaged in activity that could form the basis of an FCA action, it should contact an attorney for assistance.

HIRE Act - Tax Benefits Available to Employers Who Hire Previously Unemployed Workers

In an effort to combat national unemployment levels, Congress enacted the Hiring Incentives to Restore Employment (HIRE) Act, Public Law No. 111-139, on March 18, 2010. Under this law, employers will be eligible to receive tax benefits for hiring workers who were previously unemployed or who had only been working part time.

Specifically, employers who hired "qualified employees" from February 3, 2010 to December 31, 2010, may qualify for two types of tax-related benefits. First, employers who hired qualified employees may qualify for a 6.2-percent payroll tax incentive on those employees. The effect of this reduction in payroll tax is that employers essentially will be exempt from paying their portion of Social Security taxes on those employees who qualify under the Act. Second, for each of these qualified workers retained for at least 52 weeks, employers may claim an additional general business tax credit for up to $1,000 per worker on their 2011 tax returns. By enacting these provisions, employers were encouraged to expand their payrolls in 2010 by adding new positions or by filling currently vacant positions with employees who otherwise would be unemployed.

More information on the HIRE Act can be found in the newsroom at www.irs.gov.

New OSHA Rules Impact the Use of Cranes and Derricks

On July 28, 2010, the United States Department of Labor, through the Occupational Safety and Health Administration (OSHA), issued a new rule related to the use of cranes and derricks in construction. The new rule, which aims to reduce the large number of fatalities related to crane and derrick use, updates a previous rule which relied on 40-year-old standards for safety requirements, techniques, and equipment.

According to a press release on OSHA's website, "The new rule is designed to prevent the leading cause of fatalities, including electrocution, crushed-by/struck-by hazards during assembly/disassembly, collapse and overturn." The rule also "sets requirements for ground conditions and crane operator assessments … addresses tower crane hazards, addresses the

use of synthetic slings for assembly/disassembly work, and clarifies the scope of the regulation by providing both a functional description and a list of examples for the equipment that is covered."

OSHA has highlighted the changes or modifications to the rule to include: (1) a requirement that employers must comply with local and state operator licensing requirements in several instances; (2) a clarification that employers must pay for certification or qualification of their currently uncertified or unqualified operators; (3) a clarification that written certification tests may be administered in any language understood by the operator candidate; (4) a statement that employers with employees qualified for power transmission and distribution who are working in accordance with § 1910.269 will be considered in compliance with the requirements for working around power lines; (5) a requirement that employers must use a qualified rigger for rigging operations during assembly/disassembly; and (6) a requirement that employers must perform a pre-erection inspection of tower cranes. Although the rule does not require all riggers to be certified, the rigger must be a qualified person for the performance of specific hoisting activities. The rigger can be considered "qualified" either through a degree, certificate or professional standing, or by knowledge, training and experience.

Contractors affected by these new rules should take an opportunity to reevaluate the qualifications of those employees who perform work on or around cranes and derricks to ensure compliance with the new rules. See http://www.osha.gov for more information.

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